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THE WATER QUALITY ACT OF 1994, AND ISSUES RELATED TO CLEAN WATER ACT REAUTHORIZATION (H.R. 3948)

(103–82)

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The Water Quality Act of 1994, and...

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
WATER RESOURCES AND ENVIRONMENT

OF THE

COMMITTEE ON
PUBLIC WORKS AND TRANSPORTATION
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

MAY 24 AND 26, 1994

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103D CONGRESS
2D SESSION

H. R. 3948

To amend the Federal Water Pollution Control Act.

IN THE HOUSE OF REPRESENTATIVES

MARCH 3, 1994

Mr. MINETA (for himself and Mr. BOEHLERT) introduced the following bill; which was referred to the Committee on Public Works and Transportation

---

A BILL

To amend the Federal Water Pollution Control Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 "Water Quality Act of 1994".

6 (b) TABLE OF CONTENTS.—

Sec. 1. Short title; table of contents.
Sec. 2. Definition.
Sec. 3. Amendment of Federal Water Pollution Control Act.

TITLE I—RESEARCH AND RELATED PROGRAMS

Sec. 101. National goals and policies.

TITLE II—CONSTRUCTION GRANTS

Sec. 201. Uses of funds.
Sec. 202. Recovery of operation and maintenance costs.
Sec. 203. Sewage collection systems.
Sec. 204. Treatment works defined.
Sec. 205. Value engineering review.
Sec. 206. Grants for construction of treatment works.

TITLE III—STANDARDS AND ENFORCEMENT

Sec. 301. Innovative technology.
Sec. 302. Antidegradation.
Sec. 303. Mixing zones.
Sec. 304. Guidance on water quality standards for arid areas.
Sec. 305. Effluent limitations.
Sec. 306. Water quality reports.
Sec. 307. Citizen water quality monitoring program.
Sec. 308. Toxic pollutants.
Sec. 309. Federal enforcement.
Sec. 310. Federal facilities.
Sec. 311. Nonpoint source management programs.
Sec. 312. National estuary program.
Sec. 313. Pollution prevention.
Sec. 314. State watershed management programs.

TITLE IV—PERMITS AND LICENSES

Sec. 401. State permit programs.
Sec. 402. Stormwater discharge permits.
Sec. 403. Combined sewer overflows.
Sec. 404. Discharges into ground water.
Sec. 405. Beneficial use of biosolids.

TITLE V—GENERAL PROVISIONS

Sec. 501. Needs estimate.
Sec. 502. Emergency powers.
Sec. 503. Citizen suits.
Sec. 504. General program authorizations.
Sec. 505. Native American programs.

TITLE VI—STATE WATER POLLUTION CONTROL REVOLVING FUNDS

Sec. 601. Water use efficiency measures.
Sec. 602. Guidance for small communities.
Sec. 603. Types of assistance.
Sec. 604. Allotment of funds.
Sec. 605. Authorization of appropriations.

TITLE VII—MISCELLANEOUS PROVISIONS

Sec. 701. Financial assistance for international wastewater treatment facilities.
Sec. 702. Wastewater service for colonias.
Sec. 703. Pollution from mobile sources.
Sec. 704. Technical amendments.

SEC. 2. DEFINITION.

In this Act, the term "Administrator" means the "Administrator of the Environmental Protection Agency".

SEC. 3. AMENDMENT OF FEDERAL WATER POLLUTION CONTROL ACT.

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Federal Water Pollution Control Act (33 U.S.C. 1251–1387).

TITLE I—RESEARCH AND RELATED PROGRAMS

SEC. 101. NATIONAL GOALS AND POLICIES.

(a) POLLUTION PREVENTION.—Section 101(a) (33 U.S.C. 1251(a)) is amended—

(1) by striking "and" at the end of paragraph (6);

(2) by striking the period at the end of paragraph (7) and inserting a semicolon; and

(3) by adding at the end the following:

"(8) it is the national policy that pollution of navigable waters should be prevented and reduced at the source of the pollution whenever feasible;".

1 (b) FISHABLE, SWIMMABLE, AND DRINKABLE.—Sec-
2 tion 101(a) is further amended by adding at the end the
3 following:
4 "(9) it is the national policy that the Nation's
5 waters achieve a level of quality appropriate as a
6 source of water for human consumption;".
7 (c) GROUND WATER.—Section 101(a) is further
8 amended by adding at the end the following:
9 "(10) it is the national policy to protect, in an
10 integrated manner, the quality of the Nation's wa-
11 ters, including ground water that has a direct hydro-
12 logic connection to surface water;".
13 (d) RECLAMATION AND REUSE.—
14 (1) RECLAMATION.—Section 101(a)(4) is
15 amended by inserting after "works" the following:
16 "and to reclaim waste water from municipal and in-
17 dustrial sources".
18 (2) BENEFICIAL REUSE.—Section 101(a) is fur-
19 ther amended by adding at the end the following:
20 "(11) it is the national policy that beneficial
21 reuse of waste water effluent, residuals, and byprod-
22 ucts be encouraged to the fullest extent possible;
23 and".
24 (e) WATER USE EFFICIENCY.—Section 101(a) is fur-
25 ther amended by adding at the end the following:

"(12) it is the national policy that water use efficiency be encouraged to the fullest extent possible.".

TITLE II—CONSTRUCTION GRANTS

SEC. 201. USES OF FUNDS.

(a) REMOVAL OF LIMITATION.—Section 201(g)(1) (33 U.S.C. 1281(g)(1)) is amended by striking the period at the end of the first sentence and all that follows through the period at the end of the last sentence and inserting the following: "and for any purpose for which a grant may be made under sections 319(h) and 319(i) of this Act (including any innovative and alternative approaches for the control of nonpoint sources of pollution).".

(b) CONSIDERATION OF WATER USE EFFICIENCY.—Section 201(g)(2) (33 U.S.C. 201(g)(2)) is amended—

(1) by striking "and" at the end of subparagraph (A);

(2) by striking the period at the end of subparagraph (B) and inserting "; and"; and

(3) by adding at the end the following new subparagraph:

"(C) water use efficiency options have been studied and evaluated and, to the extent practicable and cost effective, implemented.".

SEC. 202. RECOVERY OF OPERATION AND MAINTENANCE COSTS.

Section 204(b)(1) (33 U.S.C. 1284(b)(1)) is amended by striking "and (B)" and inserting the following: "(B) has adopted or will adopt a system of charges that will recover the costs of operation and maintenance (including replacement and rehabilitation) of treatment works within the applicant's jurisdiction; and (C)".

SEC. 203. SEWAGE COLLECTION SYSTEMS.

Section 211(a) (33 U.S.C. 1291(a)) is amended—

(1) in clause (1) by striking "an existing collection system" and inserting "a collection system existing on the date of the enactment of the Water Quality Act of 1994";

(2) in clause (2) by striking "an existing community" and inserting "a community existing on such date of enactment"; and

(3) in clause (2) by inserting after "sufficient existing" the following: "on such date of enactment".

SEC. 204. TREATMENT WORKS DEFINED.

(a) INCLUSION OF OTHER LANDS.—Section 212(2)(A) (33 U.S.C. 1292(2)(A)) is amended—

(1) by striking "any works, including site";

(2) by striking "is used for ultimate" and inserting "will be used for ultimate"; and

(3) by inserting before the period at the end the following: "and acquisition of other lands, and interests in lands, which are necessary for construction".

(b) POLICY ON COST EFFECTIVENESS.—Section 218(a) (33 U.S.C. 1298(a)) is amended by striking "combination of devices and systems" and all that follows through "from such treatment;" and inserting "treatment works;".

SEC. 205. VALUE ENGINEERING REVIEW.

Section 218(c) (33 U.S.C. 1298(c)) is amended by striking "$10,000,000" and inserting "$25,000,000".

SEC. 206. GRANTS FOR CONSTRUCTION OF TREATMENT WORKS.

(a) GENERAL AUTHORITY.—The Administrator shall make grants under title II of the Federal Water Pollution Control Act for the purpose of constructing treatment works to serve the following localities and in the following amounts:

(1) Boston, Massachusetts, $153,000,000.

(2) New York, New York, $70,000,000.

(3) Los Angeles, California, $50,000,000.

(4) Los Angeles County, California, $50,000,000.

(5) Seattle, Washington, $35,000,000.

(6) Wayne County, Michigan, $82,000,000 for the Rouge River National Wet Weather Demonstration Project.

(b) FUNDING.—The Administrator shall carry out this section using amounts which were appropriated before the date of the enactment of this Act and which are available for making grants described in subsection (a).

(c) BOSTON, MASSACHUSETTS.—

(1) GRANTS.—The Administrator may make grants under title II of the Federal Water Pollution Control Act to Boston, Massachusetts, for the purpose of constructing treatment works.

(2) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection $100,000,000 for fiscal year 1995. Such sums shall remain available until expended.

TITLE III—STANDARDS AND ENFORCEMENT

SEC. 301. INNOVATIVE TECHNOLOGY.

Section 301(k) (33 U.S.C. 1311(k)) is amended—

1 (1) by striking "lower costs" and all that fol-
2 lows through "achievable," and inserting "reducing
3 the release of pollutants to other media,";
4 (2) by striking "a date" and inserting "a sched-
5 ule for compliance";
6 (3) by inserting "which includes a date for such
7 compliance" before "no later than"; and
8 (4) by striking "two years" and inserting "3
9 years".

10 **SEC. 302. ANTIDEGRADATION.**

11 Section 303 (33 U.S.C. 1313) is amended—
12 (1) by redesignating subsections (f), (g), and
13 (h) as subsections (h), (i), and (j), respectively; and
14 (2) by inserting after subsection (e) the follow-
15 ing:
16 "(f) ANTIDEGRADATION POLICY.—
17 "(1) IN GENERAL.—Not later than the last day
18 of the 24-month period beginning on the date of the
19 enactment of this paragraph, each State shall de-
20 velop and submit to the Administrator for approval
21 a statewide antidegradation policy, including imple-
22 mentation procedures for such policy.
23 "(2) MINIMUM REQUIREMENTS.—An
24 antidegradation policy under this subsection shall, at
25 a minimum—

1 "(A) identify existing instream water uses,
2 including any uses occurring on or after No-
3 vember 28, 1975, and provide for maintenance
4 and protection of water quality necessary to
5 protect such uses;
6 "(B) provide for maintenance and protec-
7 tion of the water quality of any waters the qual-
8 ity of which are in excess of the levels necessary
9 to support the protection and propagation of a
10 balanced population of fish, shellfish, and wild-
11 life, and recreation in and on the water;
12 "(C) provide that if the State finds, after
13 notice and opportunity for comment and full
14 satisfaction of the intergovernmental coordina-
15 tion provisions of the continuing planning proc-
16 ess of the State, that allowing a reduction in
17 the degree of water quality with respect to any
18 waters described in subparagraph (B) is nec-
19 essary to accommodate important economic or
20 social development in the area in which the wa-
21 ters are located, the State may reduce the level
22 of maintenance and protection required under
23 subparagraph (B) with respect to such waters
24 if the State notifies the Administrator of such

1 finding and waiver at least 30 days before such
2 waiver takes effect and if the State—
3 "(i) ensures a degree of water quality
4 adequate to maintain and protect existing
5 uses (as described in subparagraph (A));
6 "(ii) ensures that all new and existing
7 point sources which discharge pollutants
8 into such waters, and each industrial user
9 introducing pollutants into a publicly
10 owned treatment works which discharges
11 pollutants into such waters, are subject to
12 all applicable requirements of this Act; and
13 "(iii) ensures that all new and existing
14 nonpoint sources within the State that af-
15 fect or are likely to affect the water quality
16 of such waters are subject to all applicable
17 requirements of this Act;
18 "(D) provide for establishment and imple-
19 mentation by the State of a program to main-
20 tain and protect any high quality waters which
21 the State designates as outstanding national re-
22 source waters; except that the State may allow
23 necessary short-term or temporary exceedances;
24 "(E) designate as outstanding national re-
25 source waters within the boundaries of the

1 State all waters within a national park (other
2 than a park located in an urbanized area, as
3 defined by the Bureau of the Census of the De-
4 partment of Commerce) or national wilderness
5 area and any waters of exceptional recreational
6 or ecological significance; except that the State
7 may propose not to designate specific waters as
8 outstanding national resource waters, and the
9 Administrator may approve, after notice and
10 opportunity for comment, the proposal—
11 "(i) if the State demonstrates to the
12 satisfaction of the Administrator that the
13 designation would result in important so-
14 cial and economic harms; and
15 "(ii) if, in the case of waters located
16 within Federal lands, the Federal manager
17 of the lands concurs with the State pro-
18 posal;
19 "(F) allow any citizen of the State to peti-
20 tion the State for the designation of any waters
21 as outstanding national resource waters; and
22 "(G) provide that a permitting authority
23 under section 402 shall conduct an
24 antidegradation review for waters before issuing
25 or reissuing any permit under section 402 for

1 a point source if such permit authorizes any
2 new, expanded, or increased discharge of a pol-
3 lutant into receiving waters; except that a re-
4 view shall not be required for an existing dis-
5 charge unless—
6 "(i) the discharger is proposing to in-
7 crease an existing effluent limitation under
8 its permit; or
9 "(ii) a new effluent limitation is re-
10 quired in the permit of the discharger for
11 a pollutant that was not previously sub-
12 jected to an effluent limitation in the per-
13 mit or addressed in the permit.
14 "(3) APPROVAL OR DISAPPROVAL.—
15 "(A) DEADLINE.—Subject to subpara-
16 graph (B), not later than 180 days after the
17 date of submission to the Administrator of any
18 antidegradation policy under this subsection,
19 the Administrator shall either approve or dis-
20 approve such policy. If the Administrator does
21 not disapprove a policy in such 180-day period,
22 such policy shall be deemed approved for pur-
23 poses of this subsection.
24 "(B) PROCEDURE FOR DISAPPROVAL.—If,
25 after notice and opportunity for public comment

1 and consultation with appropriate Federal and
2 State agencies and other interested persons, the
3 Administrator determines that the proposed
4 policy does not meet the requirements of this
5 subsection or is not likely to satisfy the goals
6 and requirements of this Act, the Administrator
7 shall within 6 months of the receipt of the pro-
8 posed policy notify the State of any revisions or
9 modifications necessary to obtain approval. The
10 State shall thereupon have an additional 3
11 months to submit its revised policy and the Ad-
12 ministrator shall approve or disapprove such re-
13 vised policy within 3 months of receipt.

14 "(C) FAILURE OF STATE TO SUBMIT POL-
15 ICY.—If a State does not submit the policy re-
16 quired by paragraphs (1) and (2) within the 24-
17 month period beginning on the date of the en-
18 actment of this subparagraph, the Adminis-
19 trator shall, within 30 months after such date
20 of enactment, prepare an antidegradation policy
21 for such State which meets the requirements of
22 this subsection.

23 "(D) REPORT.—Upon completion of action
24 under subparagraph (C) and after notice and
25 opportunity for comment, the Administrator

1 shall report to Congress on the actions taken by
2 the Administrator under subparagraph (C).
3 "(4) GUIDANCE.—Not later than 1 year after
4 the date of the enactment of this subparagraph, the
5 Administrator shall publish guidance for States to
6 assist in the designation and protection of outstand-
7 ing national resource waters, including a description
8 of necessary short-term or temporary exceedances of
9 the antidegradation policy with respect to such
10 waters.".

11 **SEC. 303. MIXING ZONES.**

12 Section 303 (33 U.S.C. 1313) is further amended by
13 inserting before subsection (h), as redesignated by section
14 301 of this Act, the following:

15 "(g) MIXING ZONES.—
16 "(1) LIST.—The Administrator shall establish,
17 by regulation, a list of persistent, acutely toxic, or
18 bioaccumulative chemicals which pose a sufficient
19 risk to human health and the environment that the
20 use of mixing zones with respect to such chemicals
21 should be restricted or prohibited.
22 "(2) PROHIBITION OR RESTRICTION ON USE OF
23 MIXING ZONES.—The Administrator may issue regu-
24 lations to prohibit or restrict the use of mixing zones

1 with respect to chemicals included on the list estab-
2 lished pursuant to paragraph (1).
3 "(3) APPLICABILITY.—Any prohibition or re-
4 striction established pursuant to paragraph (2) shall
5 only apply to permits issued under section 402 after
6 the last day of the 5-year period beginning on the
7 date of the enactment of this subsection.
8 "(4) LIMITATION ON STATUTORY CONSTRUC-
9 TION.—Nothing in this subsection shall be construed
10 as limiting or otherwise affecting any authority of
11 the Administrator or a State regarding the use of
12 mixing zones.".

13 **SEC. 304. GUIDANCE ON WATER QUALITY STANDARDS FOR**
14 **ARID AREAS.**

15 Section 304(a) (33 U.S.C. 1314(a)) is amended by
16 adding at the end the following:
17 "(9) GUIDANCE ON STANDARDS FOR ARID
18 AREAS.—Not later than 1 year after the date of the
19 enactment of this paragraph, the Administrator shall
20 develop and publish guidance to the States on devel-
21 opment and adoption of water quality standards ap-
22 plicable to arid areas.".

23 **SEC. 305. EFFLUENT LIMITATIONS.**

24 Section 304 (33 U.S.C. 1314) is amended by adding
25 at the end the following:

1 "(n) EFFLUENT LIMITATIONS FOR DISCHARGES
2 INTO GROUND WATERS.—Not later than 1 year after the
3 date of the enactment of this subsection, the Adminis-
4 trator shall, after consultation with appropriate Federal
5 and State agencies and other interested persons, publish
6 regulations providing guidance for effluent limitations for
7 discharges into the ground or ground water that are sub-
8 ject to permit requirements pursuant to section
9 402(r)(1).".

10 **SEC. 306. WATER QUALITY REPORTS.**

11 (a) EFFECTIVENESS OF MUNICIPAL AND INDUS-
12 TRIAL STORMWATER PERMIT PROGRAM.—Section
13 305(b)(1) (33 U.S.C. 1315(b)(1)) is amended—

14 (1) by striking "and" at the end of subpara-
15 graph (D);

16 (2) by striking the period at the end of sub-
17 paragraph (E); and

18 (3) by inserting after subparagraph (E) the fol-
19 lowing:

20 "(F) an assessment of the effectiveness of the
21 municipal and industrial stormwater permit program
22 being carried out under section 402 (including an
23 assessment of management measures being imple-
24 mented under such program) and the progress being
25 made toward attainment of water quality standards

1 under this Act through the implementation of such
2 program; and".
3 (b) QUALITY OF GROUND WATER.—Section
4 305(b)(1) is further amended by adding at the end the
5 following:
6 "(G) a description of the quality of the ground
7 water in such State and an evaluation of how the
8 pollution of ground water, surface water, aquatic
9 sediment, and wetlands in such State are related.".
10 (c) BIENNIAL REPORTS; LISTING OF NONATTAIN-
11 MENT WATERS.—Section 305(b)(2) (33 U.S.C.
12 1315(b)(2)) is amended by striking "transmit" and all
13 that follows through the period at the end and inserting
14 the following: "transmit to Congress on or before October
15 1, 1976, and biennially thereafter such State reports, to-
16 gether with an analysis thereof. The Administrator may
17 add, to the list of waters in a State which are not meeting
18 applicable water quality standards under this Act, any
19 other waters in the State which are not meeting applicable
20 water quality standards under this Act.".
21 **SEC. 307. CITIZEN WATER QUALITY MONITORING PRO-**
22 **GRAM.**
23 Section 305 (33 U.S.C. 1315) is further amended by
24 adding at the end the following:

1 "(c) CITIZEN WATER QUALITY MONITORING PRO-
2 GRAM.—
3 "(1) IN GENERAL.—The Administrator shall
4 allow a State to use not more than 5 percent of the
5 amount made available to the State under section
6 319(h) in any fiscal year beginning after the date of
7 the enactment of this subsection or $100,000
8 (whichever amount is greater for such fiscal year) to
9 establish and carry out a citizen water quality mon-
10 itoring program in accordance with this subsection.
11 "(2) IMPLEMENTATION.—A State may carry
12 out a citizen water quality monitoring program
13 under this subsection either directly or by entering
14 into cooperative agreements or contracts with appro-
15 priate organizations, including educational institu-
16 tions.
17 "(3) PARTICIPATION.—Water quality monitor-
18 ing under a citizen water quality monitoring pro-
19 gram under this subsection shall be conducted by
20 program participants with appropriate qualifications
21 and training.
22 "(4) TRAINING.—A citizen water quality mon-
23 itoring program under this subsection shall provide
24 for the training and evaluation of all program par-
25 ticipants. Such training and evaluation shall be car-

1 ried out as a continuing component of the program
2 in order to ensure the reliability of data collected
3 under the program.
4 "(5) QUALITY ASSURANCE.—In conducting a
5 citizen water quality monitoring program under this
6 subsection, a State shall use quality assurance con-
7 trol procedures described in the guidance to be de-
8 veloped by the Administrator pursuant to paragraph
9 (8) or equivalent procedures developed by the State.
10 "(6) USE OF DATA.—Data obtained under a
11 citizen water quality monitoring program under this
12 subsection may be used to obtain information re-
13 quired under subparagraphs (A) and (E) of sub-
14 section (b)(1) and to develop and implement a
15 nonpoint source management program under section
16 319 or a watershed management program under sec-
17 tion 322.
18 "(7) AVAILABILITY OF DATA.—A State shall
19 make the data collected under a citizen water quality
20 monitoring program under this subsection available
21 for public review.
22 "(8) GUIDANCE.—The Administrator shall de-
23 velop and publish guidance to assist States in devel-
24 oping, planning, and implementing citizen water
25 quality monitoring programs under this subsection,

1 including protocols on quality assurance and quality
2 control.".

3 **SEC. 308. TOXIC POLLUTANTS.**

4 (a) LISTING OF TOXIC POLLUTANTS.—Section
5 307(a)(1) (33 U.S.C. 1317(a)(1)) is amended—

6 (1) by inserting "bioaccumulation potential,"
7 after "degradability,"; and

8 (2) by inserting "the magnitude and risk of ex-
9 posure to the pollutant," after "organisms,".

10 (b) TOXIC EFFLUENT STANDARDS.—Section
11 307(a)(2) (33 U.S.C. 1317(a)(2)) is amended to read as
12 follows:

13 "(2) TOXIC EFFLUENT STANDARDS.—

14 "(A) GENERAL RULE.—Each toxic pollutant
15 listed in accordance with paragraph (1) of this sub-
16 section shall be subject to effluent limitations result-
17 ing from the application of the best available tech-
18 nology economically achievable for the applicable cat-
19 egory or class of point sources established in accord-
20 ance with sections 301(b)(2)(A) and 304(b)(2) of
21 this Act.

22 "(B) PUBLICATION AND APPLICABILITY.—The
23 Administrator may publish in the Federal Register
24 a proposed effluent standard (which may include a
25 prohibition) establishing requirements for a toxic

1 pollutant which, if an effluent limitation is applicable
2 to a class or category of point sources, shall be ap-
3 plicable to such category or class only if such stand-
4 ard imposes more stringent requirements.
5 "(C) FACTORS.—The published effluent stand-
6 ard (or prohibition) shall take into account—
7 "(i) the pollutant's persistence, toxicity,
8 degradability, and bioaccumulation potential;
9 "(ii) the magnitude and risk of exposure to
10 the pollutant, including risks to affected orga-
11 nisms and the importance of such organisms;
12 "(iii) the relative contribution of point
13 source discharges of the pollutant to the overall
14 risk from the pollutant;
15 "(iv) the availability of, and risk posed by,
16 substitute chemicals or processes or the avail-
17 ability of treatment processes or control tech-
18 nology;
19 "(v) the beneficial and adverse social and
20 economic effects of the effluent standard, in-
21 cluding the impact on energy resources;
22 "(vi) the extent to which effective control
23 is being or may be achieved in an expeditious
24 manner under other regulatory authorities;

"(vii) the impact on national security interests; and

"(viii) such other factors as the Administrator deems appropriate.

"(D) COMMENT PERIOD.—The Administrator shall allow a period of not less than 90 days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard.

"(E) PROMULGATION.—After consideration of any comments on the proposed standard (or prohibition), the Administrator shall promulgate such standard (or prohibition) with such modifications as the Administrator finds are justified. Such promulgation by the Administrator shall be made as expeditiously as possible, but not later than 365 days, after publication of the proposed standard (or prohibition).

"(F) FINALITY.—A promulgated standard (or prohibition) shall be final; except that if, on judicial review, such standard is determined to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, the Administrator shall promulgate a revised standard.

1 "(G) DEADLINE.—Effluent limitations shall be
2 established in accordance with sections 301(b)(2)(A)
3 and 304(b)(2) for every toxic pollutant referred to in
4 table 1 of Committee Print Numbered 95–30 of the
5 Committee on Public Works and Transportation of
6 the House of Representatives as soon as practicable
7 after the date of the enactment of the Clean Water
8 Act of 1977, but no later than July 1, 1980. Effflu-
9 ent limitations or effluent standards (or prohibi-
10 tions) shall be established for every other toxic pol-
11 lutant listed under paragraph (1) of this subsection
12 as soon as practicable after it is so listed.".
13 (c) PROCEDURE FOR PETITIONING EPA.—Section
14 307(a) (33 U.S.C. 1317(a)) is further amended by adding
15 at the end the following:
16 "(8) PROCEDURE FOR PETITIONING EPA.—
17 "(A) GENERAL AUTHORITY.—Any person
18 may petition the Administrator to limit or pro-
19 hibit discharges of toxic pollutants or classes of
20 toxic pollutants which contribute to water qual-
21 ity impairment.
22 "(B) CONTENTS OF PETITION.—A petition
23 submitted to the Administrator under this para-
24 graph shall contain such information as the Ad-
25 ministrator may require by regulation, including

1 information on each of the factors listed in
2 paragraph (2)(C).
3 "(C) ACTION OF ADMINISTRATOR.—The
4 Administrator may deny a petition submitted
5 under this paragraph based on the information
6 contained in the petition and such other infor-
7 mation as may be available to the Adminis-
8 trator or may initiate a rulemaking proceeding
9 to limit discharges of toxic pollutants, including
10 prohibition of discharges of toxic pollutants. If
11 the Administrator determines that there is not
12 sufficient information to approve or deny the
13 petition, the Administrator may request the pe-
14 titioner to submit such additional information
15 as may be necessary.
16 "(D) FACTORS TO CONSIDER.—In deter-
17 mining whether or not to approve or deny a pe-
18 tition under this paragraph, the Administrator
19 shall consider the factors listed in paragraph
20 (2)(C).".
21 (d) FEDERAL ESTABLISHMENT OF CHEMICAL-SPE-
22 CIFIC NUMERIC WATER QUALITY CRITERIA.—Section
23 303(c) (33 U.S.C. 1313(c)) is amended by adding at the
24 end the following:

1 "(5) CHEMICAL-SPECIFIC NUMERIC WATER
2 QUALITY CRITERIA.—If the Administrator issues, by
3 regulation, chemical-specific numeric water quality
4 criteria for toxic pollutants under section 304(a) and
5 if a State has not adopted water quality standards
6 for navigable waters under the jurisdiction of the
7 State including such criteria before the last day of
8 the 3-year period beginning on the date of issuance
9 of such criteria, such criteria—
10 "(A) shall be treated for purposes of Fed-
11 eral and State law as if such criteria were
12 adopted by the State as a water quality stand-
13 ard for such waters; and
14 "(B) if the State has established des-
15 ignated uses for such waters, such criteria shall
16 be applied consistent with the designated
17 uses.".
18 (e) WATER QUALITY CRITERIA.—Section 304(a) (33
19 U.S.C. 1314(a)) is amended by adding at the end the fol-
20 lowing:
21 "(9) WATER QUALITY CRITERIA FOR POLLUT-
22 ANTS FROM NONPOINT SOURCES.—Not later than 3
23 years after the date of the enactment of this para-
24 graph, the Administrator shall develop and publish
25 under paragraph (1) additional criteria for water

1 quality with respect to pollutants entering navigable
2 waters with an emphasis on pollutants entering such
3 waters from nonpoint sources.".
4 (f) FISH CONSUMPTION ADVISORIES.—Section 304
5 (33 U.S.C. 1314) is amended by adding at the end the
6 following:
7 "(n) FISH CONSUMPTION ADVISORIES.—After con-
8 sultation with appropriate Federal and State agencies, the
9 Administrator may develop and issue guidance that States
10 may use—
11 "(1) in issuing fish consumption advisories;
12 "(2) in developing a monitoring program for
13 contaminants in fish and shellfish; and
14 "(3) in issuing scientific protocols for testing
15 contamination levels of fish.".
16 (g) BEACH WATER QUALITY MONITORING.—
17 (1) IN GENERAL.—Section 304 is further
18 amended by adding at the end the following:
19 "(o) BEACH WATER QUALITY MONITORING.—After
20 consultation with appropriate Federal and State agencies,
21 the Administrator may develop and issue guidance that
22 States may use in monitoring water quality at beaches and
23 issuing health advisories with respect to beaches, including
24 testing protocols, recommendations on frequency of test-
25 ing and monitoring, recommendations on pollutants for

1 which monitoring and testing should be conducted, and
2 recommendations on when health advisories should be is-
3 sued.".

4 (2) REPORTS.—Section 516(a) (33 U.S.C.
5 1375(a)) is amended by striking "and (9)" and in-
6 serting "(9) the monitoring conducted by States on
7 the water quality of beaches and the issuance of
8 health advisories with respect to beaches, and (10)".

9 (h) CURRENT STATE OF SCIENTIFIC KNOWLEDGE
10 ON CERTAIN CHEMICALS.—

11 (1) NAS STUDY.—The National Academy of
12 Sciences shall conduct a study on the current sci-
13 entific knowledge of those chemicals which are
14 present in waters of the United States and for which
15 there is evidence that exposure to such chemicals
16 may result in endocrine, immune, or nervous system
17 or developmental health effects in humans, fish, or
18 wildlife, including evidence that exposure to such
19 chemicals may increase the incidence of breast and
20 other cancers, decrease sperm count, or impair re-
21 production.

22 (2) REPORT.—Not later than 3 years after the
23 date of the enactment of this Act, the National
24 Academy of Sciences shall transmit to Congress a
25 report on the results of the study conducted under

1 this subsection, including recommendations for any
2 actions which the National Academy of Science de-
3 termines are appropriate based on such results.

4 **SEC. 309. FEDERAL ENFORCEMENT.**

5 (a) VIOLATIONS OF LOCAL PRETREATMENT RE-
6 QUIREMENTS.—Section 307(d) (33 U.S.C. 1317(d)) is
7 amended to read as follows:

8 "(d) VIOLATIONS.—After the effective date of any ef-
9 fluent standard or prohibition or pretreatment standard
10 promulgated under this section or any requirement im-
11 posed in a pretreatment program approved under section
12 402(a)(3) or 402(b)(8) of this Act, it shall be unlawful
13 for any owner or operator of any source to operate any
14 source in violation of any such effluent standard or prohi-
15 bition, pretreatment standard, or requirement.".

16 (b) INSPECTIONS, MONITORING, AND ENTRY.—Sec-
17 tion 308(a) (33 U.S.C. 1318(a)) is amended by inserting
18 after "(A) the Administrator shall require the owner or
19 operator of any point source" the following: ", any indirect
20 discharger, and any other person who may have informa-
21 tion relating to compliance with this Act".

22 (c) ENFORCEMENT OF LOCAL PRETREATMENT RE-
23 QUIREMENTS.—

24 (1) GENERAL AUTHORITY.—Section 309(a)(1)
25 (33 U.S.C. 1319(a)(1)) is amended by inserting

1 after "404 of this Act," the following: "or is in vio-
2 lation of any requirement imposed in a pretreatment
3 program approved under section 402(a)(3) or
4 402(b)(8) of this Act,".

5 (2) ISSUANCE OF ORDERS.—Section 309(a)(3)
6 (33 U.S.C. 1319(a)(3)) is amended by inserting
7 after "404 of this Act by a State," the following: "or
8 is in violation of any requirement imposed in a
9 pretreatment program approved under section
10 402(a)(3) or 402(b)(8) of this Act,".

11 (3) CRIMINAL PENALTIES.—Section
12 309(c)(3)(A) (33 U.S.C. 1319(c)(3)(A)) is amended
13 by inserting after "Army or by a State," the follow-
14 ing: "or knowingly violates any requirement imposed
15 in a pretreatment program approved under section
16 402(a)(3) or 402(b)(8) of this Act,".

17 (4) ADMINISTRATIVE PENALTIES.—Section
18 309(g)(1)(A) (33 U.S.C. 1319(g)(1)(A)) is amended
19 by inserting after "404 by a State," the following:
20 "or has violated any requirement imposed in a
21 pretreatment program approved under section
22 402(a)(3) or 402(b)(8) of this Act, or has violated
23 an order issued by the Administrator under sub-
24 section (a) of this section or section 504 of this
25 Act,".

(5) CITIZEN SUITS.—Section 505(f) (33 U.S.C. 1365(f)) is amended—

(A) by striking "or" before "(7)"; and

(B) by striking the last comma and inserting the following: "; (8) any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act; or (9) a permit or any condition thereof issued by the Secretary of the Army or a State under section 404 of this Act".

(d) CIVIL ACTIONS COMMENCED BY THE ADMINISTRATOR.—Section 309(b) (33 U.S.C. 1319(b)) is amended—

(1) by inserting after the first sentence the following: "Such injunctive relief may include an order to require remedial measures or an environmental audit.";

(2) by striking "and to require compliance" and inserting ", to require compliance, and to provide other appropriate relief"; and

(3) by inserting before the last sentence the following: "A district court may issue a permanent injunction in any such action based solely upon a finding that a violation has occurred.".

1 (e) MAXIMUM TERM OF IMPRISONMENT FOR KNOW-
2 ING VIOLATIONS.—Section 309(c)(2) (33 U.S.C.
3 1319(c)(2)) is amended—
4 (1) by striking "3 years" and inserting "5
5 years"; and
6 (2) by striking "6 years" and inserting "10
7 years".
8 (f) KNOWING ENDANGERMENT.—Section
9 309(c)(3)(A) (33 U.S.C. 1319(c)(3)(A)) is amended by
10 striking "he thereby" and inserting ", in connection with
11 or in the course of committing the violation, the person".
12 (g) FALSE STATEMENTS.—
13 (1) KNOWING OMISSIONS.—Section 309(c)(4)
14 (33 U.S.C. 1319(c)(4)) is amended by inserting
15 after "Any person who knowingly" the following:
16 "omits required material information or".
17 (2) MAXIMUM PUNISHMENT FOR FIRST CONVIC-
18 TIONS.—Section 309(c)(4) (33 U.S.C. 1319(c)(4)) is
19 amended—
20 (A) by striking "$10,000" and inserting
21 "$50,000"; and
22 (B) by striking "2 years" and inserting "5
23 years".

1 (3) MAXIMUM PUNISHMENT FOR SUBSEQUENT
2 CONVICTIONS.—Section 309(c)(4) (33 U.S.C.
3 1319(c)(4)) is amended—
4 (A) by striking "$20,000 per day of viola-
5 tion" and inserting "$100,000 per violation";
6 and
7 (B) by striking "4 years" and inserting
8 "10 years".
9 (h) SHARING OF FINES IN CRIMINAL ACTIONS.—
10 (1) IN GENERAL.—Section 309(c) (33 U.S.C.
11 1319(c)) is amended by redesignating paragraphs
12 (6) and (7) as paragraphs (7) and (8), respectively,
13 and by inserting after paragraph (5) the following:
14 "(6) SHARING OF FINES.—Upon the rec-
15 ommendation of the United States, and in accord-
16 ance with such recommendation, a court may issue
17 an order requiring that a portion of the amounts as-
18 sessed by the court in criminal fines under this sub-
19 section for a violation be paid—
20 "(A) to any person as an award for provid-
21 ing information leading to the arrest and con-
22 viction of a person for the violation; and
23 "(B) to any State, municipality, or other
24 political subdivision for providing material sup-
25 port in the prosecution of the violation.".

1 (2) GUIDANCE.—The Administrator shall issue
2 guidance to ensure consistency in recommendations
3 of the United States made pursuant to the amend-
4 ment made by paragraph (1).
5 (i) DETERMINATION OF AMOUNT OF CIVIL PEN-
6 ALTIES.—The second sentence of section 309(d) (33
7 U.S.C. 1319(d)) is amended by inserting after "the eco-
8 nomic impact of the penalty on the violator," the follow-
9 ing: "the amount of any penalty previously imposed on
10 the violator by a court or administrative agency for the
11 same violation or violations,".
12 (j) JOINING STATES AS PARTIES IN ACTIONS IN-
13 VOLVING MUNICIPALITIES.—Section 309(e) (33 U.S.C.
14 1319(e)) is amended by striking "shall be joined as a
15 party. Such State" and inserting "may be joined as a
16 party. Any State so joined as a party".
17 (k) ADMINISTRATIVE PENALTIES.—
18 (1) MAXIMUM AMOUNT OF CLASS I PEN-
19 ALTIES.—Section 309(g)(2)(A) (33 U.S.C.
20 1319(g)(2)(A)) is amended by striking "$25,000"
21 and inserting "$100,000".
22 (2) MAXIMUM AMOUNT OF CLASS II PEN-
23 ALTIES.—Section 309(g)(2)(B) (33 U.S.C.
24 1319(g)(2)(B)) is amended by striking "$125,000"
25 and inserting "$300,000".

1 (3) DETERMINATION OF AMOUNT.—Section
2 309(g)(3) (33 U.S.C. 1319(g)(3)) is amended by in-
3 serting after "resulting from the violation," the fol-
4 lowing: "the amount of any penalty previously im-
5 posed on the violator by a court or administrative
6 agency for the same violation or violations,".
7 (4) PUBLIC NOTICE.—Section 309(g)(4) (33
8 U.S.C. 1319(g)(4)) is amended—
9 (A) in subparagraph (A) by inserting
10 "class II" before "civil penalty";
11 (B) in subparagraphs (B) and (C) by in-
12 serting "class II" before "penalty" the first
13 place it appears; and
14 (C) in subparagraph (C) by striking "para-
15 graph (2)(A) in the case of a class I civil pen-
16 alty and".
17 (5) LIMITATION ON ACTIONS.—Section
18 309(g)(6)(A) (33 U.S.C. 1319(g)(6)(A)) is
19 amended—
20 (A) in clause (i) by inserting "or" at the
21 end;
22 (B) by striking clause (ii) and redesignat-
23 ing clause (iii) as clause (ii);

1 (C) in clause (ii), as so redesignated, by
2 striking ", the Secretary, or the State" and in-
3 serting "or the Secretary"; and
4 (D) in clause (ii), as so redesignated, by
5 striking "or such comparable State law, as the
6 case may be,".
7 (l) RECOVERY OF ECONOMIC BENEFIT.—Section 309
8 (33 U.S.C. 1319) is amended by adding at the end the
9 following:
10 "(h) RECOVERY OF ECONOMIC BENEFIT.—
11 "(1) CIVIL PENALTIES.—
12 "(A) GENERAL RULE.—The amount of any
13 civil penalty determined and assessed by a court
14 for a violation in a civil action commenced
15 under this section shall not be less than the
16 amount of the economic benefit (if any) to the
17 violator resulting from the violation.
18 "(B) MAXIMUM AMOUNT.—The require-
19 ment of subparagraph (A) shall apply even if
20 the amount of economic benefit described in
21 subparagraph (A) is greater than the amount of
22 the maximum penalty for the violation other-
23 wise established by this section.
24 "(2) ADMINISTRATIVE PENALTIES.—

1 "(A) GENERAL RULE.—The amount of any
2 administrative penalty determined and assessed
3 by the Administrator or the Secretary of the
4 Army for a violation in an administrative action
5 commenced under this section shall not be less
6 than the amount of the economic benefit (if
7 any) to the violator resulting from the violation.
8 "(B) MAXIMUM AMOUNT.—The require-
9 ment of subparagraph (A) shall apply only if
10 the amount of economic benefit described in
11 subparagraph (A) is less than the amount of
12 the maximum administrative penalty for the
13 violation established by this section. If the
14 amount of such economic benefit is greater than
15 the amount of such maximum penalty, then the
16 amount of the penalty assessed for the violation
17 shall be equal to such maximum penalty.
18 "(3) REGULATIONS.—The Administrator shall
19 propose regulations on methods to determine eco-
20 nomic benefit for purposes of this section not later
21 than 180 days after the date of the enactment of
22 this subsection and shall issue final regulations on
23 such methods not later than 18 months after such
24 date of enactment.

1 "(4) PUBLICLY OWNED TREATMENT WORKS.—
2 This subsection shall not apply to a penalty assessed
3 against a treatment works (as defined by section
4 212 of this Act) which is publicly owned.".
5 (m) PENALTY FUND.—
6 (1) ESTABLISHMENT.—Section 309 is further
7 amended by adding at the end the following:
8 "(i) PENALTY FUND.—Amounts received by the
9 United States as a penalty or fine under this Act shall
10 be deposited into a special fund in the Treasury of the
11 United States. The Administrator shall annually report to
12 Congress on the sums deposited into the fund, the sources
13 thereof, and the actual and proposed uses thereof.".
14 (2) AUTHORIZATION OF APPROPRIATIONS.—
15 Section 607 (33 U.S.C. 1387) is amended by insert-
16 ing "(a) IN GENERAL.—" before "There is"; and by
17 adding at the end the following:
18 "(b) FROM PENALTY FUND.—Amounts in the fund
19 established under section 309(i) are authorized to be ap-
20 propriated to carry out the purposes of this Act and shall
21 remain available until expended.".
22 (n) FEDERAL PROCUREMENT.—Section 508(a) (33
23 U.S.C. 1368(a)) is amended by adding at the end the fol-
24 lowing: "The Administrator may extend the prohibition to

1 other facilities owned or operated by the convicted
2 person.".
3 (o) ISSUANCE OF SUBPOENAS BY THE ADMINIS-
4 TRATOR.—Section 509(a)(1) (33 U.S.C. 1369(a)(1)) is
5 amended by inserting "or 308" after "section 305".
6 (p) LIMITATION ON JUDICIAL REVIEW.—Section
7 509(b)(2) (33 U.S.C. 1369(b)(2)) is amended by inserting
8 after "this subsection" the following: "and an action of
9 a State in issuing or denying a permit under section 402
10 with respect to which review could have been obtained
11 under comparable provisions of State law".
12 **SEC. 310. FEDERAL FACILITIES.**
13 (a) APPLICATION OF CERTAIN PROVISIONS.—Section
14 313(a) (33 U.S.C. 1323(a)) is amended by striking all
15 preceding subsection (b) and inserting the following:
16 **"SEC. 313. FEDERAL FACILITIES POLLUTION CONTROL.**
17 "(a) APPLICABILITY OF FEDERAL, STATE, INTER-
18 STATE, AND LOCAL LAWS.—
19 "(1) IN GENERAL.—Each department, agency,
20 or instrumentality of the executive, legislative, and
21 judicial branches of the Federal Government—
22 "(A) having jurisdiction over any property
23 or facility, or

1 "(B) engaged in any activity resulting, or
2 which may result, in the discharge or runoff of
3 pollutants,
4 and each officer, agent, or employee thereof in the
5 performance of his official duties, shall be subject to,
6 and comply with, all Federal, State, interstate, and
7 local requirements, administrative authority, and
8 process and sanctions respecting the control and
9 abatement of water pollution in the same manner
10 and to the same extent as any nongovernmental en-
11 tity, including the payment of reasonable service
12 charges.
13 "(2) TYPES OF ACTIONS COVERED.—Paragraph
14 (1) shall apply—
15 "(A) to any requirement whether sub-
16 stantive or procedural (including any record-
17 keeping or reporting requirement, any require-
18 ment respecting permits, and any other require-
19 ment),
20 "(B) to the exercise of any Federal, State,
21 or local administrative authority, and
22 "(C) to any process and sanction, whether
23 enforced in Federal, State, or local courts or in
24 any other manner.

1 "(3) PENALTIES AND FINES.—The Federal,
2 State, interstate, and local substantive and proce-
3 dural requirements, administrative authority, and
4 process and sanctions referred to in paragraph (1)
5 include all administrative orders and all civil and ad-
6 ministrative penalties and fines, regardless of wheth-
7 er such penalties or fines are punitive or coercive in
8 nature or are imposed for isolated, intermittent, or
9 continuing violations.
10 "(4) SOVEREIGN IMMUNITY.—
11 "(A) WAIVER.—The United States hereby
12 expressly waives any immunity otherwise appli-
13 cable to the United States with respect to any
14 requirement, administrative authority, and
15 process and sanctions referred to in paragraph
16 (1) (including any injunctive relief, any admin-
17 istrative order, any civil or administrative pen-
18 alty or fine referred to in paragraph (3), or any
19 reasonable service charge).
20 "(B) PROCESSING FEES.—The reasonable
21 service charges referred to in this paragraph in-
22 cludes fees or charges assessed in connection
23 with the processing and issuance of permits, re-
24 newal of permits, amendments to permits, re-
25 view of plans, studies, and other documents,

1 and inspection and monitoring of facilities, as
2 well as any other nondiscriminatory charges
3 that are assessed in connection with a Federal,
4 State, interstate, or local water pollution regu-
5 latory program.
6 "(5) EXEMPTIONS.—
7 "(A) GENERAL AUTHORITY OF PRESI-
8 DENT.—The President may exempt any effluent
9 source of any department, agency, or instru-
10 mentality in the executive branch from compli-
11 ance with any requirement to which paragraph
12 (1) applies if the President determines it to be
13 in the paramount interest of the United States
14 to do so; except that no exemption may be
15 granted from the requirements of section 306
16 or 307 of this Act.
17 "(B) LIMITATION.—No exemptions shall
18 be granted under subparagraph (A) due to lack
19 of appropriation unless the President shall have
20 specifically requested such appropriation as a
21 part of the budgetary process and the Congress
22 shall have failed to make available such re-
23 quested appropriation.
24 "(C) TIME PERIOD.—Any exemption under
25 subparagraph (A) shall be for a period not in

1 excess of 1 year, but additional exemptions may
2 be granted for periods of not to exceed 1 year
3 upon the President's making a new determina-
4 tion.

5 "(D) MILITARY PROPERTY.—In addition to
6 any exemption of a particular effluent source,
7 the President may, if the President determines
8 it to be in the paramount interest of the United
9 States to do so, issue regulations exempting
10 from compliance with the requirements of this
11 section any weaponry, equipment, aircraft, ves-
12 sels, vehicles, or other classes or categories of
13 property, and access to such property, which
14 are owned or operated by the Armed Forces of
15 the United States (including the Coast Guard)
16 or by the National Guard of any State and
17 which are uniquely military in nature. The
18 President shall reconsider the need for such
19 regulations at 3-year intervals.

20 "(E) REPORTS.—The President shall re-
21 port each January to the Congress all exemp-
22 tions from the requirements of this section
23 granted during the preceding calendar year, to-
24 gether with the President's reason for granting
25 such exemption.

1 "(6) VENUE.—Nothing in this section shall be
2 construed to prevent any department, agency, or in-
3 strumentality of the Federal Government, or any of-
4 ficer, agent, or employee thereof in the performance
5 of official duties, from removing to the appropriate
6 Federal district court any proceeding to which the
7 department, agency, or instrumentality or officer,
8 agent, or employee thereof is subject pursuant to
9 this section, and any such proceeding may be re-
10 moved in accordance with chapter 89 of title 28,
11 United States Code.

12 "(7) PERSONAL LIABILITY OF FEDERAL EM-
13 PLOYEES.—No agent, employee, or officer of the
14 United States shall be personally liable for any civil
15 penalty under any Federal, State, interstate, or local
16 water pollution law with respect to any act or omis-
17 sion within the scope of the official duties of the
18 agent, employee, or officer.

19 "(8) CRIMINAL SANCTIONS.—An agent, em-
20 ployee, or officer of the United States shall be sub-
21 ject to any criminal sanction (including any fine or
22 imprisonment) under any Federal or State water
23 pollution law, but no department, agency, or instru-
24 mentality of the executive, legislative, or judicial

1 branch of the Federal Government shall be subject
2 to any such sanction.".
3 (b) FUNDS COLLECTED BY A STATE.—Section 313
4 (33 U.S.C. 1323) is further amended by adding at the
5 end the following:
6 "(c) LIMITATION ON STATE USE OF FUNDS.—Unless
7 a State law in effect on the date of the enactment of this
8 subsection or a State constitution requires the funds to
9 be used in a different manner, all funds collected by a
10 State from the Federal Government in penalties and fines
11 imposed for the violation of a substantive or procedural
12 requirement referred to in subsection (a) shall be used by
13 the State only for projects designed to improve or protect
14 the environment or to defray the costs of environmental
15 protection or enforcement.".
16 (c) ENFORCEMENT.—Section 313 is further amended
17 by adding at the end the following:
18 "(d) FEDERAL FACILITY ENFORCEMENT.—
19 "(1) ADMINISTRATIVE ENFORCEMENT BY
20 EPA.—The Administrator may commence an admin-
21 istrative enforcement action against any department,
22 agency, or instrumentality of the executive, legisla-
23 tive, or judicial branch of the Federal Government
24 pursuant to the enforcement authorities contained in
25 this Act.

1 "(2) PROCEDURE.—The Administrator shall
2 initiate an administrative enforcement action against
3 a department, agency, or instrumentality under this
4 subsection in the same manner and under the same
5 circumstances as an action would be initiated
6 against any other person under this Act.
7 "(3) VOLUNTARY SETTLEMENT.—Any vol-
8 untary resolution or settlement of an action under
9 this subsection shall be set forth in a consent order.
10 "(4) CONFERRAL WITH EPA.—No administra-
11 tive order issued to a department, agency, or instru-
12 mentality under this section shall become final until
13 such department, agency, or instrumentality has had
14 the opportunity to confer with the Administrator.".
15 (d) LIMITATION ON ACTIONS AND RIGHT OF INTER-
16 VENTION.—Section 313 is further amended by adding at
17 the end the following:
18 "(e) LIMITATION ON ACTIONS AND RIGHT OF INTER-
19 VENTION.—Any violation with respect to which the Ad-
20 ministrator or Secretary, as applicable, has commenced
21 and is diligently prosecuting an action under this sub-
22 section, or for which the Administrator or Secretary, as
23 applicable, has issued a final order and the violator has
24 either paid a penalty or fine assessed under this subsection
25 or is subject to an enforceable schedule of corrective ac-

1 tions, shall not be the subject of an enforcement action
2 under section 505 of this Act. In any action under this
3 subsection, any citizen may intervene as a matter of
4 right.".

5 (e) DEFINITION OF PERSON.—Section 502(5) (33
6 U.S.C. 1362(5)) is amended by inserting before the period
7 at the end the following: "and includes any department,
8 agency, or instrumentality of the United States".

9 (f) DEFINITION OF RADIOACTIVE MATERIALS.—Sec-
10 tion 502 (33 U.S.C. 1362) is amended by adding at the
11 end the following:

12 "(21) The term 'radioactive materials' includes
13 source materials, special nuclear materials, and byproduct
14 materials (as such terms are defined under the Atomic
15 Energy Act of 1954) which are used, produced, or man-
16 aged at facilities not licensed by the Nuclear Regulatory
17 Commission; except that such term does not include any
18 material which is discharged from a vessel or other facility
19 covered by Executive Order 12344 (42 U.S.C. 7158 note;
20 relating to the Naval Nuclear Propulsion Program).".

21 (g) CONFORMING AMENDMENTS.—Section 313(b)
22 (33 U.S.C. 1323(b)) is amended—

23 (1) by striking "(b)(1)" and inserting the fol-
24 lowing:

25 "(b) WASTEWATER FACILITIES.—

"(1) COOPERATION FOR USE OF WASTEWATER CONTROL SYSTEMS.—";

(2) in paragraph (2) by inserting "LIMITATION ON CONSTRUCTION.—" before "Construction"; and

(3) by moving paragraphs (1) and (2) 2 ems to the right.

(h) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act and shall only apply to violations occurring after such date of enactment.

SEC. 311. NONPOINT SOURCE MANAGEMENT PROGRAMS.

(a) STATE ASSESSMENT REPORTS.—

(1) RELATIONSHIP TO INDIVIDUAL MANAGEMENT PLANS.—Section 319(a)(1)(B) (33 U.S.C. 1329(a)(1)(B)) is amended by inserting before the semicolon the following: ", including nonpoint sources of ground water pollution and nonpoint sources for which the State may require site-specific management plans".

(2) REVIEW AND REVISION.—Section 319(a) is further amended—

(A) in paragraph (2) by inserting ", reviewing, and revising" after "developing";

(B) in paragraph (2) by striking "section," the first place it appears and inserting "subsection,"; and

(C) by adding at the end the following new paragraph:

"(3) REVIEW AND REVISION.—Not later than 12 months after the date of the enactment of this paragraph, and every 5 years thereafter, the State shall review and revise the report required by this subsection.".

(3) APPROVAL PROCESS.—Section 319(d) is amended—

(A) in paragraph (1) by inserting "or revised report" after "any report"; and

(B) in paragraph (3)—

(i) by striking "the report" and inserting "a report or revised report";

(ii) by striking "30" and inserting "18"; and

(iii) by striking "of the enactment of this section" and inserting "on which such report is required to be submitted under subsection (a)".

(b) STATE MANAGEMENT PROGRAM.—

1 (1) TERM OF PROGRAM.—Section 319(b)(1) is
2 amended by striking "four" and inserting "5".
3 (2) CONTENTS.—Section 319(b)(2) is
4 amended—
5 (A) in each of subparagraphs (A) and (C)
6 by striking "paragraph (1)(B)" and inserting
7 "subsection (a)(1)(B)";
8 (B) in subparagraph (B)—
9 (i) by striking ", as appropriate," and
10 inserting "enforceable policies and mecha-
11 nisms,";
12 (ii) by striking "for enforcement";
13 and
14 (iii) by adding at the end the follow-
15 ing: "Such programs shall, at a minimum,
16 provide for implementation of best man-
17 agement practices and measures in con-
18 formity with guidance to be issued by the
19 Administrator pursuant to subsection
20 (o).";
21 (C) in subparagraph (C) by striking "at
22 the earliest practicable date" and inserting
23 "and measures on a watershed or other appro-
24 priate basis within 3 years after the date on
25 which each such watershed or other area is des-

1 ignated under subparagraph (K) for undertak-
2 ing such practices and measures";
3 (D) in subparagraph (D) by striking "A
4 certification of" and inserting "After the date
5 of the enactment of the Water Quality Act of
6 1994, a certification by"; and
7 (E) by adding at the end the following:
8 "(G) A description of monitoring and as-
9 sessment which will be carried out under the
10 program for the purposes of monitoring and as-
11 sessing the effectiveness of the program, includ-
12 ing the effectiveness of site-specific manage-
13 ment plans.
14 "(H) A description of measures and prac-
15 tices of the program which will be applicable to
16 land owners and a description of any category
17 of land owners (including categories of land-
18 owners determined solely on the basis of eco-
19 nomic hardship), class of activities, or areas
20 which will be exempt from such measures and
21 practices.
22 "(I) An identification of classes or cat-
23 egories of activities for which land owners will
24 be required to develop, submit to the State for
25 approval, and (after approval) implement site-

1 specific management plans. Before January 1,
2 2005, a land owner participating in and com-
3 plying with the requirements of a qualified pro-
4 gram shall be treated as having satisfied the re-
5 quirements for implementation of a site-specific
6 management plan under this subparagraph with
7 respect to pollutants and land areas regulated
8 under the qualified program. For purposes of
9 this section, a land owner shall be considered to
10 be participating in and complying with the re-
11 quirements of a qualified program, whether or
12 not the land owner is receiving financial assist-
13 ance under such program, if the agency admin-
14 istering such program provides certification
15 with respect to such compliance. For the pur-
16 poses of this subparagraph, the term 'qualified
17 program' means any of the following:
18 "(i) The Conservation Reserve Pro-
19 gram established under section 1231 of the
20 Food Security Act of 1985.
21 "(ii) The Agriculture Water Quality
22 Protection Program established under sec-
23 tion 1238B of the Food Security Act of
24 1985.

1 "(iii) The Integrated Farm Manage-
2 ment Program Option established under
3 section 1451 of the Food, Agriculture,
4 Conservation, and Trade Act of 1990.
5 "(iv) The Organic Certification Pro-
6 gram under title XXI of the Food, Agri-
7 culture, Conservation, and Trade Act of
8 1990.
9 "(v) The Coastal Zone Act Reauthor-
10 ization Amendments of 1990.
11 "(vi) A program which is determined
12 by the State to contribute to water quality
13 improvement or protection and to meeting
14 the objectives of this section and which is
15 submitted to the Administrator and ap-
16 proved by the Administrator.
17 "(J) If the program identifies any land
18 owner or category of land owners which will be
19 required to implement a site-specific manage-
20 ment plan under subparagraph (I), an identi-
21 fication of methods to inform each such land-
22 owner or category of landowners of sources of
23 Federal, State, and local governmental assist-
24 ance available for development and implementa-
25 tion of such plan.

1 "(K) Designation of those watersheds or
2 other areas located in whole or in part within
3 the boundaries of the State for which best man-
4 agement practices and measures will be under-
5 taken in each year. If, based on a revised as-
6 sessment under subsection (a), navigable waters
7 within a watershed or area are not meeting ap-
8 plicable water quality standards under section
9 303, the State shall require the implementation
10 of such additional best management practices
11 and measures as may be necessary for such
12 navigable waters to meet such standards.
13 "(L) A schedule for addressing during the
14 5-year period beginning 2 years after the date
15 of the enactment of this subparagraph, and
16 during each 5-year period thereafter, all
17 nonpoint sources of pollution in the State. The
18 schedule shall address approximately 20 percent
19 of the watersheds or other areas located in
20 whole or in part within the boundaries of the
21 State during each year of the 5-year period.
22 "(M) An identification of activities on Fed-
23 eral lands in the State that are inconsistent
24 with the State management program.".

1 (3) DEADLINE FOR SUBMISSION OF PRO-
2 GRAM.—Section 319(c)(2) is amended by striking
3 "this section" and inserting "the Water Quality Act
4 of 1994 and each 5-year period thereafter".
5 (c) PROCEDURE FOR DISAPPROVAL OF REPORTS AND
6 MANAGEMENT PROGRAMS.—Section 319(d)(2)(D) is
7 amended by striking "are not adequate" and all that fol-
8 lows through the semicolon at the end and inserting "will
9 not result in reasonable progress toward the attainment
10 of applicable water quality standards under section 303
11 as expeditiously as possible but not later than December
12 31, 2009;".
13 (d) LOCAL AND FEDERAL MANAGEMENT PROGRAMS;
14 TECHNICAL ASSISTANCE.—Section 319(e) is amended—
15 (1) in the subsection heading by inserting "AND
16 FEDERAL" after "LOCAL";
17 (2) by striking "If a State" and inserting the
18 following:
19 "(1) LOCAL.—If a State";
20 (3) by striking "If the Administrator approves
21 such management program," and all that follows
22 through the period and inserting "Such agency shall
23 be eligible to receive financial assistance under sub-
24 section (h) for preparation and implementation of

1 such management program as if the agency were a
2 State.";
3 (4) by moving paragraph (1), as designated by
4 paragraph (2) of this subsection, 2 ems to the right;
5 and
6 (5) by adding at the end the following:
7 "(2) FEDERAL.—If a State fails to submit a
8 management program or revised management pro-
9 gram under subsection (b) or the Administrator does
10 not approve such a management program, the Ad-
11 ministrator shall prepare a management program for
12 controlling pollution added from nonpoint sources to
13 the navigable waters within the State and improving
14 the quality of such waters in accordance with sub-
15 section (b).".
16 (e) GRANT PROGRAM.—
17 (1) FOR PREPARING ASSESSMENT REPORTS
18 AND MANAGEMENT PROGRAMS.—Section 319(h)(1)
19 is amended to read as follows:
20 "(1) GRANTS FOR PREPARATION AND IMPLE-
21 MENTATION OF REPORTS AND MANAGEMENT PRO-
22 GRAMS.—Upon application of a State, the Adminis-
23 trator may make grants under this subsection, sub-
24 ject to such terms and conditions as the Adminis-
25 trator considers appropriate, to such State for the

1 purpose of assisting the State in preparing a report
2 under subsection (a) and in preparing and imple-
3 menting a management program under subsection
4 (b). Grants for implementation of such management
5 program may be made only after such report and
6 management program are approved under this sec-
7 tion. Funds reserved pursuant to section 205(j)(5)
8 of this Act may be used to develop and implement
9 such management program.".

10 (2) FEDERAL SHARE.—Section 319(h)(3) is
11 amended—

12 (A) by striking "management program im-
13 plemented" and inserting "report prepared and
14 management program prepared and imple-
15 mented"; and

16 (B) by striking "implementing" and insert-
17 ing "preparing such report and preparing and
18 implementing".

19 (3) PRIORITY FOR EFFECTIVE MECHANISMS.—
20 Section 319(h)(5) is amended—

21 (A) by striking "or" at the end of subpara-
22 graph (C);

23 (B) by striking the period at the end of
24 subparagraph (D) and inserting a semicolon;
25 and

1 (C) by adding at the end the following:
2 "(E) protect waters designated pursuant to
3 section 303(c)(2)(A) as public water supplies;
4 or
5 "(F) control particularly difficult or seri-
6 ous nonpoint pollution problems in urban
7 areas.".
8 (4) LIMITATION ON USE OF FUNDS.—Section
9 319(h)(7) is amended to read as follows:
10 "(7) LIMITATION ON USE OF FUNDS.—States
11 may use funds from grants made pursuant to this
12 section—
13 "(A) only for providing financial assistance
14 with respect to those activities whose principal
15 purpose is protecting and improving water qual-
16 ity; and
17 "(B) only to the extent that such assist-
18 ance is related to the cost of implementing the
19 State management program.".
20 (5) COMPLIANCE WITH STATE MANAGEMENT
21 PROGRAM.—Section 319(h)(8) is amended—
22 (A) by striking "SATISFACTORY
23 PROGRESS.—" and inserting "COMPLIANCE
24 WITH STATE MANAGEMENT PROGRAM.—"; and

1 (B) by striking "made satisfactory
2 progress" and all that follows through the pe-
3 riod and inserting "complied in such preceding
4 fiscal year with its management program or re-
5 vised management program approved under this
6 section.".

7 (f) AUTHORIZATION OF APPROPRIATIONS.—Section
8 319(j) is amended by striking "and $130,000,000" and
9 all that follows through "$7,500,000" and inserting the
10 following: "$130,000,000 for each of fiscal years 1991,
11 1992, and 1993, $200,000,000 for fiscal year 1994,
12 $250,000,000 for fiscal year 1995, $300,000,000 for fis-
13 cal year 1996, $350,000,000 for fiscal year 1997,
14 $400,000,000 for fiscal year 1998, $450,000,000 for fis-
15 cal year 1999, and $500,000,000 for fiscal year 2000; ex-
16 cept that for each of such fiscal years not to exceed
17 $25,000,000".

18 (g) REPORTS.—Section 319(m) is amended—

19 (1) in paragraph (1) by striking "ANNUAL" and
20 inserting "BIENNIAL";

21 (2) in paragraph (1) by striking "1988, and
22 each January 1" and inserting "1995, and bienni-
23 ally"; and

24 (3) in paragraph (2) by striking "FINAL RE-
25 PORT.—" and all that follows through "Such re-

1 port," and insert "CONTENTS.—Each report submit-
2 ted under paragraph (1),".
3 (h) GUIDANCE ON BEST MANAGEMENT PRACTICES
4 AND MEASURES.—Section 319 is further amended by add-
5 ing at the end the following new subsection:
6 "(o) GUIDANCE ON BEST MANAGEMENT PRACTICES
7 AND MEASURES.—
8 "(1) IN GENERAL.—The Administrator, in con-
9 sultation with appropriate Federal and State depart-
10 ments and agencies, and after providing notice and
11 opportunity for public comment, shall publish guid-
12 ance to identify best management practices and
13 measures which may be undertaken under manage-
14 ment programs established pursuant to this section.
15 "(2) PUBLICATION.—The Administrator shall
16 publish proposed guidance under this subsection not
17 later than 6 months after the date of the enactment
18 of this subsection and shall publish final guidance
19 under this subsection not later than 18 months after
20 such date of enactment. The Administrator shall pe-
21 riodically review and revise the final guidance at
22 least every 3 years after its publication.
23 "(3) BEST MANAGEMENT PRACTICES AND
24 MEASURES DEFINED.—For the purposes of this sub-
25 section, the term 'best management practices and

1 measures' means economically achievable measures
2 for the control of the addition of pollutants from ex-
3 isting and new categories and classes of nonpoint
4 sources of pollution which reflect the greatest degree
5 of pollutant reduction achievable through the appli-
6 cation of the best available nonpoint pollution con-
7 trol practices, technologies, processes, siting criteria,
8 operating methods, or other alternatives.".

9 (i) ENFORCEABLE POLICY DEFINED.—Section 319
10 of such Act is further amended by adding at the end the
11 following new subsection:

12 "(p) ENFORCEABLE POLICY DEFINED.—In this sec-
13 tion, the term 'enforceable policy' means any policy of a
14 State which is legally binding through constitutional provi-
15 sions, laws, regulations, land use plans, ordinances, or ju-
16 dicial or administrative decisions and by which the State
17 exercises control over private and public land and water
18 uses and natural resources.".

19 **SEC. 312. NATIONAL ESTUARY PROGRAM.**

20 (a) TECHNICAL AMENDMENT.—Section 320(a)(2)(B)
21 (33 U.S.C. 1330(a)(2)(B)) is amended to read as follows:

22 "(B) PRIORITY CONSIDERATION.—The Ad-
23 ministrator shall give priority consideration
24 under this section to Long Island Sound, New
25 York and Connecticut; Narragansett Bay,

1 Rhode Island; Buzzards Bay, Massachusetts;
2 Massachusetts Bay, Massachusetts (including
3 Cape Cod Bay and Boston Harbor); Puget
4 Sound, Washington; New York-New Jersey
5 Harbor, New York and New Jersey; Delaware
6 Bay, Delaware and New Jersey; Delaware In-
7 land Bays, Delaware; Albemarle Sound, North
8 Carolina; Sarasota Bay, Florida; San Francisco
9 Bay, California; Santa Monica Bay, California;
10 Galveston Bay, Texas; Barataria-Terrebonne
11 Bay estuary complex, Louisiana; Indian River
12 Lagoon, Florida; and Peconic Bay, New York.".
13 (b) GRANTS.—Section 320(g)(2) (33 U.S.C.
14 1330(g)(2)) is amended by inserting "and implementa-
15 tion" after "development".

16 **SEC. 313. POLLUTION PREVENTION.**

17 (a) POLLUTION PREVENTION PLANS.—Title III (33
18 U.S.C. 1311–1330) is amended by adding at the end the
19 following:

20 **"SEC. 321. POLLUTION PREVENTION PLANS.**

21 "(a) DEVELOPMENT.—The Administrator shall es-
22 tablish by regulation a schedule under which major
23 nonmunicipal dischargers of pollutants and significant in-
24 dustrial users are required to develop and submit, to the
25 Administrator and the State in the case of a State which

1 is administering a pollution prevention program approved
2 by the Administrator under this section, a plan to prevent
3 or reduce pollution of navigable waters.
4 "(b) CONTENTS.—A plan developed and submitted to
5 the Administrator under this section shall include, at a
6 minimum, the following:
7 "(1) IDENTIFICATION OF POLLUTANTS.—Iden-
8 tification of those pollutants that the person submit-
9 ting the plan discharges into navigable waters or in-
10 troduces into a publicly owned treatment works.
11 "(2) DESCRIPTION OF POLLUTION SOURCES
12 AND COMPREHENSIVE REVIEW OF PROCESSES.—A
13 description of the sources of such pollutants and a
14 comprehensive review of the processes used by the
15 person submitting the plan that result in the dis-
16 charge or introduction of such pollutants, as the
17 case may be.
18 "(3) ANALYSIS OF POLLUTION PREVENTION
19 METHODS.—An analysis of the methods which could
20 be used to prevent or reduce such pollution in a cost
21 effective manner, including application of innovative
22 and alternative technologies, and any adverse envi-
23 ronmental impacts of the use of those methods.
24 "(4) STATEMENT OF GOALS.—A statement of
25 pollution prevention goals or strategies of the person

1 submitting the plan, including priorities for short-
2 term and long-term action.
3 "(5) DESCRIPTION OF INTENDED ACTIONS.—A
4 description of the methods which the person submit-
5 ting the plan intends to implement over the succeed-
6 ing 5-year period in order to implement the goals or
7 strategies contained in the statement described in
8 paragraph (4).
9 "(6) DESCRIPTION OF EXISTING POLLUTION
10 PREVENTION METHODS.—A description of any pollu-
11 tion prevention measures that currently are being
12 implemented by the person submitting the plan and,
13 to the extent available, identification of their im-
14 pacts.
15 "(c) COMPARABLE STATE AND LOCAL PROGRAMS.—
16 At any time after the date of the issuance of regulations
17 to carry out this section, the Governor of a State may sub-
18 mit to the Administrator a description of pollution preven-
19 tion laws and programs for discharges of pollutants into
20 navigable waters and introduction of pollutants into pub-
21 licly owned treatment works within its jurisdiction the
22 State proposes to administer under State law or under an
23 interstate compact, including any existing State pollution
24 prevention program. If the Administrator determines that
25 the State program is at least comparable to the program

1 of the Administrator under this section, then the State
2 program shall apply instead of the program of the Admin-
3 istrator.

4 "(d) PUBLIC AVAILABILITY.—A person submitting a
5 plan to the Administrator or a State under this section
6 shall make summaries of such plan available to the public,
7 upon request or during normal working hours, at the prin-
8 cipal place of business of such person located in the juris-
9 diction of the State.

10 "(e) NONENFORCEABILITY.—The contents of a plan
11 to be developed and submitted to the Administrator or a
12 State under this section shall not be enforceable.

13 "(f) CONFIDENTIALITY.—Information made available
14 to the Administrator in a plan developed under this section
15 shall be entitled to protection under section 1905 of title
16 18, United States Code, and shall be considered confiden-
17 tial in accordance with the purposes of that section, except
18 that such information may be disclosed to other officers,
19 employees, or authorized representatives of the United
20 States concerned with carrying out this Act. Information
21 to be submitted to a State in a plan developed under this
22 section shall be afforded protection equivalent to that
23 which would be afforded to such information under the
24 preceding sentence and section 1905 of such title if the

1 information was being submitted to the Administrator
2 under this section.

3 "(g) LIMITATIONS ON STATUTORY CONSTRUC-
4 TION.—Nothing in this section shall be construed as af-
5 fecting applicable effluent limitations or the requirements
6 for individual control strategies under section 304(l).
7 Nothing in this section shall be construed to authorize the
8 Administrator or a State to modify or condition the con-
9 tents of an adequately prepared plan submitted under this
10 section.

11 "(h) REGULATIONS.—Not later than 1 year after the
12 date of the enactment of this section, the Administrator
13 shall issue such regulations as may be necessary to carry
14 out this section.

15 "(i) REPORT ON INNOVATIVE AND ALTERNATIVE
16 TECHNOLOGIES.—Not later than 1 year after the date of
17 the enactment of this section, the Administrator shall re-
18 view, analyze, and compile in a report information on inno-
19 vative and alternative technologies which are available for
20 preventing and reducing pollution of navigable waters,
21 submit such report to Congress, and publish in the Fed-
22 eral Register a summary of such report and a notice of
23 the availability of such report. The Administrator shall an-
24 nually update the report prepared under this subsection,
25 submit the updated report to Congress, and publish in the

1 Federal Register a summary of the updated report and
2 a notice of its availability.
3 "(j) DEFINITIONS.—In this section, the following
4 definitions apply:
5 "(1) MAJOR NONMUNICIPAL DISCHARGER OF
6 POLLUTANTS.—The term 'major nonmunicipal dis-
7 charger of pollutants' means a person who dis-
8 charges toxic chemicals in excess of 200,000 pounds
9 per year into navigable waters and who is required
10 to submit forms or information to the Administrator
11 under section 313 of the Emergency Planning and
12 Community Right-To-Know Act of 1986 (42 U.S.C.
13 11023).
14 "(2) SIGNIFICANT INDUSTRIAL USER.—The
15 term 'significant industrial user' means a person
16 who introduces into a publicly owned treatment
17 works toxic chemicals in excess of 200,000 pounds
18 per year and who is required to submit forms or in-
19 formation to the Administrator under section 313 of
20 the Emergency Planning and Community Right-To-
21 Know Act of 1986 (42 U.S.C. 11023).".
22 (b) TOXIC REDUCTION ACTION PLANS.—Section 307
23 (33 U.S.C. 1317) is amended by adding at the end the
24 following:
25 "(f) TOXIC REDUCTION ACTION PLANS.—

1 "(1) DEVELOPMENT.—Each publicly owned
2 treatment works that is required to develop an ap-
3 proved pretreatment program under this Act and
4 each federally owned treatment works shall develop
5 a toxic reduction action plan.
6 "(2) PURPOSE.—A plan developed under this
7 section shall be designed to reduce, through public
8 education, best management practices, technology-
9 based local limits, and other means, the introduction
10 of toxic pollutants and hazardous wastes into pub-
11 licly owned treatment works and federally owned
12 treatment works and shall be directed at sources not
13 scheduled to be subject to categorical standards
14 under section 304(l).
15 "(3) GUIDANCE.—Not later than 18 months
16 after the date of the enactment of this subsection,
17 and after providing for notice and comment, the Ad-
18 ministrator shall publish guidance on the develop-
19 ment, approval, and implementation of plans under
20 this subsection and on providing technical assistance
21 to small communities to assist them in reducing the
22 introduction of toxic pollutants and hazardous
23 wastes from small industrial and commercial sources
24 into publicly owned treatment works and federally
25 owned treatment works.

1 "(4) ENFORCEMENT.—Effective on the last day
2 of the 1-year period beginning on the date of publi-
3 cation of guidance under paragraph (3), a toxic re-
4 duction action plan approved by the Administrator
5 under this section shall be a precondition for issu-
6 ance or renewal of a permit under section 402 of
7 this Act to a treatment works that is required to
8 have an approved pretreatment program under this
9 Act.".

10 **SEC. 314. STATE WATERSHED MANAGEMENT PROGRAMS.**

11 (a) ESTABLISHMENT.—Title III (33 U.S.C. 1311–
12 1330) is amended by adding at the end the following:

13 **"SEC. 322. STATE WATERSHED MANAGEMENT PROGRAMS.**

14 "(a) APPLICATION.—A State may submit to the Ad-
15 ministrator for approval an application to implement a
16 State watershed management program. Such application
17 shall be in such form and contain such information as the
18 Administrator may require by regulation.

19 "(b) MINIMUM ELEMENTS FOR APPROVAL.—The Ad-
20 ministrator may only approve a State watershed manage-
21 ment program for implementation under this section if the
22 State provided an appropriate opportunity for public par-
23 ticipation in development of the program, if the State
24 demonstrates to the satisfaction of the Administrator the

1 capability to implement the program, and if the program
2 includes the following elements:
3 "(1) Identification of the State agency respon-
4 sible for overseeing and approving watershed man-
5 agement plans under the program.
6 "(2) A method for establishing watershed areas
7 within the areas of the State, including watersheds
8 located in more than 1 State. If a watershed is lo-
9 cated in more than 1 State, the program shall re-
10 quire the State submitting the application to cooper-
11 ate with the other States within the boundaries of
12 which the watershed is located and may include co-
13 operative efforts, mutual assistance, and the estab-
14 lishment of agencies in accordance with section
15 103(b).
16 "(3) Designation of those watersheds which will
17 receive priority under the program for development
18 and implementation of watershed management
19 plans. The factors to be considered in designating
20 such watersheds may include—
21 "(A) the presence within the watershed of
22 waters the water quality of which is threatened
23 or impaired;
24 "(B) the need to protect highly productive,
25 fragile, declining, or unique environmental

1 areas which rely on such waters for their exist-
2 ence;
3 "(C) the degree of risk to human health
4 and the environment within the watershed;
5 "(D) the need to restore or maintain wa-
6 ters of special significance to local interests;
7 and
8 "(E) the need to protect priority ground
9 water or drinking water supplies.
10 "(4) A schedule, including appropriate mile-
11 stones, for implementing watershed management
12 plans under the program and for achieving and
13 maintaining water quality standards in all waters lo-
14 cated within the boundaries of the State by not later
15 than December 31, 2009.
16 "(5) A mechanism for designation of those per-
17 sons who are responsible for development and imple-
18 mentation of each watershed management plan
19 under the program. The designated persons may
20 include—
21 "(A) interstate and regional agencies or
22 entities having jurisdiction over all or a signifi-
23 cant part of the watershed;
24 "(B) interested Federal agencies;

1 "(C) local governments having jurisdiction
2 over any land or water located within the water-
3 shed; and
4 "(D) affected industries, public and private
5 educational institutions, and representatives of
6 the general public.
7 "(6) Identification of State environmental ob-
8 jectives which will be adopted and achieved under
9 the program, including attainment of water quality
10 standards and other environmental goals and re-
11 quirements.
12 "(7) A program for monitoring water quality
13 for the purpose of determining the effectiveness of
14 the State watershed management program.
15 "(8) A mechanism for including public involve-
16 ment in the development and implementation of wa-
17 tershed management plans under the State water-
18 shed management program.
19 "(9) A process for State oversight and evalua-
20 tion of development and implementation of such
21 plans.
22 "(c) GUIDANCE.—Not later than 1 year after the
23 date of the enactment of this section, the Administrator,
24 after consultation with appropriate State and local govern-
25 ment agencies, shall develop and publish guidance to the

1 States on development of State watershed management
2 programs. Such guidance shall describe the minimum ele-
3 ments necessary for approval of such programs under this
4 section.

5 "(d) COOPERATION OF OTHER FEDERAL AGEN-
6 CIES.—Upon request, Federal agencies shall provide to
7 States and watershed management entities such informa-
8 tion as may be useful for development and implementation
9 of watershed management programs and plans.

10 "(e) APPROVAL PROCESS.—Not later than the last
11 day of the 180th day following the date of submission of
12 an application under this subsection, the Administrator,
13 after consultation with other Federal agencies, shall ap-
14 prove or disapprove the application. If the Administrator
15 disapproves the application, the Administrator shall speci-
16 fy, in writing, any modifications of the application which
17 are necessary for approval of the application under this
18 section.

19 "(f) REVOCATION OF APPROVAL.—If the Adminis-
20 trator, after consultation with other Federal agencies,
21 finds that a State watershed management program ap-
22 proved under this section is not resulting in the mainte-
23 nance or attainment of water quality standards in accord-
24 ance with the implementation schedule approved as part
25 of the program under this section, the Administrator shall

1 notify the State, in writing, of any modifications of the
2 program necessary to continue approval of the program
3 under this section. If, after the State has been provided
4 an opportunity to modify the program and to implement
5 the modified program, the program is not resulting in the
6 maintenance or attainment of water quality standards, the
7 Administrator shall revoke approval of the program under
8 this section.

9 "(g) STATE REPORTS.—Each State implementing a
10 watershed management program under this section shall
11 submit to the Administrator annual reports on the activi-
12 ties carried out under the program during the preceding
13 year and the progress being made toward attainment of
14 water quality standards and other environmental goals
15 and requirements under the program.

16 "(h) INCENTIVES.—

17 "(1) TRANSFERABILITY OF FUNDS.—In any fis-
18 cal year in which a State is implementing a State
19 watershed management program approved under
20 this section, the State may transfer any funds it re-
21 ceives under each of sections 104(b)(3), 104(g), 106,
22 314(b), 319, and 604(b) for use under any of such
23 other sections. Any such transfer shall be subject to
24 such limitations and conditions as the Administrator
25 may impose to ensure that the transferred funds are

1 used in accordance with the terms and conditions of
2 the program to which such funds are transferred.
3 "(2) EXTENSION OF TERMS OF NPDES PER-
4 MITS.—In any fiscal year in which a State is imple-
5 menting a State watershed management program
6 approved under this section, the Administrator or
7 the State (if the State has a permit program ap-
8 proved under section 402) may extend—
9 "(A) on a one-time basis, the terms of per-
10 mits, issued under such section for the dis-
11 charge of any pollutant or combination of pol-
12 lutants into waters in a watershed subject to
13 such program, from 5 years to a maximum of
14 8 years for the purpose of having the same ter-
15 mination year for all permits issued under such
16 section for discharges into waters in such wa-
17 tershed; and
18 "(B) the terms of permits issued under
19 such section for discharges from a point source
20 into waters in the State from 5 years to a maxi-
21 mum of 10 years if such waters are meeting ap-
22 plicable water quality standards under this Act
23 and if, throughout the term of the permit, such
24 water quality standards will be maintained.".
25 (b) ADDITIONAL INCENTIVES.—

1 (1) EXTENSION OF REVIEW PROCESS.—Section
2 303(c)(1) (33 U.S.C. 1313(c)(1)) is amended by in-
3 serting after "1972" the following: "or at least once
4 each 5-year period in the case of a State which is
5 implementing a watershed management program ap-
6 proved under section 322".
7 (2) PLANNING.—Section 604(b) (33 U.S.C.
8 1384(b)) is amended by adding at the end the fol-
9 lowing: "In any fiscal year in which a State is imple-
10 menting a State watershed management program
11 approved under section 322, the State may reserve
12 up to an additional 2 percent of the sums allotted
13 to the State for such fiscal year for development of
14 watershed management plans under such program if
15 50 percent of the amount reserved under this sen-
16 tence will be made available to local entities.".
17 (c) TRANSFER OPPORTUNITIES.—
18 (1) STUDY.—The Administrator shall conduct a
19 study—
20 (A) to assess the opportunities for trans-
21 ferring the governmentally granted authority—
22 (i) to discharge conventional and
23 nonconventional pollutants between dis-
24 charges of pollutants with similar environ-
25 mental effects;

(ii) to discharge toxic pollutants; and

(iii) to discharge pollutants between different media and among a variety of point and nonpoint sources; and

(B) to evaluate methods of implementing such transfers.

(2) REPORT.—Not later than 18 months after the date of the enactment of this Act, the Administrator shall transmit to Congress a report on the results of the study conducted under this subsection, together with recommendations.

TITLE IV—PERMITS AND LICENSES

SEC. 401. STATE PERMIT PROGRAMS.

(a) JUDICIAL REVIEW OF PERMITS.—Section 402(b)(3) (33 U.S.C. 1342(b)(3)) is amended—

(1) by striking "and to provide" and inserting ", to provide"; and

(2) by inserting before the semicolon at the end the following: ", and to provide any interested person an opportunity for judicial review of the approval or denial of any such application".

(b) PENALTIES.—Section 402(b)(7) (33 U.S.C. 1342(b)(7)) is amended by inserting after "civil and crimi-

1 nal penalties" the following: "which are comparable to
2 Federal civil and criminal penalties".

3 **SEC. 402. STORMWATER DISCHARGE PERMITS.**

4 Section 402(p) of the Federal Water Pollution Con-
5 trol Act (33 U.S.C. 1342(p)) is amended to read as fol-
6 lows:

7 "(p) MUNICIPAL AND INDUSTRIAL STORMWATER
8 DISCHARGES.—

9 "(1) GENERAL RULE.—Permits for discharges
10 composed entirely of stormwater are required under
11 this Act only for the discharges described in para-
12 graph (2). No permit shall be required under this
13 Act for any other discharge composed entirely of
14 stormwater. Such other discharges shall be subject
15 to section 319, relating to nonpoint source manage-
16 ment programs.

17 "(2) DESCRIPTIONS OF DISCHARGES FOR
18 WHICH PERMITS ARE REQUIRED.—Permits are re-
19 quired under this Act for the following stormwater
20 discharges:

21 "(A) A discharge with respect to which a
22 permit has been issued under this section before
23 February 4, 1987.

24 "(B) A discharge associated with any in-
25 dustrial activity (other than a discharge that is

1 composed entirely of stormwater) that is subject
2 to regulation by a State or local stormwater
3 program, and that is from a construction activ-
4 ity which disturbs less than 5 acres of total
5 land area and is not part of a larger common
6 plan of development or sale. The Administrator
7 may, by regulation, exempt from such permit
8 requirement a discharge composed entirely of
9 stormwater from conveyances or systems of
10 conveyances (including pipes, conduits, ditches,
11 and channels) used for collecting and conveying
12 precipitation runoff and which are not contami-
13 nated by contact with, or do not come into con-
14 tact with, any material handling equipment or
15 activity, industrial machinery, raw material, in-
16 termediate product, finished product, byprod-
17 uct, or waste product located on the site of the
18 industrial activity.
19 "(C) A discharge from a municipal sepa-
20 rate storm sewer system serving a population of
21 250,000 or more.
22 "(D) A discharge from a municipal sepa-
23 rate storm sewer system serving a population of
24 100,000 or more but less than 250,000.

1 "(E) A discharge for which the Adminis-
2 trator or the State, as the case may be, deter-
3 mines that the stormwater discharge contrib-
4 utes to a violation of a water quality standard
5 or is a significant contributor of pollutants to
6 waters of the United States.
7 "(F) A discharge from a municipal sepa-
8 rate storm sewer system serving an urbanized
9 area (as defined by the Bureau of Census of the
10 Department of Commerce) with a population of
11 less than 100,000 and more than 50,000.
12 "(3) PERMIT REQUIREMENTS.—
13 "(A) INDUSTRIAL DISCHARGES.—Permits
14 for discharges associated with industrial activity
15 shall meet all applicable provisions of this sec-
16 tion and section 301.
17 "(B) MUNICIPAL DISCHARGE.—Permits
18 for discharges from municipal separate storm
19 sewer systems—
20 "(i) may be issued on a system- or ju-
21 risdiction-wide basis;
22 "(ii) shall include a requirement to ef-
23 fectively prohibit non-stormwater dis-
24 charges into the municipal separate storm
25 sewer system;

1 "(iii) shall require controls to reduce
2 the discharge of pollutants to the maxi-
3 mum extent practicable, including manage-
4 ment practices, control techniques and sys-
5 tem, design and engineering methods, and
6 such other provisions as the Administrator
7 or the State determines appropriate for the
8 control of such pollutants;
9 "(iv) shall require reasonable progress
10 toward attainment of applicable water
11 quality standards under this Act as expedi-
12 tiously as possible, but not later than De-
13 cember 31, 2009; and
14 "(v) that are renewed after the date
15 of the enactment of this clause, shall in-
16 clude such additional requirements for the
17 control of the discharge of pollutants as
18 the Administrator or the State, in the case
19 of a State with authority to issue permits
20 under this section, determines are nec-
21 essary for the attainment or maintenance
22 of applicable water quality standards under
23 this Act.
24 "(C) GENERAL AND GROUP PERMITS.—
25 The Administrator or the State, in the case of

1 a State with authority to issue permits under
2 this section, may, after notice and opportunity
3 for public hearing, issue general or group per-
4 mits for any discharges described in paragraph
5 (2) (other than discharges from municipal sepa-
6 rate storm sewer systems) if the Administrator
7 or the State determines that the discharges are
8 similar in nature and that application of similar
9 management measures will effectively reduce
10 pollution occurring from such discharges.

11 "(D) COMPLIANCE WITH WATER QUALITY
12 STANDARDS.—Neither the Administrator nor
13 the State, in the case of a State with authority
14 to issue permits under this section, may re-
15 quire, in a permit issued under this section for
16 discharges described in paragraph (2), compli-
17 ance with a numeric effluent limitation or an
18 applicable water quality standard directly before
19 December 31, 2009, except to the extent nec-
20 essary for implementation of management
21 measures under the regulations issued under
22 paragraph (5).

23 "(4) PERMIT APPLICATION REQUIREMENTS.—

24 "(A) INDUSTRIAL AND LARGE MUNICIPAL
25 DISCHARGES.—Not later than 2 years after the

1 date of the enactment of this subsection, the
2 Administrator shall establish regulations setting
3 forth the permit application requirements for
4 stormwater discharges described in paragraphs
5 (2)(B) and (2)(C). Applications for permits for
6 such discharges shall be filed no later than No-
7 vember 18, 1992. Not later than November 18,
8 1993, the Administrator or the State, as the
9 case may be, shall issue or deny each such per-
10 mit. Any such permit shall provide for compli-
11 ance as expeditiously as practicable, but in no
12 event later than 3 years after the date of issu-
13 ance of such permit.

14 "(B) MEDIUM MUNICIPAL DISCHARGES.—
15 Not later than 4 years after the date of the en-
16 actment of this subsection, the Administrator
17 shall establish regulations setting forth the per-
18 mit application requirements for stormwater
19 discharges described in paragraph (2)(D). Ap-
20 plications for permits for such discharges shall
21 be filed no later than May 17, 1993. Not later
22 than May 17, 1994, the Administrator or the
23 State, as the case may be, shall issue or deny
24 each such permit. Any such permit shall provide
25 for compliance as expeditiously as practicable,

1 but in no event later than 3 years after the date
2 of issuance of such permit.
3 "(C) OTHER URBANIZED DISCHARGES.—
4 Not later than October 1, 1995, the Adminis-
5 trator shall establish regulations setting forth
6 the permit application requirements for
7 stormwater discharges described in paragraph
8 (2)(F). Applications for permits for such dis-
9 charges shall be filed no later than May 1,
10 1997. Not later than May 1, 1998, the Admin-
11 istrator or the State, as the case may be, shall
12 issue or deny each such permit. Any such per-
13 mit shall provide for compliance as expedi-
14 tiously as practicable, but in no event later than
15 3 years after the date of issuance of such per-
16 mit.
17 "(5) REGULATIONS.—Not later than October 1,
18 1995, the Administrator, in consultation with State
19 and local officials, shall propose and, not later than
20 May 1, 1996, issue final regulations for the issuance
21 of permits for municipal separate storm sewer sys-
22 tem discharges described in paragraphs (2)(C),
23 (2)(D), and (2)(F). Such regulations shall include,
24 at a minimum, the following:

1 "(A) Methods to prohibit effectively
2 nonstormwater discharges into the municipal
3 separate storm sewer system of the permittee.
4 "(B) Information on the development and
5 implementation of management measures to re-
6 duce, to the maximum extent practicable, the
7 discharge of pollutants from such system. In
8 this subsection, the term 'management meas-
9 ures' means economically achievable measures
10 for the control of the addition of pollutants
11 from a municipal separate storm sewer system
12 which reflect the greatest degree of pollutant
13 reduction achievable through the application of
14 the best available storm water control practices,
15 technologies, processes, siting criteria, operating
16 methods, or other alternatives. The Adminis-
17 trator shall establish objective minimum per-
18 formance standards for each management
19 measure.
20 "(C) Requirements for development and
21 implementation of a municipal stormwater qual-
22 ity management program for implementation of
23 the requirements of subparagraphs (A) and
24 (B). The program shall be incorporated into the

1 permit and shall be subject to public hearing
2 and review before implementation.
3 "(D) Requirements for monitoring of the
4 waters receiving discharges described in para-
5 graphs (2)(C), (2)(D), and (2)(F) for the pur-
6 pose of determining if the requirements of the
7 permit are resulting in progress toward attain-
8 ing by December 31, 2009, applicable water
9 quality standards under this Act.
10 The Administrator shall periodically review and re-
11 vise the regulations taking into account States' as-
12 sessments of the effectiveness of the management
13 measures being implemented under such regula-
14 tions.".

15 **SEC. 403. COMBINED SEWER OVERFLOWS.**

16 Section 402 (33 U.S.C. 1342) is amended by adding
17 at the end the following:
18 "(q) COMBINED SEWER OVERFLOWS.—
19 "(1) EXISTING PERMITS.—After the last day of
20 the 1-year period beginning on the date of the enact-
21 ment of this subsection, a permit issued under this
22 section before, on, or after such date of enactment
23 shall be subject to the provisions of this subsection
24 to the extent such permit applies to a discharge

1 from a municipal combined sewer system resulting
2 from a wet weather overflow.
3 "(2) REGULATIONS.—Not later than 120 days
4 after the date of the enactment of this subsection,
5 the Administrator shall issue regulations—
6 "(A) to require, after the last day of the
7 1-year period described in paragraph (1), a per-
8 mit under this section for any discharge from a
9 municipal combined sewer system resulting
10 from a wet weather overflow;
11 "(B) to require that an applicant for such
12 a permit submit for approval to the Adminis-
13 trator or the State, in the case of a State with
14 authority to issue permits under this section, a
15 permit application that—
16 "(i) characterizes the combined sewer
17 system of the applicant and the impact of
18 the wet weather overflows from the system
19 on water quality;
20 "(ii) demonstrates the ability of the
21 applicant to implement, within 3 years
22 after the date of submission of the applica-
23 tion, such technology-based controls for
24 wet weather overflows as may be specified
25 in the regulations; and

1 "(iii) contains a long-term control
2 plan;
3 "(C) to require that any permit issued on
4 the basis of such an application—
5 "(i) provide for implementation, with-
6 in 3 years after the date of submission of
7 the application, of such technology-based
8 controls for wet weather overflows as may
9 be specified in the regulations; and
10 "(ii) set forth a compliance schedule
11 for implementation of the long-term con-
12 trol plan contained in the application as
13 soon as practicable after the date of issu-
14 ance of such permit; and
15 "(D) to require that such permit require
16 reasonable progress toward attainment of appli-
17 cable water quality standards under this Act as
18 expeditiously as possible, but not later than De-
19 cember 31, 2009.
20 "(3) COMPLIANCE WITH WATER QUALITY
21 STANDARDS.—Before December 31, 2009, neither
22 the Administrator nor the State, in the case of a
23 State with authority to issue permits under this sec-
24 tion, may require in a permit issued under this sec-
25 tion and subject to this subsection that a discharge

1 from a municipal combined sewer system resulting
2 from a wet weather overflow comply with a numeric
3 effluent limitation or a water quality standard di-
4 rectly.

5 "(4) LENGTH OF COMPLIANCE SCHEDULE.—
6 The term of any permit issued by the Administrator
7 or the State, in the case of a State with authority
8 to issue permits under this section, for a discharge
9 from a municipal combined sewer system resulting
10 from a wet weather overflow shall not be construed
11 to limit the length of the compliance schedule estab-
12 lished by the permit.".

13 **SEC. 404. DISCHARGES INTO GROUND WATER.**

14 Section 402 (33 U.S.C. 1342) is amended by adding
15 at the end the following:

16 "(r) DISCHARGES INTO GROUND WATER.—

17 "(1) GENERAL RULE.—For the purposes of this
18 section, any discharge of a pollutant into the ground
19 or ground waters shall be treated as a discharge of
20 a pollutant into the navigable waters if—

21 "(A) there is a reasonably foreseeable and
22 demonstrable direct hydrologic connection be-
23 tween the ground waters and surface waters in
24 the proximity of the discharge;

1 "(B) a greater than de minimis quantity of
2 the pollutant reasonably and demonstrably is
3 able to reach such surface waters; and
4 "(C) no other Federal law directly address-
5 es the activity resulting in the discharge.
6 "(2) LIMITATION ON ASSESSMENT OF PEN-
7 ALTIES.—No penalty may be assessed under this
8 Act against any person for a discharge of a pollutant
9 into the ground or ground waters unless the person
10 knew or should have known that there is a direct hy-
11 drologic connection between the ground waters and
12 surface waters in the proximity of the discharge.
13 "(3) PERMIT APPLICATION REQUIREMENT.—
14 The Administrator or the State, in the case of a
15 State with authority to issue permits under this sec-
16 tion, shall require as part of any application for a
17 permit under this section that the applicant
18 provide—
19 "(A) a description of any known or sus-
20 pected sources of pollution at the facility of the
21 applicant to the ground or ground waters that
22 have a direct hydrologic connection to surface
23 waters; and

"(B) a description of any measures that have been or will be taken by the applicant to eliminate or reduce such sources of pollution.".

SEC. 405. BENEFICIAL USE OF BIOSOLIDS.

Section 405(g) (33 U.S.C. 1345(g)) is amended—

(1) in the first sentence of paragraph (1)—

(A) by inserting "(also referred to as 'biosolids')" after "sewage sludge"; and

(B) by inserting "building materials," after "agricultural and horticultural uses,";

(2) in paragraph (1) by adding at the end the following: "Not later than January 1, 1996, the Administrator shall issue guidance on the beneficial use of sewage sludge."; and

(3) in paragraph (2) by striking "September 30, 1986," and inserting "September 30, 1994,".

TITLE V—GENERAL PROVISIONS

SEC. 501. NEEDS ESTIMATE.

Section 516(b)(1) (33 U.S.C. 1375(b)(1)) is amended—

(1) in the first sentence by striking "biennially revised" and inserting "quadrennially revised"; and

(2) in the second sentence by striking "February 10 of each odd numbered year" and inserting

1 "December 31, 1995, and December 31 of every 4th
2 calendar year thereafter".

3 **SEC. 502. EMERGENCY POWERS.**

4 Section 504 (33 U.S.C. 1364) is amended to read as
5 follows:

6 **"SEC. 504. EMERGENCY POWERS.**

7 "(a) ISSUANCE OF ORDERS; COURT ACTION.—Not-
8 withstanding any other provision of this Act, whenever the
9 Administrator finds that a pollution source or combination
10 of sources may present an imminent and substantial
11 endangerment (whether actual or threatened) to the public
12 health or welfare (including the livelihood of persons) or
13 to the environment, the Administrator may issue such or-
14 ders or take such action as may be necessary to protect
15 the public health or welfare or the environment and com-
16 mence a suit (or cause it to be commenced) in the United
17 States district court for the district in which the pollution
18 source or combination of sources is located. Such court
19 may grant such relief to abate the threat and to protect
20 against the endangerment as the public interest and the
21 equities of the case may require.

22 "(b) ENFORCEMENT OF ORDERS.—Any person who,
23 without sufficient cause, violates or fails to comply with
24 an order of the Administrator issued under this section
25 shall be liable for civil penalties to the United States in

1 an amount not to exceed $25,000 per day for each day
2 on which such violation or failure occurs or continues.".

3 **SEC. 503. CITIZEN SUITS.**

4 (a) NOTICE.—Section 505(b) (33 U.S.C. 1365(b)) is
5 amended by adding at the end the following: "After an
6 action is commenced against a person under this sub-
7 section, the plaintiff shall not be required to provide notice
8 under paragraph (1)(A) for any alleged violation by such
9 person that is not identified in a discharge monitoring re-
10 port that is publically available prior to the 60-day period
11 referred to in paragraph (1)(A).".

12 (b) REQUIREMENT FOR COMMENCING CITIZEN
13 SUITS.—Section 505(a)(1) (33 U.S.C. 1365(a)(1)) is
14 amended by inserting after "who is alleged" the following:
15 "to have violated in the 180-day period ending on the date
16 of issuance of notice under subsection (b)(1) or".

17 (c) REVIEW OF CONSENT JUDGMENTS.—Section
18 505(c)(3) (33 U.S.C. 1365(c)(3)) is amended by inserting
19 after the first sentence the following: "The Attorney Gen-
20 eral and the Administrator shall each review the proposed
21 consent judgment to determine the consistency of the
22 judgment with the purposes and requirements of this Act.
23 The court shall consider any views submitted on behalf
24 of the United States as to such consistency in determining
25 whether to enter the proposed consent judgment.".

1 **SEC. 504. GENERAL PROGRAM AUTHORIZATIONS.**

2 Section 517 (33 U.S.C. 1376) is amended—

3 (1) by striking "and" before "$135,000,000";

4 and

5 (2) by inserting before the period at the end the

6 following: ", such sums as may be necessary for each

7 of fiscal years 1991 through 1993, $185,000,000 for

8 each of fiscal years 1994 and 1995, $190,000,000

9 for each of fiscal years 1996 and 1997,

10 $195,000,000 for each of fiscal years 1998 and

11 1999, and $200,000,000 for fiscal year 2000.".

12 **SEC. 505. NATIVE AMERICAN PROGRAMS.**

13 (a) REVISED REPORT.—Section 518(b) (33 U.S.C.

14 1377(b)) is amended by adding at the end the following:

15 "Not later than 18 months after the date of the enactment

16 of the Water Quality Act of 1994, the Administrator shall

17 update the assessment conducted under this subsection

18 and transmit to Congress a revised version of the report

19 and recommendations submitted under this subsection.".

20 (b) SEWAGE TREATMENT.—Section 518(c) (33

21 U.S.C. 1377(c)) is amended—

22 (1) by striking "one-half of one percent of the

23 sums appropriated under section 207" and inserting

24 "1 percent of the sums appropriated under section

25 607"; and

1 (2) by adding at the end the following: "The
2 Administrator shall provide the funds reserved under
3 this subsection directly to Indian tribes and may
4 make a grant in an amount not to exceed 100 per-
5 cent of the cost of a project that is the subject of
6 the grant. In making a grant under this subsection,
7 the Administrator shall give priority to projects that
8 address the most significant public health and envi-
9 ronmental pollution problems, as determined by a
10 needs assessment conducted under subsection (b).".
11 (c) NONPOINT POLLUTION CONTROL.—Section
12 518(f) (33 U.S.C. 1377(f)) is amended—
13 (1) in the second sentence by striking "one-
14 third" and inserting "one-half"; and
15 (2) by adding at the end the following new sen-
16 tence: "Notwithstanding section 319(h)(3), the Ad-
17 ministrator may make a grant under this subsection
18 in an amount not to exceed 100 percent of the cost
19 of the project that is the subject of the grant.".
20 (d) REVOLVING LOAN FUNDS.—Section 603(c)(1)
21 (33 U.S.C. 1383(c)(1)) is amended by inserting "or In-
22 dian tribe" after "State agency".

TITLE VI—STATE WATER POLLUTION CONTROL REVOLVING FUNDS

SEC. 601. WATER USE EFFICIENCY MEASURES.

(a) GENERAL AUTHORITY FOR CAPITALIZATION GRANTS.—Section 601(a) (33 U.S.C. 1381(a)) is amended by inserting after "publicly owned" the following: "and for implementation of water use efficiency measures whose principal purpose is improving or protecting water quality".

(b) PROJECT ELIGIBILITY.—Section 603(c) (33 U.S.C. 1383(c)) is amended by inserting after "section 212 of this Act)" the following: "and for implementation of water use efficiency measures whose principal purpose is improving or protecting water quality".

SEC. 602. GUIDANCE FOR SMALL COMMUNITIES.

Section 602 (33 U.S.C. 1382) is amended by adding at the end the following new subsection:

"(c) GUIDANCE FOR SMALL COMMUNITIES.—

"(1) SIMPLIFIED PROCEDURES.—Not later than 1 year after the date of the enactment of this subsection, the Administrator shall establish simplified procedures for small communities to obtain assistance under this title.

"(2) PUBLICATION OF MANUAL.—Not later than 1 year after the date of the enactment of this subsection, the Administrator shall publish a manual to assist small communities in obtaining assistance under this title and publish in the Federal Register notice of availability of the manual.

"(3) SMALL COMMUNITY DEFINED.—For purposes of this title, the term 'small community' means a municipality or intermunicipal, interstate, or State agency seeking assistance under this title which serves a population of 20,000 or less.".

SEC. 603. TYPES OF ASSISTANCE.

(a) EXTENDED REPAYMENT PERIOD FOR HARDSHIP COMMUNITIES.—Section 603(d)(1) (33 U.S.C. 1383(d)(1)) is amended—

(1) in subparagraph (A) by inserting after "20 years" the following: "or, in the case of a municipality or intermunicipal, interstate, or State agency applying for assistance for a service area in which the average annual residential sewage treatment charge, after completion of the project, will be greater than 1.25 percent of the median family income for such service area, the lesser of 30 years or the expected life of the project to be financed with the proceeds of the loan"; and

1 (2) in subparagraph (B) by striking "not later
2 than 20 years after project completion" and insert-
3 ing "upon the expiration of the term of the loan".
4 (b) TECHNICAL AND PLANNING ASSISTANCE FOR
5 SMALL COMMUNITIES.—Section 603(d) (33 U.S.C.
6 1383(d)) is amended—
7 (1) by striking "and" at the end of paragraph
8 (6);
9 (2) by striking the period at the end of para-
10 graph (7) and inserting "; and"; and
11 (3) by adding at the end the following new
12 paragraph:
13 "(8) to provide technical and planning assist-
14 ance to small communities; except that such
15 amounts shall not exceed 1 percent of all grant
16 awards to such fund under this title.".
17 (c) INTEREST RATES.—Section 603 is further
18 amended by adding at the end the following new sub-
19 section:
20 "(i) INTEREST RATES.—In any case in which a State
21 makes a loan pursuant to subsection (d)(1) to a municipal-
22 ity or intermunicipal, interstate, or State agency applying
23 for assistance for a service area in which the average an-
24 nual residential sewage treatment charge will increase,
25 after completion of the project for which the loan is made

1 and as a result of the project, to greater than 1.25 percent
2 of the median family income for such service area, the
3 State may charge a negative interest rate so as to reduce
4 the unpaid principal of the loan to the extent that such
5 assistance is necessary to ensure that such charge is not
6 greater than 1.25 percent of such median family income
7 taking into account any extension of the repayment period
8 under subsection (d)(1)(A).".

9 **SEC. 604. ALLOTMENT OF FUNDS.**

10 Section 604(a) (33 U.S.C. 1384(a)) is amended by
11 striking "and 1990" and inserting "through 1994".

12 **SEC. 605. AUTHORIZATION OF APPROPRIATIONS.**

13 Section 607 (33 U.S.C. 1387(a)) is amended by strik-
14 ing paragraph (3) and all that follows through the period
15 at the end and inserting the following:

16 "(3) $2,400,000,000 for fiscal year 1992;
17 "(4) $2,550,000,000 for fiscal year 1993;
18 "(5) $2,500,000,000 for fiscal year 1994;
19 "(6) $3,000,000,000 for fiscal year 1995;
20 "(7) $3,500,000,000 for fiscal year 1996;
21 "(8) $4,000,000,000 for fiscal year 1997;
22 "(9) $4,500,000,000 for fiscal year 1998;
23 "(10) $5,000,000,000 for fiscal year 1999; and
24 "(11) $5,500,000,000 for fiscal year 2000.".

TITLE VII—MISCELLANEOUS PROVISIONS

SEC. 701. FINANCIAL ASSISTANCE FOR INTERNATIONAL WASTEWATER TREATMENT FACILITIES.

(a) IN GENERAL.—The Administrator is authorized to provide financial assistance to States for planning, design, and construction of international wastewater treatment works in the vicinity of the United States-Mexico border which are for the protection of United States residents and waters from pollution originating in Mexico.

(b) APPROVAL OF PLANS.—Any international wastewater treatment facility for which financial assistance is provided under this section shall be constructed in accordance with plans developed by the International Boundary and Water Commission in consultation with the water pollution control agency of the affected State, and approved by the United States and Mexico, to meet applicable standards under the laws of the United States and Mexico and under applicable treaties and international agreements. Such plans shall include construction cost estimates and identify responsible parties and the allocation of costs associated with operating and maintaining the treatment works.

(c) DEFINITIONS.—For purposes of this section, the following definitions apply:

1 (1) CONSTRUCTION; TREATMENT WORKS.—The
2 terms "construction" and "treatment works" have
3 the meanings such terms have under section 212 of
4 the Federal Water Pollution Control Act.
5 (2) SEWAGE.—The term "sewage" means spent
6 or used water of a municipality which contains
7 human waste and other dissolved and suspended
8 matter and includes wastewater from industries
9 which discharge into a municipal collection system
10 and any ground water, surface water, or stormwater
11 which enters the system.
12 (3) INTERNATIONAL WASTEWATER TREATMENT
13 WORKS.—The term "international wastewater treat-
14 ment works" means any facility constructed pursu-
15 ant to a Minute agreement of the International
16 Boundary and Water Commission, United States
17 and Mexico, for the treatment of wastewater in the
18 vicinity of the border described in subsection (a).
19 (d) AUTHORIZATION OF APPROPRIATIONS.—There is
20 authorized to be appropriated to carry out this section
21 $50,000,000 for fiscal years beginning after September
22 30, 1994.
23 **SEC. 702. WASTEWATER SERVICE FOR COLONIAS.**
24 (a) GRANT ASSISTANCE.—The Administrator may
25 make grants to States along the United States-Mexico

1 border to provide assistance for planning, design, and con-
2 struction of treatment works to provide wastewater service
3 to the communities along such border commonly known
4 as "colonias".

5 (b) FEDERAL SHARE.—The Federal share of the cost
6 of a project carried out using grants made available under
7 subsection (a) shall be 50 percent. The non-Federal share
8 of such cost shall be provided by the State receiving the
9 grant.

10 (c) TREATMENT WORKS DEFINED.—For purposes of
11 this section, the term "treatment works" has the meaning
12 given such term by section 212 of the Federal Water Pol-
13 lution Control Act.

14 (d) FUNDING.—The Administrator shall carry out
15 this section using amounts not to exceed $60,000,000
16 which were appropriated before the date of the enactment
17 of this Act and which are available for such purpose.

18 **SEC. 703. POLLUTION FROM MOBILE SOURCES.**

19 (a) STUDY.—The Administrator shall conduct a
20 study of pollutants to the navigable waters which originate
21 from mobile sources and which impair or threaten water
22 quality.

23 (b) DETERMINATION.—In conducting the study
24 under subsection (a), the Administrator shall determine
25 whether each source of pollution identified under the study

1 enters the navigable waters from a point or nonpoint
2 source.
3 (c) REPORT.—Not later than 2 years after the date
4 of the enactment of this section, the Administrator shall
5 transmit to the Committee on Public Works and Trans-
6 portation of the House of Representatives and the Com-
7 mittee on Environment and Public Works of the Senate
8 a report containing the results of the study to be con-
9 ducted under subsection (a), together with recommenda-
10 tions on actions to reduce or eliminate pollution from mo-
11 bile sources.
12 (d) PUBLIC REVIEW AND COMMENT.—Before trans-
13 mitting a report under subsection (c), the Administrator
14 shall make the report available for public review and com-
15 ment.
16 **SEC. 704. TECHNICAL AMENDMENTS.**
17 (a) SECTION 118.—Section 118(c)(1)(A) (33 U.S.C.
18 1268(c)(1)(A)) is amended by striking the last comma.
19 (b) SECTION 120.—Section 120(d) (33 U.S.C.
20 1270(d)) is amended by striking "(1)".
21 (c) SECTION 204.—Section 204(a)(3) (33 U.S.C.
22 1284(a)(3)) is amended by striking the final period and
23 inserting a semicolon.
24 (d) SECTION 205.—Section 205 (33 U.S.C. 1285) is
25 amended—

1 (1) in subsection (c)(2) by striking "and 1985"
2 and inserting "1985 , and 1986";
3 (2) in subsection (c)(2) by striking "through
4 1985" and inserting "through 1986";
5 (3) in subsection (g)(1) by striking the period
6 following "4 per centum"; and
7 (4) in subsection (m)(1)(B) by striking "this"
8 and inserting "such".
9 (e) SECTION 208.—Section 208 (33 U.S.C. 1288) is
10 amended—
11 (1) in subsection (h)(1) by striking "designed"
12 and inserting "designated"; and
13 (2) in subsection (j)(1) by striking "September
14 31, 1988" and inserting "September 30, 1988".
15 (f) SECTION 301.—Section 301(j)(1)(A) (33 U.S.C.
16 1311(j)(1)(A)) is amended by striking "that" the first
17 place it appears and inserting "than".
18 (g) SECTION 309.—Section 309(d) (33 U.S.C.
19 1319(d)) is amended by striking the second comma follow-
20 ing "Act by a State".
21 (h) SECTION 311.—Section 311 (33 U.S.C. 1321) is
22 amended—
23 (1) in subsection (b) by moving paragraph (12)
24 (including subparagraphs (A), (B) and (C)) 2 ems
25 to the right; and

1 (2) in subsection (h)(2) by striking "The" and
2 inserting "the".
3 (i) SECTION 404.—Section 404(s)(3) (33 U.S.C.
4 1344(s)(3)) is amended by striking "acton" and inserting
5 "action".
6 (j) SECTION 505.—Section 505(f) (33 U.S.C.
7 1365(f)) is amended by striking the last comma.
8 (k) SECTION 516.—Section 516 (33 U.S.C. 1375) is
9 amended by redesignating subsection (g) as subsection (f).
10 (l) SECTION 518.—Section 518(f) (33 U.S.C.
11 1377(f)) is amended by striking "(d)" and inserting "(e)".

○

THE WATER QUALITY ACT OF 1994 AND ISSUES RELATED TO CLEAN WATER ACT REAUTHORIZATION

TUESDAY, MAY 24, 1994

HOUSE OF REPRESENTATIVES,
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION,
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 2167, Rayburn House Office Building, Hon. Douglas Applegate (chairman of the subcommittee) presiding.

Mr. APPLEGATE. If everybody would try to squeeze in, keep the noise down, take whatever seats are available, sit on the floor. I think we can get started.

Today is the first of two days of hearings on H.R. 3948, the Water Quality Act of 1994, a bipartisan bill which was introduced by our distinguished Chair of the Committee, Norm Mineta, and by our distinguished colleague, the Ranking Republican Member of the Subcommittee on Water Resources and Environment, Sherry Boehlert.

The importance of the task before us in amending the Clean Water Act was underscored by the Environmental Protection Agency's recent release of the National Water Quality Inventory. That report to Congress, which is based on monitoring by the States, concluded that one-third of assessed waters in this country are impaired, including 38 percent of assessed rivers and streams, 44 percent of assessed lakes and reservoirs, and 32 percent of assessed estuaries and coastal waters.

EPA reported that the leading contributors to impairment of these waters are runoff from agricultural and urban sources, discharges of municipal sewage and from storm sewers. The report also stated that some wetlands continue to be lost, resulting in reduction of the biological productivity of waters and increasing the impacts of floods and pollution.

In another very important report to Congress, the 1992 Needs Survey, EPA identified needs of local government of at least $137 billion to meet wastewater treatment goals over the next 20 years. This, mind you, is up from $80 billion in the Agency's 1990 Needs Study.

H.R. 3948 attempts to address these circumstances, the continued impairment of a significant portion of our Nation's water bodies and the massive unmet wastewater construction needs. As we proceed with these hearings and ultimately with markup, I hope

that we remain mindful of the fact that all of us, and all of our constituents, regardless of political affiliation, are dependent on clean water for recreation, our livelihood and our survival.

While none of us embraces this bill in its entirety, I am hopeful that we can engage in a constructive process that will result in approval of a bill that will protect the Nation's waters for generations to come. And I remain committed to doing so in a manner that does not allow those living in small and rural communities to be neglected. That is very important to me, and it is very important to many of my colleagues.

While this is the first of our subcommittee hearings on reauthorization of the Clean Water Act since introduction of H.R. 3948, over two-and-a-half months ago on March 3rd, it certainly is not the first time our committee has conducted hearings on comments to the Clean Water Act. In fact, this is actually the 30th day of clean water hearings before the Water Resources and Environment Subcommittee, including 10 days of hearings earlier this Congress. And much of this credit can be given to my predecessor, who chaired this committee over the last several years, Henry Nowak, who held countless hearings on the Clean Water Act.

The purpose of today's and Thursday's hearings is not to rehash information that already is in the massive record before this committee. With our subcommittee's ambitious agenda, this Congress, including reauthorization of Superfund, and the Water Resources Bill, there is not time to hold another 29 days of hearings, even if there were any inclination to do so, which there is not. Rather, the distinguished Chairman of the full committee concluded, and I concurred, that limited additional hearings should be held to invite comments more specifically tailored to the substitute, which I agreed to cosponsor, to H.R. 3948, and which came out a little over a month ago on April 21st, and on the alternative to the Chairman's bill that Congressman Hayes and others released toward the end of last week.

In the tradition of this subcommittee, every effort has been made to arrange for witnesses who can present the broad range of perspectives on the central provisions of the bill, and on the issues that have been raised concerning the bill. That includes, I might add, comments regarding the Hayes alternative. While it has been impossible to grant every request to testify, we have, I believe, arrived at a balanced approach.

Today we are very honored to have as our first witness Ms. Carol Browner, the Administrator of the Environmental Protection Agency. Ms. Browner will provide us with the Agency's perspective on where the Clean Water Act needs to be improved, and what the various proposals before our subcommittee have done to meet this challenge.

Ms. Browner will be followed by a panel of individuals who will describe how water pollution has impacted them, their communities, their livelihoods, and their health. That will be followed by a panel addressing wetlands, when we are will hear from witnesses from the National Association of Home Builders, the National Wetlands Coalition, the National Wildlife Federation, Pacific Northwest and the Sierra Club National Wetlands Committee.

Finally, we will close the day with a panel of concerning a wide range of industries, including representatives of the iron and steel industry, mining, food processors, chemical manufactures, and pulp and paper.

On Thursday, our second and last day of hearings, we are privileged to have as our first witness Leon Panetta, Director of the Office of Management and Budget. Leon will be followed by spokespersons from organized labor. Then we will hear from representatives of State and local governments, and from a panel on land use issues, including issues relating to nonpoint source pollution from agriculture and silviculture.

I speak on behalf of all Members of the subcommittee when I state that I greatly appreciate the witnesses giving of their time and expertise on these important issues.

Witnesses are reminded to limit their remarks. In view of our ambitious schedule during these two days, the only way to ensure adequate time for all panels will be for witnesses to stay within the five-minute time frame.

Many Members of this subcommittee and of the full committee strenuously urge that hearings be held before proceeding with markup, and the only way to accommodate their wishes will be to follow adequate time for them to question the witnesses. The five-minute time limit applies to witnesses and Members.

Before we begin our first witness, I want to yield to my very distinguished colleague, the Ranking Republican Member of the subcommittee, Sherry Boehlert, of New York.

Mr. BOEHLERT. Thank you very much, Mr. Chairman.

I would like to begin by welcoming Administrator Browner and our other distinguished witnesses to what I believe will be an extremely informative hearing. The Clean Water Act is one of our Nation's most important infrastructure and environmental statutes, and its reauthorization is a goal to which we should all be committed.

Our Nation's success in the past and in the future is directly linked to our rich endowment of clean water. No resource is of greater importance to American agriculture, American industry, or the American people.

On March 3, 1994, Chairman Mineta and I introduced the Water Quality Act of 1994, a Clean Water Act reauthorization package that we believe embodies the insights and interests that were provided to us during exhaustive hearings last year on the topic of clean water.

Witnesses representing cities from across our Nation testified as to the need to place significant new resources and emphasis on reducing nonpoint sources of pollution. Representatives of American industry also provided compelling testimony on the need to shift resources and some of the regulatory burden to nonpoint sources of pollution.

Today, nonpoint sources of pollution are responsible for over half of all water quality impairment in our Nation. The time to address nonpoint source pollution is now, and H.R. 3948 accomplishes this in a reasonable and effective manner.

Later this morning, we will hear testimony from residents of Milwaukee, Wisconsin, a city where 104 people died and thousands be-

came ill from contaminated drinking water that experts have attributed to nonpoint source pollution, cow manure.

The threat to human health by nonpoint source pollution is very real. In fact, last week, the City of Milwaukee was once again threatened by nonpoint source contamination of its drinking water; the lethal pathogen which devastated Milwaukee last spring, cryptosporidium, was again detected in the city's drinking water. The 628,000 people living in Milwaukee were once again put on a health alert and forced to boil their drinking water.

I am reminded of Love Canal and the prophetic words of Rachel Carson in Silent Spring: We must confront nonpoint source pollution before it confronts us.

The people I talk to about clean water have consistently expressed to me their concerns about the quality of America's waters. So when special interests suggest that we should be weakening our efforts to protect America's waters, I look on suspiciously.

Last year, the American people spent over $3 billion on bottled water, nearly double what the Federal Government provided over the same period for clean water infrastructure. The American people are concerned about the quality of the Nation's waters, and they are expressing it in the most concrete of terms, with their pocketbooks.

On the issue of wetlands protection, Chairman Mineta and I have worked to craft a bill that resolves many of the bureaucratic problems confronting the regulated community, without jeopardizing the protection of critical wetlands habitat. In testimony before this committee, members of the agriculture community and the development community testified that the lengthy permit process and the lack of an effective appeals process were at the root of most problems with the Section 404 program.

In response to these assertions, a wetlands package has been developed that provides for expedited permitting and a meaningful appeals process. We can have efficient permitting and still protect America's wetlands.

I believe today's hearings will help clarify the enormous value of wetlands to our society. This weekend, we were once again reminded of the great importance of wetlands.

Governor Pete Wilson declared a state of emergency in four of northern California's coastal communities as a result of a severe drop in commercial salmon fishing. Salmon populations have dropped between 50 percent and 90 percent in California's rivers. It comes as no surprise that these massive declines in fish population and the economic hardships that follow are in a State that has destroyed over 98 percent of its original wetlands.

Today, over 60 percent of all fish that end up in our plates begin their lives in wetlands. As America's taste for seafood grows, so will the need to protect wetlands.

Since the introduction of H.R. 3948, I have been astounded by the proliferation of misinformation on what this bill will and will not do. Particularly disturbing is the horrific picture of citizen lawsuits that have been painted in Washington and sold in rural America.

As a founder and Chairman of the Northeast Agriculture Caucus, I am particularly sensitive to Federal regulations that impact farm-

ers, and would like to take this opportunity to shed some light on the issue of citizen suits.

Under current law, citizen suits are limited, let me stress that, are limited to point sourcnes of pollution, and nothing in H.R. 3948 changes this limitation. Farmers "will not," let me stress, farmers "will not" be subject to citizen lawsuits for violations of the nonpoint source provisions in the Clean Water Act, end of story.

The Water Quality Act of 1994 has been available for comment and discussion since March 3rd, over two-and-one-half months. During this time, Chairman Mineta and I have sat down with many of you, both here on the dais and the audience. Throughout these meetings, we have listened and sought to change our introduced bill to reflect what is best for the diverse interests that are represented in this critically important battle on clean water.

Less than a week ago, an alternative to H.R. 3948 was released in draft form. Though many have yet to review this measure, it is clear that enactment of this proposal would dramatically hamper efforts to address nonpoint source pollution, would lead to the expanded destruction of our Nation's wetlands, and undermine many of the basic provisions in the Clean Water Act. I think today's hearings will make it crystal clear that the American people need and will demand clean water, not a murky substitute.

For those who suggest the work we are about is not critically important, I say: "Tell that to the people of Milwaukee." For those who say we are pushing too hard for too much, I say: "Tell that to the people of Milwaukee." And for those who say what is the rush, let's slow down a bit, I say: "Tell that to the people of Milwaukee."

Thank you.

Mr. APPLEGATE. Thank you very much, Mr. Boehlert. Excellent statement.

I am going to make a statement here, and that is to ask the Members to withhold any oral statements at this time, because we are going to be very pressed for time if we expect to get through with this today and Thursday, but that your statements will be made a part of the record.

You will have an opportunity to question Ms. Browner and the other members of the panel, but I think this would help us to expedite the time, get the information that we need, and proceed with business.

[Mr. Emerson's prepared statement follows:]

BILL EMERSON
MEMBER OF CONGRESS
8TH DISTRICT, MISSOURI

HOUSE COMMITTEE ON
AGRICULTURE
HOUSE COMMITTEE ON
PUBLIC WORKS AND TRANSPORTATION

SELECT COMMITTEE ON HUNGER

Bill Emerson
M.C

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STATEMENT OF CONGRESSMAN BILL EMERSON
BEFORE THE SUBCOMMITTEE ON
WATER RESOURCES AND ENVIRONMENT
REAUTHORIZATION OF THE FEDERAL WATER POLLUTION CONTROL ACT
MAY 24 and 26, 1994

MR. CHAIRMAN, [redacted] THANK YOU [redacted], FOR HOLDING THIS FORUM ON AN ISSUE CAUSING GREAT CONCERN IN MANY RURAL TOWNS AND COMMUNITIES -- PARTICULARLY IN SOUTHERN MISSOURI.

INDEED, THE REAUTHORIZATION OF THE FEDERAL WATER POLLUTION CONTROL OR CLEAN WATER ACT HAS TREMENDOUS IMPLICATIONS FOR BOTH RURAL AMERICA AND THE CRITICAL AGRICULTURAL ECONOMY THAT SUSTAINS THESE SAME RURAL TOWNS AND COMMUNITIES. I WELCOME THIS OPPORTUNITY TO ADDRESS BOTH THE NEEDS AND THE SOLUTIONS TO PROBLEMS FACING THE FAMILIES OF TODAY'S FARMING COMMUNITIES.

WITHOUT A DOUBT, AMERICAN FARMERS AND RANCHERS ARE THE ORIGINAL STEWARDS OF THE LAND. NO ONE HAS A GREATER INTEREST IN MAINTAINING AND IMPROVING THE QUALITY OF THEIR WATER AND SOIL THAN THE DOMESTIC FARM PRODUCER. CERTAINLY, THE HARD-WORKING MEN AND WOMEN OF TODAY'S FARMING AND RANCHING COMMUNITIES ARE WILLING TO FURTHER COMMIT THEMSELVES TO CONTINUED, RESPONSIBLE SOIL AND WATER CONSERVATION PRACTICES WHICH WILL ALLOW THEM TO PASS ON THEIR PRODUCTIVE LAND, CROPS, AND LIVESTOCK TO FUTURE FARMING GENERATIONS.

AS WE SET ABOUT TO REAUTHORIZE ~~OF~~ THE FEDERAL WATER POLLUTION CONTROL ACT, WE MUST ACKNOWLEDGE THE TWENTY YEAR COMMITMENT OUR NATION HAS PUT FORWARD TO ADDRESS THE CHALLENGES OF POINT AND NON-POINT SOURCE POLLUTION. I BELIEVE THAT OUR SUCCESS IN FURTHER REDUCING WATER POLLUTION, PARTICULARLY NON-POINT SOURCE EFFORTS, WILL REQUIRE SIMILAR TIME AND RESOURCE COMMITMENTS.

NON-POINT SOURCE POLLUTION IS LARGELY A WEATHER-RELATED OCCURRENCE THAT CAN BE MANAGED, BUT NOT ECONOMICALLY ELIMINATED ENTIRELY. RATHER, WE MUST BEAR IN MIND THAT NON-POINT SOURCE POLLUTION IS CAUSED BY THE INADVERTENT DISCHARGE OF POLLUTANTS FROM A WIDE RANGE OF SOCIETY'S MOST ESSENTIAL ACTIVITIES.

AS WE SEEK SOLUTIONS TO THESE NON-POINT ISSUES, A SOUND AND REASONABLE APPROACH MUST BE OUR GUIDE. FEDERAL AND STATE INCENTIVES, EDUCATION, AND TECHNICAL ASSISTANCE ARE JUST A FEW OF THE MEANS WE MUST MAKE AVAILABLE TO THE FARM AND RANCH PRODUCTION COMMUNITY IN MANAGING NON-POINT SOURCE POLLUTION.

EQUALLY IMPORTANT, WE MUST COORDINATE THE EXTENSIVE WATER QUALITY PROGRAMS THAT ARE ALREADY IN PLACE AT THE U.S. DEPARTMENT OF AGRICULTURE, THE ENVIRONMENTAL PROTECTION AGENCY, AND THE U.S. GEOLOGICAL SURVEY. WE COULD MAKE TREMENDOUS PROGRESS WITH VERY MINIMAL ADDITIONAL FUNDING IF WE COULD START TO GET THESE AGENCIES TO NOT ONLY SHARE DATA, BUT TO USE THE SAME DATA IN MAKING WATER QUALITY DETERMINATIONS.

THE CLEAN WATER ACT HAS BEEN TREMENDOUSLY SUCCESSFUL -- IN FACT PERHAPS IT COULD BE CALLED THE MOST SUCCESSFUL ENVIRONMENTAL LAW SO FAR -- BUT WE NEED TO REALIZE THAT THERE ARE OTHER PROGRAMS OUT THERE AFFECTING AND SHAPING WATER QUALITY AND IF WE CAN COORDINATE THESE PROGRAMS, WE WILL MAKE SUBSTANTIAL PROGRESS TOWARD THAT GOAL. MANY PROGRAMS ARE ALREADY IN PLACE AND THE FARMING COMMUNITY IS WILLING TO PARTICIPATE -- BUT THE LACK OF AVAILABLE FUNDS REMAINS A LARGE OBSTACLE IN APPROPRIATELY RESPONDING TO THESE RURAL NEEDS.

MOREOVER, FULLY FUNDING THE 319 PROGRAM IS STILL A KEY ELEMENT OF ANY EFFORT TO FIGHT NON-POINT POLLUTION. WHILE WE HAVE LARGELY FOCUSED ON POINT SOURCE POLLUTION IN THE PAST 20 YEARS AND HAVE SUCCEEDED IN SIGNIFICANTLY REDUCING POINT SOURCE PROBLEMS, WE MUST KEEP IN MIND THAT WE HAVE SPENT NEARLY 60 BILLION DOLLARS IN FEDERAL FUNDS OVER 20 YEARS, AND ALMOST 90 BILLION IN STATE, LOCAL, AND PRIVATE MONIES OVER THIS SAME PERIOD TO ACHIEVE THAT GOAL. IF WE WISH TO NOW TURN OUR FOCUS TO NON-POINT SOURCE POLLUTION, A SIMILAR DOLLAR COMMITMENT NEEDS TO BE FORTHCOMING.

MR. CHAIRMAN, I LOOK FORWARD TO WORKING WITH YOU AND THE MEMBERS OF THIS COMMITTEE TO DEVELOP AND ADDRESS THE PROBLEMS FACING THE MEN AND WOMEN OF AMERICAN AGRICULTURE AND THE PROUD COMMUNITIES IN WHICH THEY LIVE. INDEED, ONLY IF OUR NATION'S AGRICULTURAL PRODUCERS CONSERVE THEIR SOIL AND WATER RESOURCES WILL THEY CONTINUE TO MAKE A LIVING ON THE LAND AND SUSTAIN OUR RURAL CULTURE. IT IS MY HOPE THAT WE CAN SHED MORE LIGHT ON NEEDED SOLUTIONS TO THIS MATTER THAT OUR NATION'S BACKBONE, RURAL AMERICA, SO RIGHTFULLY DESERVES.

BILL EMERSON
MEMBER OF CONGRESS
8TH DISTRICT, MISSOURI

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March 16, 1994

The Honorable Norman Mineta
Chairman, Public Works and Transportation Committee
U.S. House of Representatives
2165 Rayburn Office Building
Washington, DC 20515

Dear Mr. Chairman: Norm:

I am writing to advise you of my grave concerns regarding H.R. 3948, the Water Quality Act of 1994, and the devastating impact this legislation will have on small, rural farming and ranching communities. Quite frankly, I find this legislation has been drafted with little to no understanding of the agricultural livelihood which supports twenty percent of our nation's Gross Domestic Product and employs seventeen percent of our workforce.

In its present form, H.R. 3948 will effectively drive small to mid-size family farm operations out of agricultural production and into other rural or suburban areas that do not have the resources or employment opportunities to support them. Moreover, I fear this very piece of legislation could tragically shift this nation from a world food supplier to a food importer dependent upon other regions and geopolitical forces of the world to hold our nation hostage to such a basic American tenet as food availability.

In a business such as agriculture where profit margins are vulnerable to weather and marketing conditions beyond the control of the local producer, the imposition of more redtape, more federally approved land-use management plans, more EPA mandates, and more uncontrollable, built-in costs can only guarantee the erosion of marginally profitable family farm operations.

Bear in mind, the availability of annual operating capital for most family farm operations is in the hands of a local, commercial financial entity. What reply is there for a small operator -- who has held a farm in the family for generations -- when a local banker or farm credit officer asks how that farmer intends to defray the cost of mandated Clean Water Act requirements? This scenario is all too commonplace today and needs to be eliminated -- not compounded.

I believe it is imperative that the cost-effectiveness of this bill's dictated management measures and practices be taken into full consideration. Common sense and limited financial resources dictate that farmers should not be asked to implement practices where an unreasonable relationship exists between the costs of the practice or management measure and the benefits derived from implementing it.

In fact, cooperative efforts based on voluntary adoption of economically feasible conservation practices provide the most effective means of achieving environmental benefits. First of all, resources must be directed to true problem areas. We are all aware of the limited resources available to address rural non-point problems -- both real and perceived.

I firmly hold that environmental problems can best be addressed if the federal government acts in a cooperative, partnership effort with the farm community. As we have learned through the Endangered Species Act, an unchecked EPA bureaucracy can create untold economic havoc on small communities.

Today, small, agricultural-dependent communities, facing limited economic opportunities, are already strapped with volumes of unworkable and costly environmental redtape, concocted by a Washington professional bureaucracy whose grasp of farm production does not extend beyond the local supermarket. This federally created dilemma with its daily frustrations threatens to suffocate the very pioneer spirit our rural communities have embodied for nearly two centuries.

Good science, economically-sound practices, and incentive-based voluntary programs are the answer to fixing our nation's rural water quality ills. Several inexpensive solutions are available to help reduce farm run-off; however, they are not receiving favor with the professional environmental community. For example, I have sponsored legislation that will give farmers credit for practicing environmentally sound procedures -- a proposal which has drawn relative silence from the preservationist community.

In fact, rural water quality programs continue to be underfunded in part because they do not fit the professional environmental agenda of obligatory government controls. In the past several decades, urban factories and industries have received tens of billions in taxpayer dollars to reduce point-source pollution. Under H.R. 3948, American agriculture will be forced with similar mandates -- but have little hope of receiving financial help from the federal government.

Furthermore, language in this bill would increase opportunities for litigation of Clean Water Act violations by non-government entities which would ultimately impair efforts to improve water quality.

The Honorable Norm Mineta
March 16, 1994
Page Three

Agriculture producers and processors, like all business people, have finite financial resources. Certainly, the environment would be better served if those resources are devoted to controlling and eliminating water pollution instead of defending lawsuits.

Mr. Chairman, there are few issues before Congress this year that will have greater impact on our agricultural community. American agricultural producers -- whose livelihood depends on protecting our soil and water -- must be protected from this growing tide of mandatory regulatory burdens that bear too steep an economic cost to the world's most productive agricultural system.

The American farmer is working as hard as ever to exercise ecologically sound farm production practices through sound science, economically-sound practices, and incentive-based voluntary programs. This approach can and will work -- for the future of American agriculture depends on it.

I do look forward to working with you in order to make this cooperative plan a reality.

Sincerely,

Bill

BILL EMERSON
Member of Congress

BE:nm

[The prepared statements of Mr. Zeliff, Mr. Tucker, and Mr. Barcia follow:]

STATEMENT OF THE HONORABLE WILLIAM H. ZELIFF BEFORE THE SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT ON HR 3948

May 24, 1994

Mr. Chairman,

I want to thank you, and our distinguished Chairman of the full Committee, Norman Mineta, for holding these hearings on HR 3948 and issues related to the reauthorization of the Clean Water Act. I am hoping that we can also hold hearings in the very near future relating to reauthorization of the very flawed ~~on the problematic~~ Superfund program.

The reauthorization of the Clean Water Act will likely represent the most important environmental initiative that this Committee will consider this year.

85-427 95 – 5

The decisions we make regarding issues such as the state revolving loan funds, non-point source pollution, and wetlands regulation, will impact our environment and our economy for years to come.

When we began the reauthorization process early last year, the question, "how clean is clean", was heard frequently. Our ability to detect minute levels of pollutants has far outstripped our ability to remove those pollutants in a cost-effective manner. We have reached a point where we must ask ourselves whether tougher regulations and tougher standards enhance public health and safety, or do they simply make it tougher to live and work in this country?

This represents the core question that I am seeking answers to as we proceed with the reauthorization process. We cannot deny that unfunded mandates are a major problem for the nation's cities and towns. We must take steps to improve water quality where necessary, but we must also consider the ability of local communities to pay for stricter mandates.

I am looking forward to hearing the testimony from our witnesses today, including the distinguished head of the EPA, Carol Browner. Working together, I am hoping that we can develop a Clean Water bill that everyone can live with and that communities can pay for.

Thank you, Mr. Chairman.

Opening Statement of Congressman Walter Tucker
Subcommittee on Water Resources and Environment
May 24, 1994

I WOULD LIKE TO THANK BOTH CHAIRMAN APPLEGATE AND THE FULL COMMITTEE CHAIRMAN NORM MINETA FOR RECOGNIZING THE NEED TO CONDUCT THESE VERY IMPORTANT HEARINGS ON THE BILL TO REAUTHORIZE TO CLEAN WATER ACT. WE ALL KNOW THIS BILL IS OF GREAT CONCERN A WIDE ARRAY OF GROUPS INCLUDING ENVIRONMENTALISTS, MUNICIPAL, STATE, AND FEDERAL GOVERNMENTS, SMALL BUSINESSES AS WELL AS INDUSTRY, NOT TO MENTION THE IMPORTANCE THIS BILL HAS ON THE INDIVIDUAL PERSON SUCH AS YOU AND I.

THE BILL COVERS MANY AREAS INCLUDING STORM WATER RUN-OFF, WET LANDS, FUNDING OF WASTE WATER TREATMENT NEEDS, NON-POINT SOURCE POLLUTION JUST TO NAME A FEW. I THANK TODAY'S DISTINGUISHED PANEL FOR COMING IN TO TESTIFY THIS MORNING, I THANK MY COLLEAGUES FOR TAKING PART IN THIS HEARING AND I THANK BOTH THE SUBCOMMITTEE AND FULL COMMITTEE CHAIRMEN FOR HAVING THESE VERY IMPORTANT HEARINGS ON CLEAN WATER ACT REAUTHORIZATION.

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Opening Statement
Honorable James A. Barcia
Hearing of the Water Resources and Environment Subcommittee
on Reauthorization of the Clean Water Act
May 24 & 26, 1994

MR. CHAIRMAN, I would again like to thank you and Chairman Mineta for holding further hearings on this critical issue. When I came to Washington last year, I was congratulated by many on my assignment to this Committee. Each of these well-wishers commented not only on the importance of the work I would do under your leadership, but on this Committee's history of bipartisanship and consensus. Your willingness to listen to the concerns of our colleagues and the witnesses in these hearings confirms this. I can think of no piece of legislation on which this spirit of cooperation is more critical.

Mr. Chairman, I firmly believe that economic and environmental health are not mutually exclusive. We must make every possible effort to balance these concerns, or as Congressman Frank testified before this subcommittee last year, we risk losing the support of the public which is so critical to our success in meeting our water quality goals.

I, like many of my colleagues, have questions and concerns regarding the implementation of Congressional directives under this legislation. While I can agree with much of what has been explained to me as the intent of H.R. 3948, I have grave concerns about numerous possibilities for broad interpretation of the powers of the federal government within the bill. I have seen, in too many federal programs, a propensity to concentrate on the methods by which we attempt to meet our legislative goals, rather than the goals themselves.

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If a state, locality, business or farmer is demonstrating an ability to responsibly attack water quality problems, the method by which they do this should be a secondary consideration. I want to make it clear in our deliberations today and Thursday that realistic water quality goals are our primary concern.

In my State of Michigan, we have done an excellent job of reversing much of the damage that has been done to the Great Lakes and its tributaries. While our work is not complete, we have made tremendous progress. This was accomplished largely through the cooperative, and in many cases voluntary, efforts of State and Local Governments, and the business, agricultural and environmental communities. Although I acknowledge the importance of national goals for water quality, I am extremely wary of giving the federal government the power to force upon our state and local governments, or the private sector, a cookie-cutter approach to local concerns. I believe, Mr. Chairman, that the flexibility in meeting our goals should be given to the regulated, not the regulator. If states and municipalities can meet their goals while protecting jobs and services through such practices as flexible system upgrade schedules, intake credits or mixing zones, we should applaud, not punish, their efforts.

The intent of H.R. 3948, as I understand it, is for the federal government to help in development of a strategy for addressing water quality problems which, to date, have not received sufficient resources or attention. State and local governments will contribute, in part, by developing watershed and non-point source pollution plans. The private sector would look into ways to cut pollution and cooperate with state and local governments in developing and meeting watershed and non-point source goals. EPA will assist in these efforts by providing advice in the form of guidance, and regulation of the most harmful pollutants and practices.

This being the intent of the program, we must not pass a bill which gives the federal government, now or in the future, the ability to force a rigid menu of water quality practices on State and Local Governments, or the private sector. I especially must avoid any action based upon less than sound, objective scientific principles and data. And enforcement must be used as an incentive to responsible behavior, not as a club against those who fail in honest attempts to perform legally and ethically.

Finally, Mr. Chairman, at a time when we are forced to cut the resources available to the government, I think it would be greatly unwise to increase EPA's responsibilities. I have been waiting since my arrival in Washington 17 months ago for approval of a waste disposal process that will address a grave pollution problem in my district. When the federal government is incapable of carrying out existing responsibilities, adding to the drain upon shrinking resources by increasing regulation and enforcement provisions must only be done in the most extreme circumstances.

TESTIMONY OF CAROL BROWNER, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. APPLEGATE. And again, as I had mentioned, we are very honored to have with us the Administrator of the Environmental Protection Agency, and we look forward to hearing from her.

Ms. Browner.

Ms. BROWNER. Thank you, Mr. Chairman, and good morning to you and the Members of this subcommittee. I am pleased to appear before you today to discuss the very urgent need to reauthorize the Clean Water Act. I know that all of the Members of this subcommittee, the administration, share a strong desire and commitment to protecting this Nation's water resources in the most effective and efficient manner possible.

A little over a year ago, I appeared before this subcommittee to discuss the challenges that confront us as we try to achieve the goals of the Clean Water Act. I felt then and I emphatically believe today that we have a remarkable opportunity to create a second generation environmental law, one that develops new and innovative solutions that move beyond simple command and control approaches, one that will guarantee all of the people of this country clean water, clean rivers, clean lakes, clean streams.

Since appearing before this subcommittee last year, the administration has released President Clinton's Clean Water Initiative. It is a comprehensive set of recommendations for reauthorization of the Clean Water Act. These recommendations reflect an extensive amount of outreach and discussion with groups that are affected, with individuals that are affected by the Clean Water Act, including other Federal agencies, environmental groups, the regulating community, State and local governments.

We listened to their needs and incorporated their ideas into our thinking. We have also sought to work with the staff of this committee and others in Congress to help develop a renewed Clean Water Act that will sustain and reinforce America's commitment to our waters and aquatic resources.

A few weeks ago, I had the opportunity with several young children, several 12-year-olds, to visit a river here in Washington, DC, the Anacostia. And what I saw there was truly troubling. We put a net down and we dragged the net for about 10 minutes. What we brought up from a river not too far from this Nation's Capital were two beer cans, a fish with a tumor on its mouth, a bag of leftover potato chips. Not something that anyone would expect to see when you cast a net in the rivers of this country.

We also saw areas of that river that are no longer usable to the community that surrounds that river, no longer accessible. We saw a marina that had been filled in with silt, old tires, broken bottles and trash scattered along the banks. Everywhere these children and I looked, we saw evidence of society's impacts and the carelessness that we have exhibited in the treatment of our waters.

The students and I are not alone in the concerns about the rivers, lakes and streams of our country. A recent poll indicates that 77 percent of the people in this country want government to do more to assure clean water. Water is essential to everything we do.

I would like to show you a chart about drinking water. Sixty percent of the people in this country get their tap water from the riv-

ers, lakes and streams of this country. We count on water to grow our food. We count on water to bathe our children in. We count on water to merely enjoy the recreational opportunities. But our waters, our rivers, our lakes and our streams are suffering.

EPA recently released the National Water Quality Inventory. It showed that 38 percent of the waters that we looked at, and we are not able to look at all every year, but that 8 percent of the waters we assessed are either impaired or degraded, mainly as a result of polluted runoff from storm water, from agricultural lands, from urban areas.

As we have sought in this country to solve the point source pollution problems, the pipes that come from our industrial facilities, from our wastewater treatment plants, we have unmasked another problem. And that is the problems associated with polluted runoff.

This chart demonstrates what has occurred in the last two decades, that as we have been able to address traditional pipe discharges—you can see from 1977 to 1992, the progress as a country that we have made in dealing with those point sources—what has become increasingly clear, what has been unmasked, are the problems of nonpoint source.

In 1993, approximately 1,300 water bodies were sufficiently contaminated that the States, 48 States, had to limit consumption of fish from those waters. The fish were not safe for people to eat.

Between 1990 and 1992, 18 States had to restrict harvesting of shellfish in more than 3,000 square miles of coastal and estuarine waters. Six hundred and sixty million pounds of toxic chemicals pour into the Nation's waterways and sewers annually. More than a thousand cities serving 43 million people have sewer systems that during heavy rainy vents discharge combined rainwater and raw sewage, yes, raw sewage, from as many as 15,000 overflow points.

Sixty to eighty percent of our riparian waters have been degraded. About half of the mainland's original 220 million acres of wetlands, have been destroyed.

Wetlands are nature's kidneys, serving as a filtration system, in many instances, to help purify the water. And wetland losses are continuing across this country.

So as you can see, Mr. Chairman, the problems are very real. We must act and we believe we must act now. Poor water quality and destruction of aquatic resources threaten public health, jobs and recreation.

The Clean Water Act has provided us with many successful programs and a solid framework for further action. I think we can all point with pride to many examples of improvement, but the impact of previously undetected problems is becoming more evident. And some persistent problems remain. We must craft a law that will allow us the flexibility and give us the tools to do the job the American public has every right to expect of us.

In solving these problems, we make several recommendations.

Mr. Chairman, I would ask that my statement in its entirety be included in the record, but if I might highlight several of our recommendations.

Mr. APPLEGATE. Without objection.

Ms. BROWNER. Water quality infrastructure. Since 1956, the Federal Government has provided nearly $70 billion to local communities to help construct wastewater treatment plants, sewer systems. In EPA's most recent Needs Survey, we looked across the country at what are the needs that exist today, more than 35 years later. We identified a need of $137 billion in wastewater treatment, combined sewer overflow, what occurs in a heavy rainy vent, and nonpoint source infrastructure needs.

Included in the existing Clean Water Act, is the State Revolving Loan Fund. It is commonly referred to as the SRF. This has been tremendously successful as a flexible, self-perpetuating mechanism to meet infrastructure needs. In a relatively short amount of time, it has made available $11 billion in Federal and State funds for vital water quality projects.

The authorization for the SRF expires this year. My ability to provide funds to the States expires this year. The administration's objective is that the SRF, obviously, be reauthorized, and that it be designed to provide approximately $2 billion annually in assistance to the States, that it would revolve on a regular basis in each of the 50 States. Money would be loaned out at a low interest rate to facilities, they would repay that money to the State so it could again be loaned out to another facility.

The SRF is six years old. In the past six years, our experience has demonstrated the need for some improvements in how the SRF, the State Revolving Fund, is managed. We need to create a mechanism to help disadvantaged communities.

I have met with many of you who have spoken about the small communities in your districts who cannot take advantage of the revolving fund, because there is a requirement that the money be repaid on a 20-year basis. We agree that there should be flexibility for the smaller systems, a 30-year payback.

We also believe that it would be important to expand potential loan assistance in a limited number of cases, and to expand State priority systems, to give the States the ability to determine who should get the money, when. Doing so would enable States to target resources more efficiently, flexibly, and effectively at the highest-risk problems. No two States have the same problems. Let's give them some flexibility to address the worst problems in their State first.

Mr. Chairman, I would note that in addition to helping to solve water quality problems, the SRF has also been instrumental in creating jobs. Each billion dollars spent in building environmental infrastructure, supports more than 20,000 jobs. The administration's request for the SRF is $13 billion over the next 10 years.

The second issue I would like to address is that of polluted runoff. We have achieved, as I said previously, considerable success since 1972 in reducing substantially the discharge of pollutants into our surface waters, our rivers, our lakes, and our streams.

This has been achieved primarily through the control of municipal and industrial point sources of pollution. We looked for the pipes, we found them, we applied technologies to improve the quality of the discharges from those industrial facilities, from those wastewater treatment plants, to our rivers and lakes.

But as we have begun to address, successfully address these point source pollution problems, we have unmasked another problem, and that is the nonpoint source. There are a number of States that have already developed and are implementing management programs for controlling polluted runoff.

In response to requirements of the 1990 Coastal Zone Act Reauthorization Amendments, 29 coastal States and territories are developing coastal nonpoint pollution programs. Yet, despite these efforts and the noticeable progress in some areas, polluted runoff-related impairments are widespread, and we believe we need to do more.

Existing State programs under the Clean Water Act, while providing a good basic framework, must be upgraded and strengthened. We encourage States to implement strong broad-based watershed management plans to address water quality problems.

State programs should be built on management measures for existing sources causing or significantly contributing to water quality impairments or threatened impairments, as well as measures for all new sources of runoff pollution. The Clean Water Act must be authorized, must authorize a flexible State program with a mix of voluntary and regulatory approaches that will allow States and local governments to focus on the highest priority problems in a manner that is suited to individual local conditions.

The third issue I would like to address, Mr. Chairman, is watershed protection. If we have learned anything over the last two decades, it is the need to look at entire systems, to look at the integration of the rivers, the lakes and the streams in a particular area, not to continue to focus on the mere pieces, but rather to look at the whole.

Communities around the country have tried to address the complex problems affecting the quality of their waters and aquatic resources through an integrated, coordinated approach. And there are numerous examples across the country that we could point to of real success.

The National Estuary Program is one that has achieved success in a number of places across the country, by bringing together people at the local level, by looking at the entire watershed, by looking at what it was historically, what the current impacts are, and what needs to be done to manage and protect that resource for all future needs.

We suggest that the Clean Water Act be amended to provide States with a federally supported framework for development and implementation of a watershed approach, and to provide incentives sufficient to assure widespread adoption.

Combined sewer overflows and storm water, an issue that I am sure all of you are very familiar with, they are an issue that many cities, small and large, are raising these days. The reauthorization of the Clean Water Act provides us with the opportunity to protect the environment while significantly reducing costs.

Combined sewers, again that is where there is a connection between the storm water system and the sewer system such that during heavy rainy vents, raw sewage is discharged to rivers and lakes across this country. Combined sewers are a remnant of the earliest water infrastructure of this country.

Many of these were built at the turn of the last century. Correcting the problems that they create has a significant price tag, one that many of the affected cities would have difficulty paying. Because of the high cost and the need to control raw sewage discharges, EPA and a diverse group of stakeholders, including representatives of environmental groups and municipalities, have negotiated a workable, affordable, and environmentally protective solution.

We have reached consensus on what we call the "Combined Sewer Overflow Policy Framework." It has been published in the Federal Register on April 19th. It is flexible and encourages communities to look at a variety of control options and consider cost in making final decisions.

We are hopeful that legislative endorsement of this policy will be forthcoming, so that we can clarify any uncertainty over options open to municipalities and eliminate for those municipalities the fear of litigation.

Urban storm water runoff today impairs 43 percent of estuaries and 24 percent of lake waters assessed, as the charts show. We are also working with the States to ensure a storm water permitting program that applies to the largest cities and industries. However, given the enormous number of currently unregulated sites that generate storm water, we believe we need a more targeted approach, one that enables us to focus on high-priority discharges in urban areas, and provides for adequate controls without causing unnecessary burdens for small businesses and local governments.

We must be able to deal with all threats to our water resources, and we would object to proposals that would permanently exempt from control discharges in smaller urban areas, which may be creating significant problems. But we do believe there is a way by working with the States and the cities to address the storm water issues.

The final issue I want to briefly focus on in my opening remarks, Mr. Chairman, is that of wetlands protection. Wetlands are among our Nation's most productive natural resources, representing a vital link between land and water.

They provide a multitude of services to society. They are the basis of thousands of jobs and contribute billions of dollars annually to the economy. They fulfill vital functions within the ecosystem, such as wildlife and aquatic life habitat, food chain support, water quality improvement, flood storage, and shoreline erosion control. Despite this, we continue to experience an overall loss of our Nation's wetlands and our wetlands continue to be degraded.

In response to concerns raised across this country, the administration developed a wetlands plan last August, which presented several legislative and administrative actions to better protect wetlands through a fair, flexible and effective approach. Among the most critical legislative actions identified in the plan is the recommendation that the Clean Water Act be amended to adopt a national goal of no overall net loss of our Nation's wetlands in the short term, and a net increase in the quantity and quality of our wetlands in the long run.

In addition, the administration believes congressional action is needed to increase State and local rules—excuse me, local roles, in

protecting wetlands, including authority for EPA to use its State Wetlands Grants Program to provide money to fund the implementation of State wetlands programs.

Mr. Chairman, there are several other issues that we believe are very important to the reauthorization of the Clean Water Act, toxic pollutants we believe need to be addressed, a strong enforcement program, Mr. Boehlert spoke of the citizen suits. We believe there should be a provision included in the Clean Water Act allowing citizens to participate in ensuring that the Clean Water Act is appropriately implemented.

Pollution prevention, which is a high priority at EPA, but it has been difficult to promote in some of the existing clean water programs. We would like to see language included that would provide permitting authorities the discretionary authority to incorporate pollution prevention in their programs.

There is a number of these issues that are addressed, Mr. Chairman, in the statement that I submitted for the record.

If I might just say in closing, Mr. Chairman, again, we appreciate the opportunity to be here today. We believe that you and all of the Members of this subcommittee are committed to a better, stronger, more flexible Clean Water Act, that will result in increased protection of our water resources at a lower cost.

While we recognize that legitimate issues of concern exist and will need to be discussed and addressed, we also believe it is important that we take advantage of the opportunity now to amend the Clean Water Act. And so we are available to work in whatever way is appropriate, Mr. Chairman, with all of the Members of this subcommittee, with the staff, to forge a reauthorized Clean Water Act. And to see it enacted in this session of the Congress.

Thank you very much.

Mr. APPLEGATE. Thank you very much, Ms. Browner, for a very good statement. We certainly on the committee and on the whole committee express our sincere thanks for the cooperation that we have received and the ability to be able to work with you. And we know what kind of a problem this is. It is monumental. And it is going to take a Herculean task in order to get all this accomplished, particularly trying to get everybody to agree to it.

Let me ask you this: There has been a lot of discussion within the context of a Clean Water Act authorization, and other environmental legislation as well, that we must do something more to assure that the benefits of proposed regulatory actions justify the costs which will be incurred. Why don't you tell us or describe to us how the EPA evaluates costs and benefits in its clean water regulatory programs?

Ms. BROWNER. Mr. Chairman, there are a number of tools that EPA uses in reaching decisions, particularly in the regulatory role of the Agency. Those include cost-benefit analysis, it includes risk assessment, and other tools that we believe are essential in helping to shape the decision that we ultimately make.

Last year, the Agency undertook I think more than 60 cost-benefit analyses. We can give you a breakdown of how many of those occurred under the Clean Water Act. We engaged in more than 1,000 risk assessments.

These are very, very valuable tools in the job that we have of protecting the public's health, of protecting the resources that we all share. And we are committed to their continued use and to the expanded use, where appropriate.

Mr. APPLEGATE. Do you support language in the bill to mandate the various agencies such as the EPA to come up with a cost-benefit analysis or risk assessment?

Ms. BROWNER. The administration's proposed—the recommendations that the administration has made in the Clean Water Act reauthorization do not include broad language on cost benefit or risk. Those are tools that will be necessary for use in implementation of a reauthorized Clean Water Act, as they have been used in implementation of the 1986 amendments, and we are absolutely committed to continuing the use of those tools.

Mr. APPLEGATE. In view of the success of the point source program over the years and the widespread recognition that nonpoint sources are the largest remaining uncontrolled pollution sources, would you explain why the administration still proposes modifications to the point source program?

Ms. BROWNER. Well, we believe that there are still problems that need to be addressed. There are still opportunities, there are still solutions that are available. But again, Mr. Chairman, we don't think that focusing exclusively on point sources is going to guarantee the American public clean water.

As we look at watersheds, as we look at water bodies across the United States, and as the chart demonstrates, what we see are a large number of nonpoint source or polluted runoff issues. And the proposal that the administration makes would create and give to the States the tools that we think are important if we are going to address these nonpoint source issues.

I mean, again I think it is important to remember, 60 percent of the of the water that we drink in this country comes from our rivers, lakes and streams, and almost 40 percent of those rivers, lakes and streams are impaired. They are not healthy.

Mr. APPLEGATE. One other, the nonpoint provisions of H.R. 3948 in the current requirements of the Coastal Zone Management Act, have a number of similarities. Could you please discuss how you see these two programs being reconciled and implemented in a compatible fashion?

Ms. BROWNER. Mr. Chairman, we looked at that very precise issue. And as I mentioned in my opening statement, there are a number of States, I believe it is 18 States, that are in the process of developing nonpoint source programs pursuant to the Coastal Zone Management Act.

We have other States that have developed programs under the Clean Water Act. We think it is possible to merge successfully these programs.

One thing that does not exist presently in the Clean Water Act that we think is essential in reauthorization, is the establishment of clear mileposts, so that we can guarantee to the public that progress is being made in addressing these problems, and to work with the States to develop measurements of success, measurements of progress. Under the current programs, those do not really exist.

I know my time is up. If I might add one other fact?

Mr. APPLEGATE. That is my time. I am up.

Did you have something else that you wanted to add to that, you mean?

Ms. BROWNER. Well, I was just going to say that the administration has also called for an increase in funds in the EPA budget before Congress right now; it would increase to $100 million funds available to the States for nonpoint source activities. In the Clean Water Act reauthorization, we agree—we believe that one of the flexibilities in terms of the State Revolving Fund should include nonpoint source issues, that is one of the ways the money could be used.

Mr. APPLEGATE. Okay, good.

Mr. Boehlert.

Mr. BOEHLERT. Thank you, Mr. Chairman.

Ms. Browner, in your testimony, you stress that nonpoint source pollution is going to be the emphasis, the focal point for future activity. And you know that last week there was an alternative that was introduced to H.R. 3948, and I know you have not had too much time to look at it, but you have had a chance to have some evaluation. Could you discuss the basic differences between the respective approaches in regards to nonpoint source pollution that are contained in H.R. 3948 and in the alternative that was presented last week?

Ms. BROWNER. We have not had time to fully and in great detail review the alternative. Based on a preliminary review of that, our concern is that the alternative presented creates essentially a voluntary program, if you will, for addressing northern point source. It doesn't require the establishment of mileposts.

It will be, we are concerned, very hard to assure the American public that real progress is being made, that the investments are wise investments, that there are results being achieved as a result, as a consequence of those investments. So I think if there is one fundamental difference, it is probably that. There are also other differences which we could go through in more detail.

Mr. BOEHLERT. Well, let's talk about some of the other differences, because this is a comparative analysis, we are trying to figure out what is best.

Ms. BROWNER. As I understand the alternative—let me explain as I understand what is, I think, referred to as H.R. 3948, the administration's proposal, and then the alternative very briefly. Within H.R. 3948 and the administration's proposals, which I think are relatively close, there would be a requirement for technologies to be implemented, floors, technology floors, in essence, to be implemented over a period of time, over a three- to five-year period of time. As I understand the alternative, there would be no such requirement.

In establishing those technology floors, EPA would have to undertake an analysis of existing technologies, best management practices, for example, go out and look across the country, what are people doing that is working successfully. Having done that kind of analysis, then we make that information available to the States so that they can determine what is the most economical means of addressing nonpoint source, and require adoption of these technologies in a three- to five-year period.

As I understand the alternative, there would be no requirement. There is no real schedule, as I said before, it is hard to measure progress. The goal within the alternative, as I understand it, would be the year 2009.

However, I think there is a provision that says if for some reason the Congress decides to appropriate even a dollar less than what has been authorized—and we may misunderstand this provision but this is how our lawyers have interpreted it—then a year could be added to the date of when we would actually achieve nonpoint source protections. And so for every year in which the Congress makes a decision that they cannot provide the fully authorized amount, even if it is a small difference, another year gets added. And we keep moving the date in which we are going to be able to say to the American public: Your rivers and your lakes and your streams are clean, they are suitable for fishing, they are suitable for swimming.

Mr. BOEHLERT. So you feel very strongly that we need something more than good intentions if we are going to adequately address the problem. You are hearing, I am sure, as I am, I think all of us are, from our farm community, and particularly are they concerned about, as I indicated in my opening statement, the specter of citizen suits, you know, with people treading on their property and filing suit and tying everything up in litigation.

And most of the farmers that I am privileged to represent are not wealthy people, they are hard-working people and they just don't have a lawyer on retainer, they can't spend all their time in the courtroom, they spend their time in the barn and in the fields.

Talk to us, am I correct in my interpretation that citizen action suits would not pertain to nonpoint source pollution? I think it is very important that we clarify that.

Ms. BROWNER. You are exactly right, both your statement now and the statement you made in your opening comments, that the citizen suits would not apply to nonpoint source, but rather to point source is exactly right.

If I might just say briefly, citizen suits, we believe, are a very important check and balance in the job we have of protecting resources.

There are always concerns that are raised that you are going to have—I have heard it referred to as drive-through litigation—people are going to just be willy-nilly filing lawsuits in the States that adopted citizen suits provisions, in the Federal statutes that currently include citizen suits provisions, this has not occurred. Citizens have used this tool with a great deal of discretion and we believe in a very effective manner on behalf of the public at large.

Mr. BOEHLERT. Thank you very much.

My time is up, but I do wish that you would emphasize that point in all of your discussions around the country.

Mr. APPLEGATE. Thank you, Mr. Boehlert.

We are very fortunate to have our very distinguished Chairman of the full committee, Norm Mineta.

The CHAIR. Thank you very much, Doug, I thank you and Sherry for all the hard work that you have been putting into this issue.

Ms. Browner, we appreciate your being here this morning. As you probably are aware, last week I believe it was Representative

Hayes and some others, released a discussion draft as an alternative to the text of H.R. 3948 as modified by my own substitute. I assume that you might have had an opportunity to review that draft, including its provisions on nonpoint pollution, wetlands, unfunded mandates, and risk assessment.

I guess my question is, if the alternative were to be enacted, would the Nation's water resources be better protected or less well-protected than what is in law today?

Ms. BROWNER. Mr. Chairman, our review, which is a preliminary review of the alternative, suggests two things: One, that when compared to H.R. 3948 or the administration's proposal, the kind of progress that we believe that is so essential in this area would not be achieved. The deadlines, where there are deadlines, tend to be much further out. There are far fewer mileposts for measuring success, for measuring progress.

We are also concerned that in some areas, based on our preliminary reading, that a step backwards would actually be taken, that some of the safeguards that currently exist, some of the provisions, the mechanisms for cleaning up this country's surface waters, would no longer be available.

The CHAIR. If, on the other hand, H.R. 3948 as modified by my substitute were to be enacted, would the Nation's water resources be better protected or less well-protected than they are today?

Ms. BROWNER. They would be better protected, Mr. Chairman.

The CHAIR. Then in the real world, what kind of real world differences would these two approaches make for water quality over the coming years?

Ms. BROWNER. The problem, as I said, that we are very concerned about when we look at this country's rivers and lakes and streams, is the problem of polluted runoff. H.R. 3948 gives the people of this country, gives EPA and the States, some tools that we think are extremely important if we are to address the problems of polluted runoff.

As I understand it, it also includes incentives and flexibilities for watershed solutions, which we think are particularly important. And I would say that those are probably two of the most significant differences.

We are not going to be able to do the job that the people of this country want us to do if we cannot in this reauthorization secure some tools, some additional tools to address the really significant problems that we see in terms of our waters. And we would hope that by working with all of the Members of this committee, that we can resolve, if we can be helpful in this way, the differences that may exist.

If we don't do something about these problems, they are only going to get worse. All of the indications are that they will get worse, not better, on their own.

The CHAIR. You have stated, and so have a wide variety of others who are interested in improving water quality, that the major contribution which can be made in water pollution reduction is an improved nonpoint pollution control program. Now, some have suggested that we really do not need to change the current program, that it never really had a chance to prove itself and that it has not

been as successful as designed because it hasn't been adequately funded.

Have the shortcomings in the current nonpoint program been because of a lack of Federal funding, or are they due to basic weaknesses in the structure and the implementations of the program?

Ms. BROWNER. Mr. Chairman, I do not believe the failure to address these problems is due to a lack of adequate funding. I believe it, as you have just stated, is just the tools, the authorities, do not exist in the current law to get the job done. And that is, I think, the opportunity that is created in this reauthorization, to ensure that we have what we need to address the nonpoint source problems.

Mr. Boehlert, in his opening statement, spoke about the people in Milwaukee, about cryptosporidium. Probably most of us didn't even know what cryptosporidium was until Milwaukee occurred. I mean, it is clearly a result of nonpoint source pollution, all of the experts who have looked at that have found that to be the case. Those are the sort of problems that we can prevent.

You know, it is pollution prevention, in a way. We continue today to under the current law to put things in our water, only to take them back out before we drink it. Sixty percent of the public drinks from rivers and lakes. Why not prevent it from going in in the first instance?

Why not take that money that we are spending on expensive filtration systems and spend it upstream one time, rather than year in and year out, and prevent the pollution from going in?

It seems so simple. I explained this to my son's first grade class recently, and they got it.

The CHAIR. Well, I hope the Congress does. I know that you are adhering to a strict five-minute rule, so I hope that we may have a second opportunity or round.

Thank you very much, Mr. Chairman.

Mr. APPLEGATE. Thank you very much, Mr. Chairman.

We are also very privileged to have our very distinguished Ranking Member of the full committee, Mr. Bud Shuster.

Mr. SHUSTER. Thank you very much, Mr. Chairman.

Since those of us who have a different view from the views expressed in the opening statements were not permitted to make opening statements to express those views, I will use my five minutes to make some statements and to ask the distinguished Administrator, if once I make statements, which I believe to be statements of fact, I would certainly appreciate her giving us other evidence if indeed these are not statements of fact.

Some of us have put together a bipartisan alternative is because we do indeed have a much different view from the view expressed earlier. The bipartisan alternative we put together deals with issues of property rights, particularly wetlands, unfunded mandates, land-use regulation, the impacts on small business and local economies, therefore jobs, and excessive regulation and heavy-handed enforcement in several different areas, particularly the property rights wetlands issue. And if this information is not accurate, I would very much appreciate your commenting.

A recent study of wetlands permits indicates that one-fourth of all individual permit applications involve a quarter of an acre or

less. One-half of all the applications involve 1.1 acres or less. Yet the average time to process these applications is 373 days. Further, in one specific case, 60-year-old Elsie Mills and her son Cary were sentenced to 21 months in Federal prison for placing builders sand on their dry land that a Federal district judge later concluded, quote: "Probably was never a wetland." End of quote. And the judge went on to say that the Clean Water Act is a, quote: "Regulatory Hydra, worthy of Alice in Wonderland." End of quote.

Beyond that, with regard to the unfunded mandates, I am informed that the Washington Post just recently wrote that the Clean Water Act, current act, that is, not what we are proposing here, tops everyone's list in terms of price tags heaped on local officials, a $29.3 billion price tag heaped on local officials.

And for example, the City of Columbus, Ohio, spent nearly $1 billion in the past few years, over $685 per household per year, to comply with the Clean Water Act and Safe Drinking Water Act mandates. That storm water permitting for municipalities is also going to run into billions of dollars.

The average cost so far for a municipality simply to complete the permit application exceeds $750,000. For elimination of combined sewer overflows, EPA's conservative estimates for long-term control costs are over $40 billion.

And the rulemaking by EPA, for example, in the National Toxics Rule, assumes people will consume untreated surface waters from drainage ditches and intermittent streams. The National Sludge Rules Risk Assessment assumes that toddlers will ingest undiluted sludge every day for five years from remote sites such as highway medians and golf courses. And an EPA technical report concludes that EPA standards resulted in limitations which are 25 to 200 times more stringent than intended. And I could go on and on.

But do you have evidence that disagrees with any of these statements that I have made?

Ms. BROWNER. Mr. Shuster, if I might try and address as quickly as possible, but individually, because I think you raise a number of facts that are absolutely worthy of discussion.

Let me begin with the article that appeared in The Washington Post of last week, and which you referred to some of the costs, particularly to the State of Ohio. And I believe it was the City of Columbus—thank you very much, I apologize.

As I understand from my memory of that article and the examples used, one of the concerns raised by the State of Ohio, and the City of Columbus, is the combined sewer overflow costs. As I said in my opening statement, the administration has worked with municipalities, with environmental organizations, to put forward a new policy on combined sewer overflows, that would result in a $27 billion a year savings. We heard the complaints, we worked with municipalities to address the complaints. It is our strong hope that the Congress will include appropriate language in the reauthorization to ensure that cities will not now find themselves sued unnecessarily.

The issue again that I remember from the article in terms of dripping water, is the issue that is commonly referred to as the "pineapple pesticide." Let me explain for all of the Members of the committee about the "pineapple pesticide." The "pineapple pes-

ticide" was widely used across the United States, not just in Hawaii, for things like corn, broccoli, tomatoes, green beans. It was banned 13 years ago because it was found to contribute to male sterility.

There was continued use on pineapples only in Hawaii until seven years ago. Unfortunately, this pesticide continues to turn up in the rivers and lakes that become the public's drinking water supply, including rivers and lakes in Ohio. We think it is absolutely prudent that public drinking water supplies test for the presence of this chemical even though it has been banned for 13 years, because it is still being found.

This goes back to my earlier point about maybe we shouldn't put it in, so we have to take it out—and I have just been corrected on the dollar amount on combined sewer overflow savings, I apologize; it is 10 to 12 billion annually. The full savings of what we have recommended is 27. But precise number on combined sewer overflows is 10 to 12.

You also spoke of the issue of wetlands. Obviously, an issue that has received a great deal of attention. Last August, the administration put forward a proposal that we believe addresses the concerns that have been raised. We have also suggested in the reauthorization that there be increased flexibility for things like mitigation banks.

We have seen some real successes across the country. We think that some dollars in the State Revolving Fund should be used, available to States to use to set up banking programs so that where there is a loss of wetland functions, there is a way to restore, to enhance previously impacted systems so that the function is retained.

The case of O.C. Mills is a case which I am personally familiar with. Mr. Mills comes from the State of Florida, which is where I come from and where I previously served as the head of that State's environmental agency. As I remember the case, Mr. Mills was told on repeated occasions by the U.S. Army Corps of Engineers and my State agency, that he needed permits, that he should not undertake the activities that he planned to undertake without coming in with a permit application and going through the process, as does everyone else in the State of Florida.

He refused to do that. A Florida jury found him guilty of knowingly excavating waters and filling wetlands in violation of the Clean Water Act. He was sentenced to 21 months in jail. He was fined for each violation $5,000.

The sentence, this conviction, these fines, were upheld by the 11th Circuit Court of Appeals. After he came out of jail, there was restoration work, as I remember it, that was to be done. A new District Court judge did find that he complied with the restoration work; in other words, putting back that which he had done, which was inappropriate.

They did say that he didn't have the money to pay a portion of the fine, and as I understand, it he has not been required to pay that. But in terms of the issues on which he was charged, he was found guilty and it was upheld on appeal.

The final issue that you asked, Mr. Shuster, about a number of permits and how many acres are covered, is one that, while my col-

leagues have attempted to provide me with some information, in an effort to answer your question, quite frankly, I don't have personal knowledge of. And with your permission, what I would like to do is to submit a detailed analysis of permit applications. And we would work with the Army Corps of Engineers for the record, if that is acceptable to you, Mr. Shuster, and to the Chairman?

Mr. APPLEGATE. It is acceptable to me, and I assume it is to Mr. Shuster.

Mr. SHUSTER. Sure.

[Subsequent to the hearing, the following was received from Ms. Browner:]

MR. SHUSTER'S QUESTION ON PROCESSING TIME FOR 404 PERMITS

The Clean Water Act, Section 404 program regulates the discharge of dredged or fill material into waters of the United States, including wetlands. In general, the Corps receives approximately 15,000 individual permit applications annually (this number includes both Section 404 and Section 10 applications). Of these 15,000 permit applications:

- approximately 10,000 permits (67%) are issued;
- approximately 500 permit applications (3%) are denied; and
- approximately 4,500 permit applications (30%) are withdrawn by the applicant (The applicant does not pursue the project--perhaps for reasons unrelated to the permit process, or because the impacts of the project have been reduced so that the project does not require a permit at all or qualifies for a general permit.)

In addition, approximately 75,000 minor activities are authorized each year through regional and nationwide general permits. General permits authorize activities in wetlands and other waters which do not need individual permit review so long as these activities cause only minimal adverse environmental effects. In some States, general permits authorize activities covered by a State or other wetlands regulatory program.

Approximately 92% of all permit evaluations (for both individual and general permits) are completed in less than 60 days after a completed permit application is received by the Corps. Individual permit applications that involve complex projects or sensitive environmental issues usually require more than 60 days to reach a decision. After a completed individual permit application has been received by the Corps:

- over 75% are processed in less than 120 days;
- approximately 25% are processed in 61 to 120 days
- approximately 20% require 121 days to a year to process, and
- less than 5% require more than one year to process

A recent report, *Wetland Regulation in the Real World*, prepared by Beveridge and Diamond, P.C. (B&D), purported to reveal a somewhat different situation. However, my staff and staff from the Department of the Army have reviewed this report and concluded that the analysis in this report is not statistically valid, and the report does not provide a fair evaluation of implementation of the Section 404 program. Therefore, we believe it should not be used to draw conclusions on the effectiveness of the Section 404 program.

In particular, it is important to note that the B&D report was based on a

review of 410 standard permit applications involving wetland fills, which constitute only 1.4% of the Corps' total Section 404 workload that year. In fact, it appears that the analysis focused on the most controversial and complex actions, which may help explain the higher permit evaluation times for this group. Further, the report identified relatively small acreages of wetlands filled under this group of permits. However, that reflects the size of fills permitted, not the size of the fills proposed. It is common for the agencies to work with applicants to modify their projects so as to reduce the harm to wetlands while still accomplishing the applicant's objectives.

I would like to point out that the Section 404 program has authorized about a million discharges over the last dozen years. Much attention is given to the minority of cases that encounter problems, but the accomplishments of the program are rarely mentioned. In one case, EPA's Denver office received a letter from the project engineer for a 2,000 acre planned community, expressing appreciation for EPA's role in the Section 404 program as "an inspiration" that helped the developer win an environmental award. In another case, the facilities director for a Nebraska cattle farm called the outcome of a wetlands enforcement action initiated by EPA's Kansas City office as a "win-win" situation for EPA and the cattle operation, stating "the farm is now in harmony with the environment".

The agencies have acknowledged, however, that there are opportunities to improve implementation of Federal wetlands protection efforts. The B&D report reviewed permit actions taken in 1992, well before this Administration's wetlands plan was issued in August, 1993. This plan was developed, in part, to address these types of concerns, and specifically identifies steps to be undertaken to make Federal programs more fair, flexible, and efficient. For example, EPA and the Army issued joint guidance to the field on August 23, 1993, which emphasized the flexibility in the existing regulations to tailor our permit evaluation to the specific level of impacts associated with a proposed project.

I have attached a copy of a more detailed analysis of the B&D report prepared jointly by EPA and the Army, for your information.

United States Department of the Army
Office of the Assistant Secretary
Washington, D.C. 20310

United States Environmental Protection Agency
Office of Water
Washington, D.C. 20460

MAR 29 1994

Honorable Max Baucus
Chairman
Committee on Environmental and
Public Works
United States Senate
Washington, D. C. 20510-6175

Dear Mr. Chairman:

Thank you for your letter of March 22, 1994, co-signed by Senator John H. Chafee, requesting our response to the report, *Wetland Regulation in the Real World*, prepared by Beveridge and Diamond, P. C. (B&D). The report focuses on the Army Corps of Engineers evaluation of standard permit applications under Section 404 of the Clean Water Act. We appreciate the opportunity to provide our views and the following information.

The B&D report reaches four main findings regarding the Corps implementation of the Section 404 regulatory program. Specifically, the report focuses on permit evaluation times, the size of wetland fills evaluated under standard permits, withdrawal of permit applications and wetland loss rates. Before responding to each of the report's findings, however, we would emphasize that our agencies have significant concerns that the analysis in the report is neither statistically valid nor provides a fair evaluation of the status of the overall Section 404 regulatory process.

Based on our review of the B&D reports' methods, we believe the report does not provide an accurate evaluation and should not be used to draw comprehensive conclusions about the effectiveness of the Section 404 regulatory program. In particular, the report provides only one year of analysis and focuses on what appears to be a statistically invalid and arbitrary subset of all wetland regulatory actions representing only 1.4 percent of the total Section 404 workload in Fiscal Year 1992. The report neglects the thousands of activities that are authorized each year under general permits that require little, if any, processing time. Instead, the report focuses on the most controversial and difficult types of Corps permit decisions, which typically require the most time to resolve. Finally, the report only considers the size of the fill being reviewed at the time of the permit decision, not as originally proposed in the permit application. The permit review process requires evaluation of opportunities to avoid and minimize wetlands impacts. In many respects, the Section 404 program is most successful in working with applicants to redesign projects that would otherwise be unpermittable because of potential significant impacts.

Through the review process, which can be time-consuming in certain circumstances, projects affecting many acres of wetlands can be reduced to very small, often less than one-acre fills by, for example, modifications such as building multi-level parking structures instead of surface parking lots. The result is a successful permit process that responds to the needs of the applicant while minimizing environmental harm, not the characterization of a failing regulatory program as portrayed by the B&D report.

Permit Evaluation Time

Before discussing the B&D findings, it is important to understand the context in which B&D reaches its conclusions. In Fiscal Year 1992, 28,435 individuals requested a Section 404 permit from the Corps. As indicated on the enclosed graph, 77.1 percent (21,920) of all applicants received a general permit in an average of 19 days; 7.2 percent (2,034) received a standard permit in an average of 141 days; 0.5 percent (128) received a Letter of Permission in an average of 37 days; 14.4 percent (4,101) of the applications were withdrawn; and 0.9 percent (252) were denied in an average of 164 days. The overall average for all Corps Section 404 permit decisions in Fiscal Year 1992 was 30 days.

The B&D report looks at 410 standard permit applications involving wetland fills -- 1.4 percent of the Corps total Section 404 workload in Fiscal Year 1992. Further, this subset of permit actions constitutes what we typically find are the most controversial and complex actions. It is not surprising that the permit evaluation times would be higher for this group of actions. While we are not suggesting that improvements cannot and should not be made for this type of permit action, we strongly suggest that if one wants to accurately and fairly evaluate the impact of the Section 404 program on the regulated public, the overall program, including general permits, should be considered. When such an objective evaluation is undertaken, the Corps overall performance is a highly acceptable 30 days versus B&D's 373 days. Looking at standard permits only, the average is 141 days -- 63 percent less than the B&D average.

While we disagree with B&D's general conclusions, we recognize fully that we can improve the regulatory program. In this regard, Corps Headquarters requested further information from several Corps districts regarding cases referenced in the report to determine the actual reasons for delay. From the cases that were reviewed, it appears that the majority can be separated into four categories. The first group of cases pertain to those where, in accordance with Energy and Water Development Appropriations Act of 1992, applicants requested redelineations using the 1987 Corps Wetlands Delineation Manual. In many cases several months were required to redelineate a site previously delineated under the 1989 Wetlands Delineation Manual. The second group of cases

involved projects where the wetland impacts were reduced through coordination with the Corps and resource agencies to avoid or minimize wetland impacts. This often resulted in additional evaluation time. The third group involved permit evaluations where the applicant did not furnish requested information in a timely manner and the permit application was withdrawn by the Corps. The fourth group of cases are those where we agree that the Corps could have made a more timely decision by administering the program in a more efficient manner. Through the Administration's Wetland Plan we are working to reduce such delays.

Size of Wetland Fills Evaluated Under Standard Permits

The B&D report indicates that the Corps often focuses on projects that involve a very small acreage of wetland fill (approximately 50 percent of the 410 cases reviewed involved less than one acre). While as noted above, most actions go forward in a timely manner under general permits, we agree that some Corps districts and resource agency field staff have spent an excessive amount of time evaluating applications for certain minor projects. We continue to work with our field offices to ensure that evaluation priorities are commensurate with potential environmental impacts. On August 23, 1993, the Army and the Environmental Protection Agency (EPA) issued joint guidance to the field which emphasized the flexibility found in existing regulations to tailor our evaluation to the specific level of impacts involved. Notwithstanding our concern over this issue, it is important to note that the final acreage of fill material authorized is not necessarily indicative of the acreage in the application received by the Corps. For example, a developer may initially propose a project resulting in 50 acres of wetland fill and through the Section 404 evaluation the impacts are avoided and minimized to reduce the actual permitted fill down to one acre or less. Many of the cases reviewed by B&D may fall into this category.

Withdrawal of Permit Applications

The B&D report suggests that the high application withdrawal rate is tantamount to permit denials. While the rates may appear high when standard permits alone are considered, the actual 14.4 percent rate of withdrawal is reasonable considering the variety of reasons that an application may be withdrawn. Over half of the withdrawn applications occur because the applicant does not wish to pursue the project or the project impacts are reduced to the point where a general permit can be used.. In many other cases, permit applicants do not come forward with the information necessary for the Corps to complete its evaluation.

In Fiscal Year 1993, the Corps began tracking the reasons for withdrawals and divided this group of applications into four categories: those approved by a general permit; those where the applicant withdrew the application; cases not requiring a permit; and administrative correction of the permit database. A review of this information indicates various reasons for high withdrawal rates. Some Corps districts do not initially screen applications effectively and must correct their database by closing the file as withdrawn and reopening it under the appropriate action category (e.g., general permit). In addition, the Corps has recently attempted to more accurately maintain records to reflect the current workload and pending cases. In some Corps districts, this has resulted in the withdrawal of a significant number of cases that have historically been maintained as pending where applicants no longer desire to pursue a project.

Wetland Loss Rates

The final major issue identified in the B&D report pertains to wetland acreage losses and gains as a result of the Section 404 Regulatory Program and other wetland loss acreage figures calculated by the Soil Conservation Service (SCS) and the Fish and Wildlife Service (FWS). The B&D report utilizes Fiscal Year 1993 data collected by the Corps and we do not disagree with the wetland loss and compensatory mitigation figures for the Section 404 Regulatory Program. The Corps data indicates that 11,600 acres were impacted as a result of verified Corps permits and 15,200 acres of restoration, creation or enhancement was required to mitigate for these losses. At a minimum, we estimate that an additional 8,000 acres of wetlands may be lost through nationwide general permits that do not require the permittee to contact the Corps. In addition, it is not possible to accurately assess the extent of secondary impacts or unauthorized activities. Moreover, until recently, the Section 404 program did not consistently regulate discharges incidental to activities, such as drainage, ditching and mechanized landclearing, that destroy or degrade wetlands. The combined extent of undocumented and unregulated losses is likely to be significant.

The B&D report considers wetland acreage loss and gain information developed by the FWS and the SCS. We will defer to the FWS, who will respond by separate letter, to provide specific information on the overall national wetlands loss rates. Given the improvements realized in the regulatory program and non-regulatory approaches such as the Wetlands Reserve Program, we do believe that the current annual wetland acreage loss rate is less than the 290,000 acre figure reported for the mid-1970s to the mid-1980s. In accordance with the Administration's Wetlands Plan, we will work with FWS, SCS, and the National Marine Fisheries Service to closely coordinate future wetlands trends analysis.

Although not specifically requested in your letter, we would like to provide information regarding a specific FWS project requiring Section 404 authorization that is mentioned in the B&D report as the "largest permit" of the 410 cases reviewed. The project involved the construction and maintenance of fire breaks within the Pocosin Lakes National Wildlife Refuge in North Carolina. This portion of the refuge was formerly subject to extensive agricultural activities and 579 acres of fire breaks were in place at the time the land was acquired by the FWS. The continued maintenance and construction of new fire breaks involved the discing of degraded wetlands. The project did not involve the clearing of "over 800 acres of pocosin forested wetland" as was suggested in the B&D report. In addition, because the project purpose was to ensure the long term protection and health of wetlands as part of a Federal refuge, no mitigation was determined to be appropriate or practicable.

In summary, we acknowledge that a portion of the cases reviewed in the B&D report and through our own follow-up coordination with the Corps districts revealed areas of needed improvement in the Corps evaluation of standard permit applications. The Administration's Wetlands Plan contains several initiatives that will result in more timely, efficient and flexible permit decisions by the Corps. We will continue our efforts to implement the initiatives as described in the Administration's plan, as well as identify further measures that may be appropriate to improve the evaluation of standard permits. However, it is important that in focusing on a subset of permit actions that we not lose sight of the fact that most members of the regulated public get a favorable answer in a timely manner. It would be unfortunate if, in our efforts to improve a relatively few actions, we unnecessarily reduce wetlands protection.

We appreciate the opportunity to respond to your questions on the B&D report. Should you have additional questions or comments, do not hesitate to contact us or Mr. Michael Davis, Assistant for Regulatory Affairs, at (703) 695-1376, or Mr. Gregory Peck, Chief, EPA's Wetlands and Aquatic Resources Regulatory Branch at (202) 260-8794.

Sincerely,

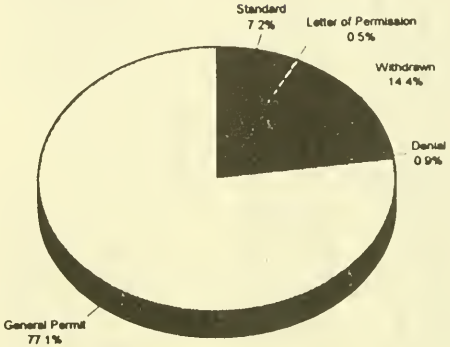
John H. Zirschky
Acting Assistant Secretary of the Army
(Civil Works)

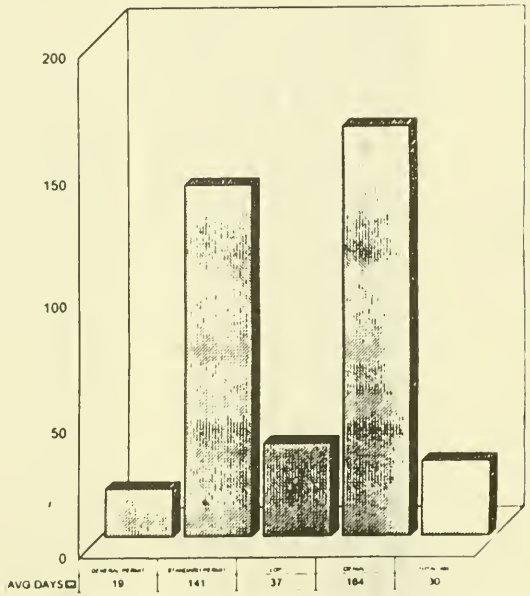
Robert Perciasepe
Assistant Administrator for Water
Environmental Protection Agency

Enclosure

CF:
Honorable George Frampton
Assistant Secretary for Fish and Wildlife and Parks
Department of Interior

FY 1992 SECTION 404 APPLICATIONS





TOTAL NUMBER EVALUATED GENERAL PERMIT 21920, STANDARD PERMIT 2034, LETTER OF PERMISSION 128, WITHDRAWN 4101 (NO DATA AVAILABLE FOR AVG DAYS EVALUATED), DENIAL 252

Mr. APPLEGATE. Yes. Thank you very much.

Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman, Administrator Browner, the questions I have are going to be brief because of time constraints and I am going to limit myself to Section 404—permitting.

First, I would like to comment on the Florida case. The court made the observation, gratuitously, that it did not have the power to change the law, but that the law was stupid, and it was a regulatory outgrowth of an unintended consequence of a 20-year old dredge and fill bill. It was never intended to do the things that impact private citizens, which it is doing. So quite often, if we will examine at record, let's consider it as the direct source.

The first point I want to make is I notice on page 5 of your printed testimony, you talk about the State Revolving Fund, but the estimate given through fiscal year 2004 is $13 billion. That is substantially lower than the amount that is in H.R. 3948. And, in fact, I think H.R. 3948, with the Chairman's mark, comes much closer to the kind of funding we ought to be doing in these programs.

Therefore if we pass the higher Chairman's mark as funding, would you be able to support that as EPA administrator?

Ms. BROWNER. Mr. Hayes——

Mr. HAYES. That is a "yes" or "no" question.

Ms. BROWNER. Can I have a sentence?

Mr. HAYES. Yes, please do.

Ms. BROWNER. I will be very quick.

We would like to work with the committee in terms of the authorization. As you know, the President had to submit a budget on behalf of the entire Federal Government. He has to work within budget caps that have been set by this Congress.

We have submitted a budget request this year that does just that. That includes, we believe, a good amount of money for the States, but we recognize the need and we would like to work with the committee.

Mr. HAYES. But the submitted number is actually under the past 10 years; isn't it? It is—it is less than the previous decade.

Ms. BROWNER. Within the previous decade, you have a shift in the program from a grants program to a revolving loan program. The dollar amount included in the administration's submission is $1.6 billion for fiscal year 1995.

Mr. HAYES. The second point that I want to make is your State of Florida has what I believe to be the best large land banking mitigation program in America. Do you agree? If during the course of our debate on this bill we are able to provide some latitude, with EPA approval, just as Florida did, to emulate that program, would you have any problem whatsoever in supporting the spread of those kinds of large land banking and mitigation programs in other States that chose to do so or chose to implement it along the lines of the State of Florida?

Ms. BROWNER. We would look forward to the opportunity to work with you on creating such a program. I believe it has been very successful in Florida. I believe other States are attempting such efforts.

What it secures is wetland systems that function as they should be, rather than the creation of systems, in Florida, for example,

scraping down of uplands to create wetlands where wetlands have never previously existed. We think it can be very successful and we would like to work with you, absolutely.

Mr. HAYES. On page 15 of your testimony, you made the comment regarding administrative appeals, but there was no reference of specific opposition to the creation of administrative appeals. It was simply saying it ought to be limited to some things.

Can I conclude that therefore you could be supportive of the creation of a fair administrative appeal process whereby citizens and other concerned individuals and agencies are able to, in much lower cost in a Federal District Court, find out both delineation determinations regarding wetland and the impact of 404?

Ms. BROWNER. I don't think we have a problem with what you are suggesting. We would be more than happy to meet with you to make sure we understand.

Mr. HAYES. All right.

And finally, the current delineation system encompasses a sequencing process. It has always struck me that this sequencing process was intended to impact the large landowner that had a great many alternatives. As a practical matter from my experience in my home State, where we have small landowners that only own one thing, and that one thing is not big, would you also have any difficulty if we designed one sequencing requirement on certain landowners, and another more streamlined program for someone that owns one thing?

It is much like a general permit theory. We expanded upon that to remove some minute acreage requests. It doesn't mean yes or no, we are telling you to accept them, but there shouldn't be the same treatment for Texaco and for somebody who owns an acre in Cameron Parish, Louisiana.

Ms. BROWNER. The idea of a general permit is one obviously that we think is appropriate.

Mr. HAYES. That is already in writing; that is correct?

Ms. BROWNER. Right.

I am concerned when we start drawing—and I don't know that this is what you are suggesting—but if we start drawing lines that say, you know, something that is less than an acre just isn't as valuable as something that may be two or three acres.

Mr. HAYES. What about urban/rural?

Let me ask one more question, if I may, Mr. Chairman? That will be the last one I ask, because it is very important, otherwise I wouldn't burden you with the time.

Recently, it has been suggested, and I would certainly like to suggest, that the bipartisan draft that was produced for the consideration of the committee, as well as the Chairman's original draft—which has many, many things in it I support, though some dwell upon things I disagree with—should be used as a means with which to create an end product. Would EPA oppose amendments if they were passed by our full committee, and altered the Chairman's original bill?

In other words, would EPA rather kill the bill if it is amended, or see it go to the House Floor?

Ms. BROWNER. Mr. Hayes, we want to see the Clean Water Act reauthorized this year. We believe that is absolutely essential, and

we are willing to work with all Members of the Congress to achieve that.

We believe that the bill introduced by Mr. Mineta and others on this committee is a good bill, that it gives us the kind of tools that we want. But there may be others that have solutions that have proposals that are worthy of consideration and we are more than happy to make our expertise available on consideration.

Mr. HAYES. Thank you very much.

I assure that is, if not the unanimous view of the committee, it is certainly the vast, vast majority view.

Thank you.

Mr. APPLEGATE. Thank you, Mr. Hayes.

Mr. Emerson.

Mr. EMERSON. Thank you, Mr. Chairman.

I ask unanimous consent to revise and extend and to include extraneous material.

Mr. APPLEGATE. Without objection.

Mr. EMERSON. Mr. Chairman, first, you stated your desire, your ultimate object, and acknowledged the difficulty of getting from here to there, of getting everyone ultimately to agree. And I wouldn't give up on that object. But I will suggest to you that it is more likely to be achieved if this subcommittee proceeds in the spirit of comity in which it normally proceeds, rather than one of exclusion.

You know, we can proceed as we normally do in that spirit of comity, or we can proceed according to the usual practices of the House, and lob grenades back and forth.

If it is your object to exclude or to limit the right to speak, as was the case in opening statements, of which I have been given no notice that there would be no opening statements, those who may differ with you and Mr. Boehlert, I don't think you are going to meet your objective of obtaining widespread agreement.

Second, Mr. Boehlert said statement that citizen suits just don't apply to agriculture, and said that with some finality. Farmers just put that out of your mind, he said, in so many words. Yet, under the language of the bill, all livestock operations, dairy, poultry, hogs, cattle, sheep, are point sources, and are subject to citizen suits.

Further, in New York State, a farmer was sued alleging that his nonpoint activities were point sources of pollution. It was a clear case of harassment by neighbors who didn't like the sights, sounds and smells of the farm. And even though the suit was eventually thrown out, it cost the farmer over $400,000 to defend himself against a frivolous suit.

The bounty hunter provisions of H.R. 3948 will provide further incentive for citizens to press a frivolous suit. H.R. 3948 extends citizen suit authority for wetlands, Section 404, which is not now a matter of law.

Mr. Chairman, I do thank you for holding this forum on an issue that is causing great concern in many rural towns and communities in Missouri and in this country. Indeed, the reauthorization of the Federal Water Pollution Control or Clean Water Act has tremendous implications for both rural America and the critical agricultural economy that sustains these rural towns and communities.

And I welcome this opportunity to address both the needs and the solutions to problems facing the families of today's farming communities.

And in the process, I would like to remind the committee, although this is often a fact that is greatly overlooked, most Americans do like to eat, and food comes from the farm before it gets to the grocery store. Without a doubt, American farmers and ranchers are the original stewards of our land. No one has a greater interest in maintaining and improving the quality of water and soil than the domestic farm producer. The hard-working men and women of today's farming and ranching communities are willing, willing to further commit themselves to continued, responsible soil and water conservation practices, which will allow them to pass on their productive land and crops and livestock to future farming generations.

So as we set out to reauthorize this act, we must acknowledge the 20-year commitment our Nation has put in already to addressing the challenges of point and nonpoint source pollution. I think that our success in further reducing water pollution, particularly nonpoint source efforts, will require similar time and similar resource commitments.

Nonpoint pollution is largely a weather-related occurrence that can be managed, but not economically eliminated altogether. Rather, we have to bear in mind that nonpoint source pollution is caused by the inadvertent discharge of pollutants from a wide range of society's most essential activities, and not just from conduct on the farm.

As we seek solutions to these nonpoint issues, source and reasonable—a sound, rather, and reasonable approach must be our guide. Federal and State incentives, education, technical assistance, are a few of the means that we must make available to the farm and ranch, the production community, in managing nonpoint source pollution.

Equally important, we must coordinate the extensive water quality programs that are already in place at the Department of Agriculture, the EPA, and the U.S. Geological Survey. We could make tremendous progress with very minimal additional funding if we could start to get these agencies not only to share their data, but to use the same data in making water quality determinations.

The Clean Water Act has been tremendously successful. In fact, it could perhaps be called the most successful environmental law so far. But we need to realize that there are other programs out there affecting and shaping water quality, and if we can coordinate these programs, we will make substantial progress toward that goal.

Many programs are already in place and the farming community is willing to participate, but the lack of available funds remains a large obstacle in appropriately responding to these rural needs.

I see my time is expired, and I want to observe the rules that you have laid down, Mr. Chairman, but I would hope that as we proceed further in the deliberations on this bill, we would not be so constrained as we are today.

Mr. BOEHLERT. Would my colleague yield?

And I think the Chair will be a little bit generous that you did specifically make reference to my opening statement.

Would you yield for a moment?

Mr. EMERSON. I am glad to yield if it is my prerogative to yield.

Mr. BOEHLERT. Well, the Chairman has agreed to accept that.

And I do want to thank you for your very spirited contribution and for all that you are doing to help us in our deliberations.

I would like to repeat what I said in my opening statement: H.R. 3948 does not, let me stress, "does not" permit citizen action suits against nonpoint source pollution. However, as you might observe, and I know you are aware of it, if you have a thousand head or more in a livestock operation, even the National Cattlemen's Association agrees, that is not a nonpoint source of pollution. That is considered a point source of pollution.

My concern, and I have expressed it repeatedly, is that family farmers all across America, modest operations, husband and wife, children working, are concerned that this bill would open up Pandora's box and there would be bounty hunters and all the inflammatory language that has been used on their property, and suing them, they would spend half their life in court. And that simply is not the case.

So I want to make sure that we are clear on that. This bill does not pertain in any way, shape or manner to citizen action suits against farmers involved in nonpoint source pollution.

Mr. EMERSON. Well, I don't—if the Chairman agreed for the gentleman to respond and we have exceeded the time, would he permit me the opportunity just to very quickly retort?

Mr. APPLEGATE. Absolutely.

Mr. EMERSON. That is to say, I view this very much like the Biological Survey bill that the House recently dealt with, that was all so innocent in its intent as portrayed to us by the administration and by the Natural Resources Committee. But the Members of the House woke up and saw that they had to insert some language in there to protect private property rights, and place some restraint on Mr. Babbitt—which was passed by overwhelming margin, including a number of Members of the Majority voted to restrain him in the interests of private property rights. And I suggest that the House will respond accordingly in the instance of this bill.

Mr. APPLEGATE. Ms. Browner, was there anything that you wanted to respond to, any of that, or shall we go on?

Ms. BROWNER. Whatever you desire, Mr. Chairman.

Mr. APPLEGATE. All right.

Well, let's go on to Ms. Shepherd.

Ms. SHEPHERD. Thank you, Mr. Chairman.

Welcome, Administrator Browner. It is nice to have you here.

I come, as you know, from Utah, and there is something of a revolution brewing in the West having to do with a whole cross-section of issues, which really revolve back to the notion that there are—that States should have the right to make most of these decisions for themselves.

And as a matter of fact, our governor, Governor Leavitt, has recently gotten the Western Governors Association to seriously consider a constitutional convention, which would clearly delineate which rights States have and which ones they don't. And the Clean Water Act is laced into all of this, because it becomes a very expensive proposition for the municipalities in Utah.

I wonder what your answer is to the charge that States should be able to take care of their own water, that they have absolutely a motivation to provide clean water to their citizens, and why don't we just let them do it the way it is best for their State to do it?

Ms. BROWNER. I agree that States have a real motivation to protect the citizens of their States and the resources that are shared by those citizens. I also believe that there is an effective division of responsibility in this area of public health, natural resource protection, between the Federal Government and the States.

When I have talked to the governors, when I have talked to the mayors about some of these issues, and I say: Well, the effect of your argument would then be to have 50 State agencies as opposed to one Federal agency, setting water quality standards, to take taxpayer resources and use many, many more of those resources to get to the same point that we currently get to. And they agree, that is not a good use of limited resources.

So a Federal agency with a lab, with scientists, with the investment that has been made in EPA, working in conjunction with the States, is a reasonable division of labor. The Clean Water Act reauthorization, I believe, provides an opportunity to further strengthen the relationship between the Federal and State Governments, and to again recognize a reasonable delineation of responsibility.

For example, watersheds, States absolutely have to, the Federal Government can't, States have to be the ones who take the steps, who take the initiative, to develop State-specific, community-specific watershed plans. That is something that is best done by them, under guidance from the Federal Government. But we recognize that no two watersheds are the same, so we have advocated in our position, and we think it is largely reflected in 3948, this approach to watershed.

In the Clean Water Act, there is a long history, since its inception, of the Federal Government providing dollars to the States. It is continued in this reauthorization, in the form of a revolving fund and a sizeable amount of money will flow from the Federal Government to State and local governments to address these problems, with increased flexibility so that individual States can make individual decisions to address the highest-risk problems first. The answers, again, will not be the same across all 50 States.

So, I think we have an opportunity with this reauthorization to strike what is an appropriate balance in the responsibilities as government, whether we be Federal, State or local, that we bring to this job of protecting the public's health, of protecting resources which don't recognize political boundaries. They are shared by all of us.

Ms. SHEPHERD. Thank you very much, Mr. Chairman.

Mr. APPLEGATE. Thank you very much, Ms. Shepherd.

Mr. Gilchrest.

Mr. GILCHREST. Thank you, Mr. Chairman.

I want to make a couple quick comments between the colloquy of the gentleman from New York and the gentleman from Missouri.

In my area of Maryland, no net loss of wetlands, means no net loss of agriculture. Those two things are mutually beneficial. No net loss of wetlands, means no net loss of agriculture. It gives you something to think about.

If you hold on to agriculture and you want your agriculture to be productive, over a long, long period of time, you are going to have conservation measures, best management practice measures. You are not going to lose soil, you are not going to overuse chemical fertilizers and so on.

The other comment I want to make is a number of my colleagues have asked me why I support the Chairman's bill. Being from Maryland, we have a 99 percent loss of our oyster production in the Chesapeake Bay. We are losing clams like crazy. Crabs are beginning to go down. Shad is a fish that is not caught anymore, striped bass is barely manageable, Canada geese are not coming down. This is caused because of wetland loss, habitat loss, overharvesting.

What causes wetland loss, habitat loss, overharvesting, which is the economic base of the Eastern Shore of Maryland? Unbridled, unmanaged growth.

We are not looking at where we are losing habitat, we are not looking at where we are losing wetlands, we are not look at the overharvesting.

I made a comment in an earlier committee hearing a couple months ago about an old water man on Smith Island, a place that is fairly precious in the Chesapeake Bay. He said the man that should get the highest environmental award is, if it was a man, is the person that invented the birth control pill.

I think what we need to do when we get into a discussion like this, and there is a number of Supreme Court decisions that we could look through which give a rationale for an understanding of a person's right to own property, and where that fits into the Fifth Amendment and where that fits into the government or the community's right to preserve the community and improve the quality of life for the community as a whole.

After all that, I did have a question, Ms. Browner, which I lost under the fray of things. Here it is: We are talking about watershed management, wetlands protection, and so on. Especially in my area, there is a term that is vital to the preservation of our economic way of life, and our economic way of life depends very heavily on how nature is treated. So if we are looking at the connection between wetland protection, that is nontitled and titled, and a State watershed management program, where, in your opinion, should cumulative impact play a role?

Now, I can give you an example of what I am talking about: Every time—when each agency—and I understand there is a nightmare with the bureaucracy, we need to streamline the Federal agencies, nothing against those bureaucrats, we need to streamline the permitting process, and I am in favor of putting time frames on the permitting process. This certainly enhances the incentive to do the job.

But when you go through the permitting process, for example, for a marina, and the marina in this particular area meets the criteria upon which it has to be given a permit, or a condominium, or a shopping plaza, or a, I don't want to say, dare I say a Wal-Mart—is that from Arkansas—or any type of big retail organization, a marina, condominium, shopping plaza, they all meet a very narrowly defined set of criteria in order to be permitted to build.

But you might have a marina a half mile up the creek, and then another half mile up the creek, and you might have a condominium a half mile away, and if we don't—in my opinion, based on where we are in the state of civilization, with the population the way it is, and in areas such as mine, that heavily depends on nature for its viable economy—cumulative impact seems to be a fairly difficult concept to institute in the regulatory process, but a very important one.

Ms. BROWNER. You are exactly right, that cumulative impact and how to evaluate and incorporate those impacts into the individual permit decisions that currently drive much of our efforts to protect our water resources, is quite difficult. That is why a watershed approach, one that takes the time to step back, to look at the entire system, to look at the impacts that have already occurred, to look at what does a community expect of that resource in the future, whether it be crabs, whether it be tap water, whether it be recreational or industrial activities, to look broadly and to look on the front end, rather than to continue a piecemeal approach, a permit-by-permit approach, which ultimately gets to the point where you say this system can't take anything more—the answers are going to have to be no, and it is not a condominium, it is not a marina that was next in line, but it is a hospital, it is a school, something that is very necessary for the community.

We strongly believe that a watershed approach—and it is something that is proposed in the administration's book for reauthorization of the clean water—that would create incentives for States to undertake this kind of approach. It is not a mandatory approach, but we think that it is of such an intelligent nature, that with the proper incentives, most States will adopt that kind of approach and it will give them a framework within which to make the very tough decisions that they have to make.

I think we have to understand, we have to accept that we expect an awful lot of our water resources. And if we are not willing to manage them wisely, they are not going to be available to meet all of those expectations in the coming years. We are not talking 50 or 100 years from now, in many parts of this country; we are talking 5, 10, 15 years.

Mr. GILCHREST. If I could just make a quick comment.

The idea of cumulative impact certainly will impact the perception of property rights. But just for the Members, if they could get an overview of three Supreme Court decisions, Penn Central, Keystone Bituminous Coal, 1978 and 1987, and Concrete Pipe and Products, 1993, it gives a real clear understanding of community's right to protect the health of the people in that community.

Thank you, Mr. Chairman.

Mr. APPLEGATE. Thank you, Mr. Gilchrest.

Mr. Barcia.

Mr. BARCIA. Thank you very much, Mr. Chairman.

I would like to thank you and Chairman Mineta and, of course, our distinguished guest this morning, Administrator Browner, for the timely hearings.

I would like to, before I ask my questions, respond to a comment that my colleague from Maryland just made, and just say that I am not certainly as familiar as I should be with agriculture in Mary-

land. But I can tell you that under the sod buster provision of the protection regarding wetlands in the current Farm Bill, millions of acres of land throughout the Midwest are lost in agricultural production as a result of bankruptcies that occur on farms, when, in fact, that land sits idle for two years or more, and then another farmer purchases that property.

It is certainly not automatic, in most cases, that permits by the Corps of Engineers or the EPA are denied, that land is taken out of agricultural production. And also, point out that cranberry production—we don't have a lot of it in Michigan, but we do throughout the Midwest—it is necessary to have wetlands to produce cranberries, in the form of bogs and the type of land that is needed to produce cranberries.

So coming from a district that has about 70 percent of the State's coastal wetlands in my State, I am very sensitive about, broadening the definition to include hundreds of millions of additional acres to be categorized as wetlands throughout the country.

Recently, we have been in negotiations with the Corps of Engineers because our Bay City State Park, the largest State park in the 90-some State park system operated by the Michigan Department of Natural Resources, was declared to be a wetland because some aquatic growth occurred on the shore in the past year. Now we are faced with closure of that State park and public swimming area, which will deny some half a million visitors a year to the State park to be able to swim or enjoy the waterfront at the Bay City State Park.

We are in the process now of mitigating or discussing mitigation plans that would allow to us have the length of a city block, about 550 feet of shoreline to be utilized by the public. But even that will require three or four acres of additional mitigation.

Thank you, Administrator Browner, for your time before the committee, and I certainly appreciate the personal leadership that you have provided at the Agency.

I will try to be brief here and just would like to say, considering the administration's efforts, stated efforts to downsize the Federal Government, do you think that EPA's resources might be strained if regulatory authority and enforcement provisions were significantly expanded under House Resolution 3948?

And I have just a follow-up comment.

Ms. BROWNER. The budget that was submitted by President Clinton for EPA as part of his submission on behalf of the whole government, it is now before the Congress, includes for EPA, an increase in resources. We are one of the few agencies that the President has recommended an increase. That is a recognition that over the last decade, EPA's responsibilities, the numbers of laws just passed by this Congress, have grown significantly, and yet our resources have been at a relatively flat level.

We have done everything in the recommendations that we have made to Congress in reauthorizing the Clean Water Act to work within the constraints as we hope they will be. In other words, we hope we will see an increase approved by this body for EPA.

In terms of enforcement, we believe that we will absolutely be able to meet our responsibilities, in part because we have just completed an extensive reorganization of the Office of Enforcement at

EPA, in fact, we have renamed it. It is now the Office of Enforcement and Compliance Assurance, and it has built on the strength of the enforcement program over the last six years, but also undone some of the problems that were created previously.

Mr. BARCIA. I appreciate those comments.

The reason that I ask, Administrator Browner, is because I have been working with the EPA, as you know, and it is no reflection on your personal leadership within the Agency, but I think represents some of the frustrations that Members of Congress and our leaders in our local communities back home have relative to the role of the EPA overall.

But since I arrived in Washington last year to get approval of and funding for a process to clean up an island in my district, which is leaching hazardous waste into the Saginaw River and Saginaw Bay. And as I mentioned, I personally appreciate your leadership, but overall, the Agency has been very slow to get resources to an already strained environment to the point that we cannot address obvious dire needs in this country.

The process I think has been pending, was recommended some two years ago out of the regional office in Chicago and has been tied up here in Washington for, well, at least I know, 17 months that I have been working on it.

Ms. BROWNER. Mr. Barcia, if I might just quickly mention, I believe that is not a clean water issue. I believe it is a Superfund issue and I know we have been working. That doesn't necessarily excuse any delays, that may not have been appropriate.

I think you are aware—and we will hope to be back before this committee to speak about the need to fix the Superfund program. We have called for fairly comprehensive changes in that program, changes that we believe will address significantly the delays, the expense associated with the current program.

Mr. BARCIA. Yes, that is encouraging to hear, because, again, I think that based on the preliminary reviews of the EPA staff out of the Chicago regional office, we have a technological process that will allow us to clean up these contaminated sites at a mere fraction of the cost of the conventional landfilling methods.

One final comment, and that is it is my understanding that EPA has recognized the appropriateness of mixing zones and has provided guidance to States for the use of mixing zones in discharge permits. Can you explain the role that EPA plays in reviewing States' mixing zone policies and how that might change under House Resolution 3948?

Ms. BROWNER. You are correct that in the administration's reauthorization recommendations, States would have authority to create mixing zones. Those would be created pursuant to guidelines or guidance issued by EPA.

A mixing zone for those of you who are not aware is—deals with a point source problem. It is where there is a discharge to a river or a lake and effectively a portion of that river or lake is used as a mixing zone and water quality has to be met at the boundaries—this is a real simplification, but at the boundaries of the zone.

Mr. APPLEGATE. Thank you, Mr. Barcia.

Mr. Hoekstra.

Mr. HOEKSTRA. Thank you, and welcome, Ms. Browner.

I take a look at the Clean Water Act, and I have real mixed emotions. You have talked today about the objectives, overall, broadly, what I think everybody on this committee and everybody in the Congress wants to achieve. And that is a safe and clean water environment.

But I will tell you that when I go back to my district and I start talking to my constituents about the Clean Water Act, they no longer believe that perhaps we need a stronger Clean Water Act. And that is because they are now living under a Clean Air Act and all of the things that they have found under the Clean Air Act are, if that is what the Clean Water Act is going to do for us—and I am from Michigan and Lake Michigan is a very prized resource, but if the Clean Water Act—is going to do for us what the Clean Air Act has done for us, we are sorry, we don't want it, primarily, for a couple of reasons.

The Clean Air Act as it is being applied in certain parts of my district is based on poor science. We are now working with the EPA and we are working with the State and we are finding out that the Clean Air Act implemented in a bureaucratic and legalistic way.

I take your comments saying that on the Clean Water Act you will be open to working with Members of Congress, you will be open to working with municipalities and States to implement or to develop the legislation—I will have to tell you that our experience on the Clean Air Act has been anything but that kind of a cooperative spirit.

It again has been bureaucratic and legalistic and we have not been able to focus on: Here is the problem, how are we going to clean the air?

It has been: Sorry, these are the rules and the regulations, this is exactly what you are going to do.

I think in my district, it has been said that we could lock up every car in the garage, throw away the keys, and we still wouldn't be able to meet the requirements of the Clean Air Act. Now when I take a look at the Clean Water Act and I hear the goals and objectives, I do wish that perhaps somewhere down the line we will have another hearing where you will actually outline for us the exact processes and procedures that are in the Clean Water Act that tell exactly how it is going to be implemented.

You know, I would like to know, and maybe you can tell me, how much is it going to cost, what are the new regulations going to be?

If I am small business person, if I live on a marina or if I have a farm next to the river, what are the expectations? If I am a mayor of a community, I don't clearly understand what you were just talking about. There is this boundary source—but if the water, a certain boundary is dirty, who is responsible for cleaning it up?

With the air we get a lot of pollution from Chicago that we are now having to clean up. Are we also now going to have to clean up water that comes around in a circular motion from Gary and Milwaukee and Chicago?

I don't know if you have got any responses or comments to that?

Ms. BROWNER. You raise several very, very important points.

If I could just begin, Mr. Chairman, by briefly saying something about the Clean Air Act.

The Clean Air Act was amended by Congress in 1990. The Agency has been working over the last four years to implement it. It is very different in some major respects, from any other environmental law that had been passed before that time. It is different in the role that is created for individual States to craft plans for achieving air quality standards, standards set that are to protect the public's health.

The good news under the Clean Air Act is we are making progress. In fact, we are looking at a number of cities that later this year, early next year, their status in terms of level of pollution will be changed because they have been able to improve the air quality within their community, within their city, because of the tools available to them in the Clean Air Act.

On the other hand, I think it is important to recognize that 70 million people in this country today live in cities where the air quality does not meet Federal air quality standards. One example of the problems that we see, asthma is on the rise in this country. So air quality problems are very real issues, particularly for children, particularly for our older population.

Since coming to the Agency, I have worked with my colleagues in the Agency, in the air program, to reach out to individual States, cities, communities, counties, and we are more than happy if there are people you would like us to work with in your district, to see if we can't help to craft a program, a plan, that meets the specific needs of your region.

Again, the Clean Air Act doesn't in many instances impose a "one answer fits all" type scenario. It does in some instances, and I think there are some who have asked whether or not that was appropriate.

In the Clean Water Act, the flexibilities and the incentives that we are recommending be included in reauthorization, we strongly believe will allow local communities and States to make decisions that are appropriate for that State given their history of development, given their economic needs, given their growth, given their realities. And I think that is what was attempted by Congress in the Clean Air Act amendments of 1990. And we are working to see that implemented and we will certainly, if the Clean Water Act is reauthorized in the way that we recommend, work with the States, with local government, to see it successfully implemented.

Mr. APPLEGATE. Thank you, Mr. Hoekstra.

Mr. Borski.

Mr. BORSKI. Thank you, Mr. Chairman.

Ms. Administrator, I would like to welcome you and thank you for your testimony today and all the fine work you are doing as the Administrator of EPA.

Our colleague, Mr. Barcia, and you were talking a little bit about Superfund, and I just wanted to tell you that I chair the Investigations and Oversight Subcommittee here. We held two years' worth of hearings, and we attempted to pass out a report last year. We had the first markup of a report in the history of the Investigations and Oversight Subcommittee, because the issue is so divisive.

For you to be able to get a 44 and 0 vote out of the Energy and Commerce Committee is nothing short of amazing, and I want to congratulate you on that. And if you perform such a miracle in En-

ergy and Commerce, I assume you can do the same thing in Public Works and Transportation.

Ms. BROWNER. Thank you for the compliment, and we will certainly work with all the Members of the committee to see if we can achieve the same here.

Mr. BORSKI. I am sure we can.

Let me ask, if we fail to pass a strong and enforceable program to reduce nonpoint pollution, I assume we will be forced to continue to apply pressure to industrial and municipal point discharges. Can you tell us how that might work?

Ms. BROWNER. It is very simple. You are exactly right. When we look at what is affecting our rivers and our lakes, if we can draw two broad categories, there are the point sources, the industrial wastewater, or the point sources, and then there are the nonpoint sources, what happens when it rains. If we are going to secure clean water, fishable and swimmable water, then we have to get the improvements from one of these two sources.

We have already gotten, in most instances, significant improvements from the point sources, from the industrial outfalls. To continue to apply expensive technologies in many of those systems will not be as cost effective as taking those same dollars and applying them to the nonpoint source problems.

I mean, we talked earlier about cost benefit and risk assessment. This is an application of those sorts of tools and it shows us that our resources are best spent, in most instances, on nonpoint source. It is not to say that we should forego the progress and the technology advances that will continue to occur for the point sources. But the real gains, the big strides that we can all be proud to take, will be in the nonpoint source, at this point in time.

Mr. BORSKI. Ms. Browner, some States have expressed concern about provisions in H.R. 3948 that would allow EPA to impose standards or criteria on the States.

Are you familiar with these concerns and how do you view the relationship between EPA and the States?

Ms. BROWNER. I am not familiar with some of the specific concerns that may have been raised. The provisions that are in, as I understand, H.R. 3948, I think are very similar to the administration's recommendations. It would require that two years after passage of the Clean Water Act reauthorization, EPA would prepare a five-year plan for criteria and standards.

Criteria are the numbers that EPA sets, standards are what are adopted by the individual States, the water quality standards that they then include, for example, in individual permits for discharge. We believe that having a plan of action, of saying: Here is what we are going to do first; here is what we are going to do second; here is what we are going to do third, is extremely important.

And I would hope that if there are criticisms, it doesn't go to the need for a plan. Because without a plan, we will continue to move forward in a way that does not guarantee our resources being applied to reductions of the greatest risks.

Mr. BORSKI. And let me ask one further question, if I may, Mr. Chairman?

The allegation has been made that enabling citizen suits for past violations will subject virtually all dischargers to penalties, since

EPA's regulations contemplate that compliance will be obtained only 95 percent of the time. Is that an accurate statement of EPA's compliance expectations?

Ms. BROWNER. I apologize, I, with the buzzer, could not hear the middle of your question.

Mr. BORSKI. All right. Let me try it again.

The allegations have been made that enabling citizen suits for past violations will subject virtually all dischargers to penalties, since EPA's regulations contemplate that compliance will be obtained only 95 percent of the time. Is that an accurate statement of EPA's compliance expectations?

Ms. BROWNER. We do not believe that the citizen suits provisions which we have proposed, which Mr. Boehlert has spoken of this morning, are going to result in large numbers of lawsuits being filed. We do think it is important to allow citizens to participate in this way, and we think it is important that it not be limited to ongoing violations, which is I think what you referred to, the quality decision by the Supreme Court, but that it be available for violations that may have previously occurred.

I think there is a simple answer to this. The people who suggest that there is just going to be hundreds of thousands or tens of thousands of lawsuits that may be filed, I think they are not observing the fact that the offices and the individuals that would file these lawsuits don't have unlimited resources. They will be looking for the best use of their resources. They will be looking for the greatest water quality improvements and will focus and target in the same way that anyone would do in using their resources and using their information.

Mr. BORSKI. Does EPA contemplate that compliance will be met only 95 percent of the time?

Are your regulations down to that limit; or do you expect them to be met all the time?

Ms. BROWNER. We are not—I have asked my colleagues who are here with me today from the water program, we are not familiar with the statistic that you use. We would be more than happy to sit down and talk to you.

There may be some statistics that we are not familiar with that suggest there is only—if I understand your statistic right, 5 percent compliance.

Mr. BORSKI. Noncompliance.

The question is, do you expect your compliance to be met all the time or only 95 percent of the time?

Ms. BROWNER. We, obviously, expect people to comply with the law and the rules all of the time. We do use statistical methods in establishing rules, in establishing criteria and standards. I guess that some could look at it and say we are assuming a 95 percent compliance. We, when we set a regulation, fully expect that the facilities covered will comply 100 percent of the time. That regulation is set to protect the public's health, to protect the resources, and we want compliance.

Mr. BORSKI. Thank you very much.

Thank you, Mr. Chairman.

Mr. APPLEGATE. Thank you, Mr. Borski.

Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

Ms. Browner, I want to refer to the combined sewer overflows. You mentioned in your comments that we hope to be able to address the regulations in a cost-effective or in a way of savings. Is it not true that there are two ways of measuring cost, the initial outlay of the capital investment, and with new modern technology, the long-range operating cost of the facility?

Ms. BROWNER. When you look at costs in terms of technology, you do look at both the capital investment required to install the technology and then the operation and the maintenance of that technology over whatever the expected life is. Obviously there are then replacement costs associated.

Mr. COLLINS. Thank you. I know your agency has looked at some new technology that will have long-range savings based on operational cost that veer away from some chemicals in the process of treating the polluted waters. I appreciate that.

In the area of wetlands, a rural or suburban county in Georgia has spent the last five years in an attempt to build a drinking water reservoir. This county is a county that is projected to almost double its population in a 15-year span. Five have already elapsed.

In their attempt, they spent over $1 million in surveys of all types. They are in the process now of mitigating wetlands, wetlands that in some areas have to be litigated one acre for two acres, two acres for one acre, even up to three acres for one acre, which seems a little bit harsh or really expensive.

Also, in the fact that they are building a reservoir for drinking water, does your agency give any consideration to the backwaters of a reservoir, in its creation of wetlands itself?

Ms. BROWNER. Yes, there is consideration given in terms of the habitat, if you will, that is created when there is the development of a reservoir. I don't know that it is given on an acre-to-acre basis, but it is taken into account in the permit consideration and in the conditions of whatever permit is ultimately issued.

Mr. COLLINS. I would like to request that you send me some information on that particular segment of your regulations.

Ms. BROWNER. Certainly.

[The information follows:]

MR. COLLINS' QUESTION ON BACKWATERS IN 404 PERMITTING

In evaluating a Section 404 permit application, EPA considers the net impact to wetlands and other aquatic ecosystems associated with the project. Where the project would involve the creation of wetlands or aquatic habitat, those benefits are considered in determining the relative environmental harm compared to any alternatives, the significance of the environmental harm the project would cause, as well as the amount of compensatory mitigation (e.g., wetlands restoration) that should be required. The preamble to the Section 404(b)(1) Guidelines, the Section 404 environmental criteria, states that: "Habitat development and restoration involve changes in open water and wetlands that minimize adverse effects of proposed changes . . . Habitats development and restoration can contribute to the maintenance and enhancement of a viable aquatic ecosystem at the discharge site." (45 *Federal Register* 85344 (December 24, 1980).)

Projects such as water supply reservoirs often transform one type of aquatic system, generally a flowing stream or river, into another type of system, usually a lake. The water supply reservoir may have wetlands habitat at its fringe. In evaluating the impacts of this type of project, consideration is given to the systems lost, the systems gained, and the relative importance of each in the affected watershed.

Mr. COLLINS. In the example you gave of the river and the pollutants when you went fishing with the school students, a good example, in fact, a lake in middle Georgia, the oldest power company lake in Georgia, there are waters where the rivers come into the lake where silt has washed down over the years and really has caused a lot of problems in the area for fishing and recreation.

The example you gave pertaining to the particular site that you visited, could you tell if those violations were of recent history or have they probably been for several years?

Ms. BROWNER. Since I don't know beer cans and I don't know potato chip bags, it is hard to say the year of those particular pieces of litter. Clearly the tumor on the fish is not something that has occurred over a short period of time. Those sorts of manifestations of pollution problems can take generations to occur within a particular animal population.

Mr. Collins, I would say that if you visited any urban waterway in this country, and you dragged a net behind a boat for 10 minutes, you would probably have a similar catch, unfortunately. Our urban waterways have been particularly degraded. And communities, cities, towns across this country are not able to make use of their urban waterways because of the contamination, because of the degradation that has occurred. And it has been over a very, very long period of time in many instances.

Mr. COLLINS. I think that is a very important point. The regulations may be working currently and the pollution has ceased or decreased versus what has been there for a long period of time. So we may be acting in haste to further enhance regulations that already are taking effect based on what is on the books today.

I think that is a very good point.

I have one other question. You make the point very clearly, Ms. Browner, in the area of citizens' lawsuits, in an attempt—and there has been some comments made about bounty hunting, vindictive lawsuits and such—in an attempt to head off such vindictive lawsuits and bounty hunting and frivolous suits, would you support a clause or provision pertaining to citizens' lawsuit that requires the loser to pay; if the citizen making the suit lost, they would reimburse the defendant for the court costs?

Ms. BROWNER. Under the rules of judicial procedure, if a party brings a frivolous lawsuit, to the best of my knowledge, a judge has that discretion to award attorneys' fees to cover the cost associated with that frivolous lawsuit. That is something that is embodied generally in our judicial practice in this country.

I think that, again, citizens' suits are a very important check and balance in the work that we at EPA do. I mean, don't forget, we at EPA will be the subject, we hope not, but probably the subject of some of these lawsuits. And we still believe them to be a very important tool in securing clean water.

Mr. COLLINS. I take it that is the discretion of the judicial system or the judge, as you stated, but your position then, you would oppose such a provision within this bill?

Ms. BROWNER. No, I think it is something that has to be addressed in the individual facts of a particular case, and it is something that is best handled by a judge who has a familiarity with the facts in a particular case.

Mr. COLLINS. That language pertaining to the judge and his discretion would not be included?

Ms. BROWNER. Since it exists, I don't see a reason to specifically include it.

Mr. Collins, if I might say something about your prior comment, I have to respectfully disagree. I don't think that we have the luxury of waiting. I think that the problems we see in our waterways are very real and they are very meet. They may have been years in the making, but if we fail to act and to act now, they will only get worse. They are not going to improve our rivers, our lakes, our streams, our water quality is not going to improve to the degree that it needs to, if we similarly wait and see if there are any more positive consequences to be had from the existing program. There will be some positive consequences, but they will not be adequate or sufficient to ensure that our rivers and lakes are swimmable, which is what the people of this country are promised. So I just wanted to respond to that.

Mr. COLLINS. I think you responded very well to it. My point was that I hope we don't act in haste based on previous acts that may be working and react in a way that may be expensive.

Thank you, Ms. Browner.

Mr. APPLEGATE. Thank you.

Mr. Filner.

Mr. FILNER. Thank you.

I do want to say, Mr. Chairman, there is some frustration in the process that we are pursuing. I know even as a freshman my first choice for committee assignments was this subcommittee, precisely to work on the Clean Water Act. And the process that we are following, without a chance to mark up in the subcommittee, with those of us who have taken the time to familiarize ourselves with the issues and to really work on these issues is a little bit frustrating. I would hope that we would have a chance in this subcommittee to take a look at this legislation in some detail.

Ms. Browner, both in today's statements and in the past year and a half or so, as Administrator you have talked about such concepts as flexibility, common-sense approach integrated approach and cost effectiveness. And I am very pleased, as I am sure all of us are, to hear those concepts.

I want to try to have you live up to them when this comes to certain situations, for example, in my own city of San Diego, and maybe I will do this by applying what I will label the first grade classroom test. I think you referred to, it was your daughter——

Ms. BROWNER. Son.

Mr. FILNER. You went to the first grade class with some EPA common-sense approach, and they got it.

I would like to make a deal with you. I would like to be invited to that class, make the case for San Diego, which does not agree with EPA, and if they get it, will you change your policy?

Ms. BROWNER. If the judge will agree, we will all go to the class. Unfortunately, Mr. Filner, my Agency is in litigation over a very complicated and long-standing problem.

Mr. FILNER. I understand, and I hope we can figure a way out of that, because, as you know, in San Diego we have our little situation with the Clean Water Act where we are being sued by the

EPA to provide a level of treatment which in the testimony of award-winning scientists and all the environmental groups in the area, believe it is not only unnecessary and not have any beneficial impact on the marine environment but which would cause rate payers literally billions of dollars.

As you know, the Federal judge that is hearing that lawsuit has already refused to enforce the Clean Water Act, and has asked Congress to take steps to rectify the situation. I assume it is similar to the case that Mr. Hayes brought up earlier in reference to some environmental legislation.

I intend, as we go forward in this process of reauthorization of the Clean Water Act, to ask my colleagues to agree to a simple amendment to allow San Diego to treat its sewage in both an environmentally sensitive and cost-effective manner, which will save San Diegans billions of dollars, which obviously we could use in environmental work, for example, water reclamation.

I would hope that EPA would work with us, even given the lawsuit, to come up with, in the words that you have used, a flexible, common-sense, cost-effective solution. And I hope that you will do that.

Your lawyers keep telling you not to interfere because there is ongoing litigation, but these are policy issues, and the Federal judge has now asked for a better policy. And I hope that you will work with us, not just leave it to this Member or this committee to try to find a solution, but work with us to find a solution that will not cause you other problems in other cities, but will give us some common-sense, flexible approaches to these problems.

Ms. BROWNER. Mr. Filner, I have personally come to appreciate your leadership and your interest in these very difficult issues, and we would very much like to work with you. As I understand it, the judge—this is for the other Members of the committee, a piece of litigation that I think may be in the fifth or sixth year now, it has been going on for some time. The judge in this case has allowed EPA and the City of San Diego to come up with a plan by January 1st of next year.

I think the hope, as Mr. Filner suggests, is that that would allow, if appropriate, Congress to take action. We will certainly work to provide whatever technical assistance, evaluation, knowledge is important to this committee, as you look at this issue, and we will continue to work with you and the other Members of the delegation on this problem.

Mr. FILNER. I appreciate and look forward to an invitation to address your son's class.

Ms. BROWNER. Certainly.

Mr. APPLEGATE. Thank you, Mr. Filner.

Mr. Mica.

Mr. MICA. Thank you, Mr. Chairman.

I have a couple of questions and a couple of comments. First of all, if EPA elevation to Cabinet-level status was ever to see the light of day, would you support the Johnson–Mica risk-assessment language?

Ms. BROWNER. Mr. Mica, as I think you are well aware, we have discussed this on several other occasions. We are firmly committed to the use of risk assessment, to the use of cost-benefit analysis.

Mr. MICA. Could you accept my language?

Ms. BROWNER. We have conveyed to you concerns with your specific language.

Mr. MICA. So you will not?

Ms. BROWNER. The language that you have proposed is of concern to us.

Mr. MICA. Thank you.

Have you seen the language dealing with risk assessment in the bipartisan alternative to H.R. 3948?

Ms. BROWNER. No, we only received the alternative late——

Mr. MICA. Would you look at that and give me a written evaluation, since you have indicated a willingness to work together?

Ms. BROWNER. Certainly.

[The information follows:]

MESSRS. MICA AND GEREN'S QUESTIONS ON RISK ASSESSMENT LANGUAGE IN SHUSTER-HAYES AMENDMENT

This proposed amendment to the Clean Water Act poses a number of difficulties for EPA. In the first instance, it is very prescriptive, in that it requires risk assessments and broad social and economic assessments to be performed for nearly all actions taken under the act. The amendment describes what would have to be included in such assessments and analyses, and does not allow for fitting the assessment to the specific regulatory action at hand. For example, the amendment calls for requiring ". . . to the maximum extent possible, a quantitative estimate of the uncertainty inherent in the risk assessment.". Such a requirement may pose a difficult problem of data acquisition and analysis, as would the required comparison with other risks, the analysis of incremental risk avoided, etc.

The amendment also confuses risk assessment issues with risk management issues in that it calls for risk management considerations such as social and economic costs to be included in the risk assessment guidelines.

Finally, the procedures called for in this amendment regarding notice and comment for the guidelines and the risk assessments themselves raise serious issues of judicial review and timing.

Mr. MICA. Have you seen the Safe Drinking Water Act as it was passed by the Senate and the provisions for risk assessment that came with that legislation as it passed the Senate?

Ms. BROWNER. There are several risk provisions included in the drinking water bill——

Mr. MICA. Are they satisfactory and acceptable to you?

Ms. BROWNER. We believe that some of them are appropriate. We have taken a position of no position on others of them.

Mr. MICA. Superfund, we have risk assessment language as it passed Energy and Commerce. Are you pleased with that language and can you accept that?

Ms. BROWNER. That might be an amendment that was adopted at the Energy and Commerce full committee markup last week and I have not had the opportunity to preview that.

Mr. Mica, if I might, again, restate that we are firmly committed to the use of these tools. In fact, the bill that is before this committee, the Clean Water Act reauthorization, includes, I think, in several important ways, and I hope the committee is aware of this, the use of cost benefit in establishing effluent guidelines. We think that is absolutely essential for inclusion in this.

Mr. MICA. Some of the language in H.R. 3948 is meaningless, and that is why you have three forces that have come together, unfunded mandates, risk assessment, and property rights, who actu-

ally have helped motivate this hearing rather than go right to a markup.

I have a couple of other questions relating to what your Agency is doing to deal with some of the problems in legislation that already exists. Local governments are already reeling and choking under oppressive EPA regulations. And I didn't plan this. Yesterday I received this letter from the City of Oviedo in my district. You are familiar with it.

It says, "On Monday evening, May 16th, the city council met to discuss another unfunded mandate, the Environmental Protection Agency Discharge Elimination System, NPDES program. This requirement, as you can see from the attachment, will cost the taxpayers of Oviedo $23,000 for the first phase."

We are only getting into the first phase. This doesn't deal with anything that is coming out of here or anything potential as far as rules of what your Agency may come up with in the future.

You said a few minutes ago in your testimony—and you were talking about an ecological system—you said the system cannot take any more. And you were talking about an ecological system. I submit that our local governments can't take any more.

Ms. BROWNER. We agree with you, Mr. Mica. That is why this administration has called for a change in the combined sewer overflow. We have suggested changes that will result in $10 to $12 billion a year in savings for local governments. We agree that there is a need to address these problems. It is why we are advocating the SRF, the State Revolving Fund. If Congress does not act this year, there will not be money to the States.

I have money right now. Right now, I have $600 million for the States to address what they would refer to as unfunded mandates that I can't give to the States because the drinking water law hasn't created the mechanism for me to hand out the dollars. I have the dollars. You all voted for them. I want nothing more than to give these dollars to local government.

Mr. MICA. Thank you. We want it, too. My local officials feel if it is important enough to mandate it is important enough for the Congress to fund. Let's not talk about just what is proposed. Let's talk about what is existing.

Very briefly, you said 60 percent of the population drinks surface water. The greatest source of surface water pollution, one of the greatest sources, is leaky sewer pipes, particularly in Florida, which you are familiar with, and also broken sewer pipes. Most of the 70 million people you talked about in our cities live in cities where the sewer pipes are deteriorating, contaminating the groundwater.

Back in March, March 24 and April 11, Administrator Coleman was written about. The EPA was proposing a ban on NMA, and I believe it is pronounced acrolamite, which is a sealant, a grout.

Here you are telling the cities to do one thing, here you are proposing a cost-effective solution, a ban on a cost-effective solution to repair the greatest source of contaminant, one of the greatest sources of contaminants to groundwater, and EPA, the industry and a Senator and a Congressman have asked you in these letters to open up and keep the record open, the docket, to accept further testimony.

Do you know what EPA has done in this situation?

Ms. BROWNER. I am not familiar with the particular NMA, which apparently—I don't even know what it is, I apologize. I would be more than happy to look into it. If it is appropriate, we would also obviously want to accept whatever information any party may have so that we can make an informed decision.

Mr. MICA. Mr. Chairman, I ask unanimous consent to have these two letters from the Senator, one is Senator Faircloth, and also one from Congressman Albert Wynn, to be made a part of the record, and also ask EPA to respond to the status of that.

Mr. APPLEGATE. Without objection.

Ms. BROWNER. We would be more than happy to do that. Thank you.

[The requested information from Ms. Browner and the letters of Rep. Wynn and Sen. Faircloth follow:]

MR. MICA'S QUESTION ON ACRYLAMIDE (NMA)

Several parties have requested that EPA reopen the record on the Acrylamide/NMA rule, ostensibly in order to impart information regarding the efficacy of the substitutes for Acrylamide and NMA discussed in the proposed rule. Two factors prompted EPA not to reopen the record for this purpose. First, in the process of writing the rule, EPA received extensive written and oral comments bearing on this issue, and has continued to follow the course of the performance and costs of the substitutes. Since this information is in hand, and will be addressed when the final rule is issued, no additional comment period is necessary.

Second, reopening the record would further delay promulgation of the final rule initially proposed over two and a half years ago. Uncertainties regarding the timing and content of the final rule have frustrated municipal and private grouting, contractor purchasing and planning activities throughout this period, and should be resolved as quickly as possible. For these reasons, we have concluded that prompt promulgation is in everyone's best interest.

ALBERT R. WYNN
4TH DISTRICT, MARYLAND

COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS

COMMITTEE ON FOREIGN AFFAIRS

COMMITTEE ON POST OFFICE AND CIVIL SERVICE

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CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515-2004

March 24, 1994

The Honorable Lynn R. Goldman
Assistant Administrator
Prevention, Pesticides and Toxic Substances
Environmental Protection Agency
401 M Street S.W.
Washington, D.C. 20460

MAR 28 1994

Dear Administrator Goldman:

I have been contacted by Instituform East, a business located in Landover, Maryland in my Congressional District, regarding a proposed EPA ban of acrylamide and N-methylolacrylamide (NMA) grouts.

I urge the EPA to reopen the docket to accept further comments on its proposed ban of these grouts under Section 6 of The Toxic Substances Control Act (TSCA). (56 Fed. Reg. 49863, Oct. 2 1991)

These grouts are an important tool in the repair of sewer systems. Loss of this tool would substantially impair the ability of municipalities located in my state to effect repairs without undertaking major and costly roadway construction.

It is my understanding that the market has changed considerably since the EPA proposed to ban acrylamide and NMA grouts almost two and one-half years ago. Many, if not all, of the products claimed in the proposed rule to be marketable and feasible alternatives to these grouts have been proven not to be efficacious and, in fact, have been withdrawn from the market. Therefore I question whether the EPA would be able to sustain its legal burden under TSCA Section 6, particularly in light of the case Corrosion Proof Fittings V. EPA.

The sewer service industry has expressed interest in working with EPA on a voluntary, cooperative basis to address the EPA's concerns with worker exposure to acrylamide and NMA grouting materials. We believe this expression of interest is worthy of serious EPA consideration. The EPA has stated repeatedly in the past year or so that if prefers to work with industry on a voluntary basis, rather than to pursue other more burdensome regulatory resolutions.

March 24, 1994
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I therefore strongly urge the EPA to act immediately to reopen the docket to accept comment on its proposed ban of acrylamide and N-methylolacrylamide (NMA) grouts under TSCA Section 6.

Sincerely,

Albert R. Wynn
Member of Congress

ARW:mak

LAUCH FAIRCLOTH
NORTH CAROLINA

United States Senate

WASHINGTON, DC 20510-3305

April 11, 1994

The Honorable Lynn R. Goldman
Assistant Administrator
Prevention, Pesticides and Toxic Substances
Environmental Protection Agency
401 M Street, Southwest
Washington, DC 20460

Dear Dr. Goldman:

I write on behalf of the National Association of Sewer Service Companies to urge EPA to reopen the docket to accept comment on its proposed ban of acrylamide and N-methylolacrylamide (NMA) grouts under Section 6 of the Toxic Substances Control Act (TSCA). 56 Fed. Reg. 49863 (Oct. 2, 1991).

These grouts are an important tool in the repair of sewer systems. Loss of this tool would substantially impair the ability of municipalities in our state to effect repairs without undertaking major and costly roadway construction.

It is our understanding that the market has changed considerably since EPA proposed to ban acrylamide and NMA grouts almost two and one-half years ago. Many, if not all, of the products claimed in the proposed rule to be marketable and feasible alternatives to these grouts have been proven not to be efficacious and, in fact, have been withdrawn from the market. We thus, question whether EPA would be able to sustain its legal burden under TSCA Section 6, particularly in light of *Corrosion Proof Fittings v. EPA*.

The Sewer service industry has expressed interest in working with EPA on a voluntary, cooperative basis to address EPA's concerns with worker exposure to acrylamide and NMA grouting materials. We believe this expression of interest is worthy of serious EPA consideration. EPA has stated repeatedly in the past year or so that it prefers to work with industry on a voluntary basis, rather than to pursue other, more burdensome regulatory resolutions.

The Honorable Lynn Goldman
April 11, 1994
Page Two

I, therefore, strongly urge EPA to act immediately to reopen the docket to accept comment on its proposed ban of acrylamide and N-methylolacrylamide (NMA) grouts under TSCA Section 6.

Sincerely,

Lauch Faircloth
United States Senator

cc: Joseph Carra

Mr. APPLEGATE. Mr. Wise.

Mr. WISE. Thank you.

I had meant to get into the unfunded mandate issue, but I have been sitting here thinking, has EPA done any analysis of unfunded non-mandates? I will give you an example. I grew up on the Kanawha River. Back in the 1960s, before there was a Clean Water Act, we had large chemical industry; we had no wastewater treatment and municipal waste. The result was that several children a year caught meningitis. In terms of air pollution, the same story.

Incidentally, for those who think that problem is cured, my children are educating me, too, Ms. Browner. Go to any day-care center. There is a new phenomenon now. It is called a nebulizer. It is where children in urban areas sit and breathe in medicine for 12 minutes or so because air in urban areas, they can't identify quite what it is. It is not an allergy. It is an irritant.

That is what we are getting, not just my child, they have a nebulizing period now in many of our kindergartens and day-care centers.

So what is the cost of unfunded nonmandates to States? I am just curious. What would the State of West Virginia pay if the Clean Water Act had never been enacted and the State had not been receiving at the time 75 percent match money, then 55 percent, now of course solid waste State revolving fund?

What is the cost of flooding, which is still taking place from clearcutting and other reasons, because there was not a mandate in place?

What is the cost of decline in groundwater, one of the major problems we are facing with our aquifers in West Virginia?

Does anybody live on a well? We do. Our well is just about shot now because nobody had a mandate in place to deal with industrial drilling.

So I just wonder, I hear a lot about these unfunded mandates. I always love to hear from local officials who then ask me where the next 80 percent is coming from for the highway that they want to build.

So I hear a lot about these unfunded mandates. But I wonder about the nonfunded mandates. I understand that is not an issue—but if EPA does a study on that, I would sure appreciate it.

Incidentally, I can't take credit for this next question. Representative Byrne passed it to me on the way up. While we are talking about takings, the last four actions of the Federal Reserve System have greatly injured my wife and my retirement system. We are in mutual funds and other things. Are we entitled to some kind of compensation for this undue taking? I didn't agree with it. It wasn't voted on by the Congress. It certainly seems to me to be a precipitous administrative act.

But if you have got a study on that, I would appreciate it, or a legal opinion.

Now, if I could ask some other questions, mixing zones, I thought they were already permitted.

Ms. BROWNER. They are.

Mr. WISE. I know in our State we are using those. I think that is an important element.

Multimedia planning. Where exactly is EPA on that? Many urge, if we are talking about the environment, that multimedia planning is a good idea. The only problem is if we are going down the road of a specific Clean Water Act, air pollution, so on, we may be running counter to that.

Ms. BROWNER. EPA is absolutely committed to multi-media planning. As you point out, we are responsible for implementation of individual laws of the Clean Air Act, Clean Water Act, RCRA, Superfund, so on. There are 13 major environmental statutes, and then others, smaller statutes that we have responsibility for implementing.

As these programs have developed over the last two decades, the reality is that we have tended to look narrowly at implementation of the individual statutes and not at the integration and the consequences of our actions under one statute on perhaps other parts of the environment, other parts of the public's health.

There is a need to look in a multimedia fashion, to understand that when you make a decision under the Clean Water Act, while it may resolve a water quality problem, don't make it in such a way that it just creates an air quality problem or a waste disposal problem.

In the Office of Enforcement reorganization that we recently undertook, we created within that office for the first time ever a multimedia unit so that we could actually look in our enforcement efforts at those sorts of issues.

We have also created a program that we refer to as industry by industry, our common sense initiative, which is going to—we will shortly select six to eight industries where we will work with the industry, with the environmental community, with the State agencies to craft for that specific industry proposals or blueprints for environmental compliance taking into account all of the laws that apply to that industry, pollution prevention opportunities, enforcement, looking comprehensively at an individual industry, moving beyond a one-size-fits-all mentality.

That is the only way we are going to be able to deal with the problems that are out there.

Mr. WISE. In Kanawha Valley, it is usually subject to just about every environmental issue, and often is a focal point. I would urge to you consider the Kanawha Valley in the chemical industry, which I found to be very responsive, and through voluntary actions have done significant efforts themselves.

I happen to think you are absolutely correct on the multimedia issue. My one concern is, in the reauthorization process, we are moving on different tracks. We move a Superfund bill one year, maybe we will move it the same year as clean water, it then becomes clean air. At some point we have got to close this all together if we are going to do multimedia planning.

I am not sure how that is. If you have any thoughts or suggestions—otherwise, we are always going to be addressing one bill at a time.

Ms. BROWNER. In the recommendations we have made to the Congress, on the drinking water reauthorization, clean water reauthorization, and Superfund, we within EPA and within the administration have looked at that integration and have worked very

hard to avoid the kind of unintended consequences we have seen previously of simply moving pollutants from one media to another media.

And we are willing to continue to work with the Congress in just that way to ensure that we don't end up with environmental statutes that tell those who are regulated to go in five different directions simultaneously. That is not good for them, clearly, but also not good for the health of the American public.

Mr. WISE. In one small valley, particularly, the site of a chemical industry, it has worked very hard. We have got every kind of media or medium to work with us. We just urge that might be one area of consideration.

Thank you.

Mr. APPLEGATE. Thank you, Mr. Wise.

Mr. Ewing.

Mr. EWING. Ms. Browner, thank you for putting in a long morning here. I think that while there is a lot of strong feeling on this piece of legislation, we all agree we need to protect our water supply.

Have you any kind of analysis of the proposed legislation that the administration is promoting as to how it compares with what the current Clean Water Act provides and how much expansion, how much new authority would be given to your Agency under the administration's proposal?

Ms. BROWNER. The administration's proposal includes some very important tools to getting this job done, the nonpoint source recommendations we make, the watershed approach recommendations we make, the SRF.

I don't know if it is as simple as just adding up what is changed, what isn't changed. I think the real question is, under implementation of these recommendations, under implementation of 3948, will the water be cleaner, will it be done in a way that is responsive and cost effective?

And I believe that is absolutely true, that that will be the case.

Mr. EWING. But do you have any polished analysis of the difference that my office could have?

Ms. BROWNER. We have two documents that we would be more than happy, if the Chairman would like us to, to provide not just to you, Mr. Ewing, but to all the Members of the subcommittee. One is President Clinton's water initiative, which is a comprehensive set of recommendations. We also have a cost analysis, which is a separate document which we could provide to you, Mr. Ewing, and to anyone else or all of the Members of the subcommittee, if that would be helpful.

[The information referenced above can be obtained from the EPA. The publication order numbers are as follow: (1) President Clinton's Clean Water Initiative (EPA 800–R–94–001); (2) President Clinton's Clean Water Initiative: Analysis of Benefits and Costs (EPA 800–R–94–002) (3) President Clinton's Clean Water Initiative: Analysis of Benefits and Costs, Executive Summary (EPA 800–S–94–001).]

Mr. EWING. I would appreciate that because one of my major concerns, we kind of give carte blanche authority on a number of different areas. We talk about the Superfund and all the different

things we do, and we need to go back and answer to our voters as to what we have done and how much control we have given over their lives that we give to the bureaucracy.

Your opening statement was very appealing. We all want motherhood, apple pie, clean water. But, you know, potato chip bags and cans that are thrown in the river are not the problem of farmers. They are not the problem of industry. They are the problem of a careless public.

I don't think there is a bill we can pass that will keep you from sending those up in streams and lakes, do you?

Ms. BROWNER. I agree that industry and farmers are not to blame for litter. I would suggest, however, that the tumor on the fish is a result of contaminations in our water supply.

Mr. EWING. And will you notice I did not question that as part of your statement, because that is something that should concern us, and maybe that is the tumor that was caused by pollution, and maybe it isn't. I don't know. But the thing is, do we have a comparison, do we ever have perfectly clean water?

I mean, the buffalo used to go in the water, they used to die in the water. I come from a rural area. We used to have cattle die in our streams. There have always been pollutants going into the water.

Ms. BROWNER. You are right that there have been wildlife that have made use of our streams that have perhaps, if you wanted to apply a strict definition of pollution, have contributed to pollution. But nature has its way of creating an appropriate balance.

What has happened as we have become increasingly industrialized, as our populations have expanded, as our demands on our water resources have necessarily grown, is that that balance has been significantly disrupted.

And so what might have been acceptable before any of us were here in terms of, quote, impacts to a river or a lake, are now very different, because of everything we have added to that system. And what we are seeking to address is what we, the people, are contributing in terms of problems in our rivers and our lakes.

Mr. EWING. You mentioned wetlands and you mentioned nonpoint pollution sources. Those are very important issues in districts like I represent in Illinois. I believe that there are reasonable regulation and reasonable actions we can take on both. But they must be cost effective. They must be practical. They must be affordable.

And while we have tried to work out the wetlands issue so that we are not worried about keeping a small piece of ground in the middle of a field that has really no value to the wetlands system, and protect those real wetlands, we haven't been able to do that with your Agency.

I think that is something you have to learn. If we are going to cooperate and address these problems, the EPA has to be able to work with farmers out there.

Ms. BROWNER. Mr. Ewing, one of the reasons why this administration, why I supported the role in increased—and a significant role for the Soil Conservation Service is because of the relationship, the historical relationship they have with the farmers of this country. We believe that it was best in trying to deal with the wetland

issues, with the kind of complaints that were being raised, to look to an Agency that had a relationship.

Now, as I understand it, since we have begun our work with the Soil Conservation Service, in talking to farmers across the country, they do have a better appreciation for the value of wetland resources. They do have a better understanding of what the law requires of them, and allows them to do.

And so I think we have sought within this administration to address the kind of concerns that you raise. And if there are other steps that are appropriate to be taken, then we are certainly interested in being made aware of those.

We are committed to protecting the vital functions of the wetlands of this country. They are very important both in terms of habitat and water quality. We are committed to doing it in a way which recognizes the needs of the people of this country and a process that creates a process that is fair and streamlined.

Mr. EWING. Mr. Chairman, my time is up, but I would just like to say one thing to Director Browner. I know for a fact that in the county in which I live, the wetlands designation was all done from a desk. Many mistakes were made. You should be careful when you talk about the number of acres that existed and how many have been destroyed.

That acreage that was put forth as the number of wetlands was very misleading and very poorly documented. We must protect our wetlands, and I support you in that. But real wetlands.

Thank you.

Mr. APPLEGATE. Thank you, Mr. Ewing.

Mr. Geren.

Mr. GEREN. Thank you, Mr. Chairman.

I just want to respond briefly to the characterization of the unfunded mandates issue that my friend Bob Wise gave a moment ago. I certainly understand and appreciate the perspective that he offered. But I am sure the communities he represents are no different than the communities I represent. They have more needs than they have money.

And the frustration that I hear isn't that the goals of the EPA aren't worthy. It is just a question who is going to set the priorities on how we spend those scarce resources. We may have a community that thinks its highest priority is infant health care needs or their county hospital or childhood nutrition.

The concern on these unfunded mandates is people come in and tell them, We don't care what you think your priorities are; your priority is going to be this or you go to jail or you face $25,000-a-day fines.

If we had cities frittering away money for useless endeavors, perhaps we would have a different issue. But I imagine every Member here represents communities that are struggling like the communities I represent to meet their basic human needs of their communities and their safety needs.

So I think the unfunded mandates issue is something we must bear in mind, and not so much what those mandates are, but who makes those decisions and how we make those decisions.

I would like to ask a question about the risk assessment, and Mr. Mica addressed it to a certain extent in his questioning. Certainly

there is nobody on Capitol Hill that appreciates the strength of the risk assessment issue more than do you. If it weren't for that, you would be Secretary Browner today instead of Administrator Browner, because that rule probably would have passed and the EPA would now be of Cabinet rank.

You said there are parts of the Senate safe drinking water risk assessment bill that you would support and parts that you wouldn't support.

Ms. BROWNER. That is not quite what I said. I said in response to Mr. Mica's question, risk is included in at least two—if my memory serves me correctly, perhaps four different ways in the drinking water bill that passed the Senate. We support several of those provisions, and in other instances, we do not oppose those provisions. But it is not—it is not just one sentence in the drinking water bill that includes the risk. It is included in many instances.

Mr. GEREN. I understand that point. As we try to put together this bill, there are many of us on this committee that would like to see risk assessment put into it. It is not present in Chairman Mineta's bill.

Could you furnish the committee so we know where you do stand the provisions you wouldn't oppose and the ones that you do support? I think that would be helpful to us in our deliberations as we consider this bill.

Ms. BROWNER. We are certainly happy to provide something in writing.

But if I might, just quickly, try and answer orally, in the recommendations included in the administration's package, we have advocated that in the setting of water quality standards, that risk to people, risk to our aquatic—to fish, be included in the analysis before a decision is made as to what is the appropriate standard to set for a discharge to a river, lake or stream.

Once EPA undertakes its responsibility under the water quality section, the standards, the criteria and standards section, then the States have decisions that they have to make in adopting those criteria, the standards they adopt, which then appear in the individual permits.

Mr. GEREN. If I could interrupt you, I just worry we are going to run out of time, and I want to make sure that we come out of this with an understanding that we are going to—we will get your assessment in writing of the provisions in the Senate bill that you like, and that you won't oppose.

I would also ask you to do the same thing with the provisions in the bipartisan substitute that will be considered by the committee as well.

So rather than try to talk about it in the little bit of time here, if you could furnish an assessment in writing for each of those, and the sooner the better, because this is going to move quickly and we don't want to butt our head against a brick wall, if they can be avoided.

[The information follows:]

MR. GEREN'S QUESTION ON RISK ASSESSMENT IN SAFE DRINKING WATER ACT (SDWA)

The Safe Drinking Water Act (SDWA) reauthorization bill, passed by the Senate on May 19, 1994, includes several significant provisions for risk assessment. As rec-

ommended by the Administration, the Senate placed greater emphasis on risk considerations in the process of selecting contaminants for future regulation. EPA strongly supports this reform. EPA also supports the Senate requirement of publishing risk reducing benefits and costs for each drinking water regulation (including the risks to sensitive subpopulations). The Senate bill gives EPA "bounded" flexibility for setting drinking water standards in the future, which EPA does not oppose. EPA also does not oppose the requirement to conduct risk assessment and cost-benefit analysis for major EPA rules.

Ms. BROWNER. In the current Clean Water Act, risk is considered by the Agency. It is one of the tools we use.

Mr. GEREN. I understand that. You mentioned earlier you all have done something like a thousand risk assessments. I am told that documentation for these risk assessments has been hard for outsiders to get their hands on.

Also, I would like to ask that you provide the committee a listing of all the risk assessments that have been done since you have been administrator, and whatever supporting documents that could help us understand the methodology.

Ms. BROWNER. Certainly.

Mr. GEREN. Mr. Chairman, I ask that I could introduce into the record a report done by the American Petroleum Institute regarding H.R. 3948.

The CHAIR [presiding]. Without objection, so ordered.

[The information received follows:]

American Petroleum Institute
Written Comments on Clean Water Act Reauthorization--H.R.3948
for the Water Resources and Environment Subcommittee of the House
Public Works and Transportation Committee
May 24 and 26, 1994

Introduction

The American Petroleum Institute ("API") is pleased to provide the following comments relating to the House Committee on Public Works' current initiatives to amend the Clean Water Act ("CWA" or "the Act.")

API is a trade association representing over 300 members, who are engaged in all aspects of the petroleum industry--exploration and production, transportation, refining and marketing. Many of API's members may be affected significantly by substantive amendments to the Clean Water Act.

One fundamental point that should be kept in mind as the House considers Clean Water Act reauthorization is that the Clean Water Act is working well and has caused a significant improvement in the nation's water quality since the Act's enactment in 1972. Further progress is built into the Act and will occur without substantial amendments to current law.

Point Sources

In 1987, the Clean Water Act was amended to include significant new authorities to control discharges of toxic pollutants. For example, the water quality authorities of the Act require states to adopt numerical water quality criteria for toxic pollutants and to identify and control toxic "hot spots"--areas where water quality standards cannot be achieved because of toxic pollutants.

Historically, point sources have been the focus of the Clean Water Act and EPA regulations. Efforts to reduce discharges of pollutants from point sources have been extremely successful. Even representatives of the environmental community have acknowledged that discharges of toxic organic pollutants from sources in 22 industries have achieved a 99% reduction[1].

Furthermore, in 1987 Congress added section 304(l) to the Act to address the need for further toxics reduction. Section 304(l) requires regulatory agencies to identify waters which will not meet water quality standards through the application of "best available technology." If point sources are a significant part of the problem, section 304(l) requires dischargers to implement

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[1] Robert W. Adler, et al., The Clean Water Act 20 Years Later (Island Press, 1993), p. 16.

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individual control strategies to address the concerns. This provision of the current Clean Water Act is now being implemented and should be given a chance to resolve any remaining concerns. It will complete the drive to eliminate point sources as a significant factor in water quality concerns. Arguably, additional requirements on point sources will provide little additional benefits, since the section 304(l) program, once fully implemented, will already have eliminated point source toxics as a significant threat to water quality.

Another initiative of the 1987 amendments was section 304(m), which established a new planning process for developing new and revised effluent limitations guidelines and new source performance standards. EPA's obligations under this section ensure that the technology-based requirements of the Act keep pace with the development of new and more effective pollution control technologies.

The Council on Environmental Quality has identified nonpoint sources as the major remaining source of further impairment to water quality. Numerous other studies support this conclusion. For example, in a study of the proposed Great Lakes Water Quality Initiative, the Council of Great Lakes Governors concluded that: (1) point source discharges of the major chemicals of concern represented just a few percent of the total loadings of those chemicals; (2) further controls on point sources would not likely

to be cost-effective, (3) further controls would be completely ineffective in isolation; and (4) focusing on point source dischargers would create unrealistic expectations on the part of the public as to what benefits would be achieved by further point source controls [2].

Against this backdrop, Congress should not enact broad new authorities that will lead to further ratcheting down of point source discharges without considering whether the benefits of these reductions will be worth the costs. With a high level of control in place already, the price of further control of point source discharges is likely to be extremely high for many industries, including the petroleum industry, and is unlikely to result in a commensurate environmental benefit. Now is the time for Congress to ask whether this high price should be paid in situations where little or no environmental benefits would be achieved. Instead of enacting broad new authorities which encourage or direct EPA to pay little heed to the important question of whether the nation will be getting value for its expenditures, Congress should decide that it is time to take stock of the achievements of the past and direct further controls where they are needed and can be demonstrated to achieve health or environmental results.

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[2] "The Great Lakes Water Quality Initiative: Cost Effective Measures to Enhance Environmental Quality and Regional Competitiveness," DRI/McGraw-Hill (September, 1993), at pp. II-4, II-15.

Cost-Benefit and Risk Assessment Analyses

A General Accounting Office (GAO) study on unfunded mandates was released on April 5th, 1994 to the House Government Operations Subcommittee on Human Resources and Intergovernmental Relations. This study is attached to the API written comments for the Subcommittee's review. The GAO Study offers an excellent description of the dilemma of our nation's municipalities and counties regarding both the cost of unfunded mandates and the lack of mandate flexibility, which intrudes on local budget decisions and drives spending priorities (GAO Study, p. 9). According to GAO, inflexible mandates result in impractical and wasteful expenditures while ignoring more practical, effective solutions, preferred by local governments, but not allowed under existing environmental mandates.

The GAO Study specifically identified the problem with the "one size fits all" approach (GAO Study, page 10), which the Federal government often uses in establishing various requirements. GAO reported that: "[o]fficials told us [GAO investigators] that it is not reasonable to expect every city of every size in the every geographical location to be able to do exactly the same thing efficiently and effectively." (GAO Study, p. 10).

GAO reported that state and local officials were concerned

that some requirements were not based on sound scientific assessments, resulting in regulations that were unreasonable, inefficient, or extremely costly. (GAO Study, p. 11).

Specifically, the GAO Study cited the Safe Drinking Water Act's Maximum Contaminant Level (MCL) for a potential carcinogen for Columbus, Ohio. This MCL limit would control the pollutant such that "an adult would have to ingest about 3,000 gallons of contaminated water per day to be at risk." (GAO Study, p. 11).

API requests that the Subcommittee review this GAO Study and the President's Executive Order 12866 (also attached) and incorporate the risk/cost-benefit recommendations into its consideration of the Clean Water Act. The Principles of Regulation, identified in the Executive Order, specifically call for federal agencies to identify alternatives, including *the alternative of not regulating*. Most importantly, API believes that Executive Order 12866 makes it clear that regulatory approaches should "maximize net benefits--including potential economic, environmental, public health and safety and other advantages: distributive impacts and equity." (58 Fed. Reg. 51735, Oct. 4, 1993.) These principles should apply broadly to mandates in the Clean Water Act.

Groundwater

The integrity of the nation's groundwater, particularly groundwater sources that may be used for drinking water, is of obvious importance for all Americans. However, this fact does not mean that Congress needs to incorporate broad new groundwater authorities into the Clean Water Act.

Primary responsibility for groundwater resides--and should continue to reside--with the states. Groundwater issues are essentially local and are best addressed through authorities and procedures that recognize this fact. The states are diligently fulfilling their responsibilities. Congress has previously, and for good reason, decided that the expansion of the Clean Water Act authorities to groundwater was unnecessary.

Existing federal authorities also address groundwater and are adequate to do so. Included among those authorities are the Resource Conservation and Recovery Act, the Comprehensive Environmental Response Compensation and Liability Act, and the Safe Drinking Water Act.

Further, H.R. 3948 is not clear as to what activities would require CWA groundwater permitting nor what constitutes a "direct

hydrologic connection." To enact a program with this inherent ambiguity can only result in regulatory confusion, an unreasonable drain on agency resources, and likely litigation.

Mixing Zones

Mixing zones allow dischargers to meet water quality standards in a rational manner by allowing discharges to a carefully delineated area in which to achieve such standards when the discharges will not pose a health or environmental hazard within this area.

Mixing zones are a valuable tool, the loss of which could have a significant impact on the petroleum industry. The Subcommittee should delete provisions relating to mixing zones.

Any effort to impose federal regulations to prohibit or limit the use of mixing zones is ill-advised. Whether mixing zones are appropriate in specific cases is a highly site-specific matter. A number of factors must be considered, including the size and quality of the receiving water body, the organisms located near the discharge, the flow of the discharge and the receiving water--to name just a few.

Toxic Pollutants

As is noted above, the existing Clean Water Act authorities addressing point source discharges of toxic pollutants have resulted in dramatic reductions in these discharges since 1972 and will continue to reduce them even further. Accordingly, there is no need for Congress to expand these authorities. While API commends the Subcommittee for including, in provisions relating to toxic pollutants, requirements that EPA consider social and economic impacts, and other factors, API still believes that no new authorities are needed to control toxic pollutants.

Enforcement

The Clean Water Act contains ample enforcement authorities. Both governments and citizens may enforce the requirements of the Act. And the Act is structured to make enforcement easy: permittees must file monthly reports, which are available to the public, showing whether they have complied with the terms of their permits. For all practical purposes, any deviation from permit requirements is actionable. Some have said that Clean Water Act enforcement is like shooting fish in a barrel. It seems clear that the system is well-designed to penalize those who do not comply with the Act and that there is no justification for changes to the Act's existing enforcement provisions.

API is particularly concerned over several provisions in H.R. 3948 that would unnecessarily expand enforcement authorities. For example, allowing duplicative filing of lawsuits where a state is diligently prosecuting an enforcement action under comparable state law would undermine state enforcement activities. There would be little incentive for a permittee to resolve an enforcement action with the state if the permittee could expect duplicative enforcement.

Another example of an ill-advised change in the Act's enforcement provisions is the effort to partially reverse the Gwaltney decision. Citizen's suits are of the greatest value to the public if they are reserved for situations in which violators have not yet installed the necessary controls and practices to ensure that there is little chance of future violations.

API also objects to the statutory requirement that civil penalties must, at a minimum, equal the economic benefit of noncompliance. There is a great deal of uncertainty in calculations of economic benefit, and a statutory requirement may only encourage enforcement authorities to calculate penalties that bear little or no relationship to actual economic benefit. Finally, API objects to the steep increases in the amount of penalties that can be assessed in administrative actions.

Pollution Prevention Planning

H.R. 3948 would impose mandatory pollution prevention planning on many petroleum industry facilities that are already implementing such plans voluntarily or in response to other federal or state requirements. This additional layer of prescriptive requirements is unnecessary and burdensome and therefore, should be eliminated. Many facilities already have pollution prevention planning programs; those that do not should be encouraged to develop a single comprehensive, multimedia plan for the entire facility. Facilities also should be given the needed flexibility to implement the cost-effective options they identify through such plans as long as they result in greater environmental protection.

Antidegradation

H.R. 3948 would require states to develop antidegradation policies within two years of enactment. API is concerned that this section of the bill contains unrealistic deadlines and a "hammer" provision. In addition, API also opposes the requirement for antidegradation reviews prior to issuance or reissuance of NPDES permits if a new limit is required in the permit. Antidegradation review should be triggered for existing permits only if the discharger is asking for a significant increase in pollutant discharges.

Intake Credits

Congress should act to reaffirm the Clean Water Act principle that dischargers are held responsible only for the pollutants that they themselves add to their discharges. Congress should clarify that EPA shall grant "intake credits" to dischargers for pollutants present in their intake waters. This issue has received considerable attention in the proposed Great Lakes Water Quality Initiative ("GLI") in which EPA has usually taken the position that it does not have authority under the Clean Water Act to provide for intake credits. However, EPA has previously approved state programs that do allow for intake credits. The combination of potentially more stringent permit limits (e.g., rural rainwater contains about 60 times more mercury than the GLI would allow in point source discharges if technology improves sufficiently to provide compliance measurements at those levels) and the trend towards ever more sensitive analytical capabilities will increase the need for intake credits by increasing the potential that intake waters exceed discharge limits.

Wetlands

Reform of the existing burdensome wetlands regulatory process is a widely acknowledged priority. While H.R. 3948 was amended to include some positive wetlands provisions, it does not provide the breadth of reform that is needed. Indeed, some current

problems with the wetlands process are worsened by H.R. 3948. In contrast, H.R. 1330, sponsored by Congressman Jimmy Hayes of Louisiana, provides for classification of wetlands according to their value and function, affords significant protection of the rights of private property owners, and does not require that wetlands mitigation banking credits be deposited prior to the start of a project. API strongly supports the wetlands provisions of H.R. 1330. H.R 1330 is the most comprehensive and substantive wetlands reform package in either the House or the Senate. API firmly believes that additional options such as concurrent mitigation banking, in lieu fees, and preservation of high value wetlands be included in any mitigation banking program.

Conclusion

The current Clean Water Act is working well and does not need to be amended. Congress should give serious consideration to whether any proposed amendment to the Clean Water Act will produce a commensurate benefit to human health or the environment.

Mr. GEREN. Thank you, Mr. Chairman.

Ms. Browner, I look forward to your comments in writing. I do think the quicker we can get to that the better chance we have of reaching some kind of mutual agreement. Thank you.

Thank you, Mr. Chairman.

The CHAIR. Let me take the prerogative of the Chair. Since we seem to be outnumbered by Democrats right now, let me go two-on-one in terms of taking Democrats who are next to be recognized on the Democratic side.

Mr. Laughlin.

Mr. LAUGHLIN. Thank you, Mr. Chairman.

Madam Secretary, I want to thank you for the manner in which you have approached this job, and I certainly appreciate your responses on all but one occasion to the problems I have had in my district. I am still waiting on my letter on the chlorine compound. And your staff can make a note. I don't want you to address that right now——

Ms. BROWNER. The letter you and I discussed—I personally apologize and you will receive it immediately.

Mr. LAUGHLIN. Under H.R. 3948, citizens could petition the EPA to prohibit discharges of classes of compounds. How will the EPA ensure that society does not lose the benefits of individual compounds within the class that do not pose threats?

Ms. BROWNER. You are, I believe, Mr. Laughlin, referring to the provision in the discharge, in the effluent——

Mr. LAUGHLIN. I am talking about under the citizen action suits.

Ms. BROWNER. You are talking about the petitions that can currently be filed under the Clean Water Act to ban a particular discharge?

Mr. LAUGHLIN. Class of compounds.

Ms. BROWNER. Right. That is a discharge. It is not just a class of compounds. It is what is discharged from a point source. There is a mechanism in the existing law that permits citizens, organizations, to petition the EPA to review and, if appropriate, ban from a discharge of a particular compound or class of compounds. And the Agency has recommended in our proposal that that be retained, and that there be some process in terms of how those petitions are handled by the Agency.

Mr. LAUGHLIN. Would the EPA go to the effort to recognize there may be some individual compounds in the class that are not harmful which in fact are very beneficial, and will those individual elements be preserved?

Ms. BROWNER. Again, this is not about compounds outside of discharge. This is about the things that flow back into the rivers and lakes of this country. When a petition is filed, we would look at the individual compounds, the class of compounds, and to the best of my knowledge we are not limited in the decision we make to all within a particular class.

We can look within the class and make different decisions in terms of should some things be banned from the discharge, should other things be reduced, are other things acceptable.

Mr. LAUGHLIN. I want to move to the watershed management program. In my home area, we have more miles of pipelines than we have miles of roads. And my concern is in the watershed pro-

grams as currently structured, there would be established a precarious regulatory structure for industries that ban linear facilities, such as natural gas lines, that could cross multiple watersheds. In fact, my hometown is equidistant to two major rivers on the Gulf Coast of Texas, roughly three and a half or four miles apart. And you go a few more miles to get into other watersheds, that in the construction of these projects could be subject to different regulatory and permit requirements in each of the watersheds administered by different State and local agencies with respect to the watershed.

Would the EPA support an amendment to simply consolidate regulatory and permitting requirements so that a singular linear pipeline project that crosses multiple watersheds is not subject to duplicative or inconsistent programs?

Ms. BROWNER. Many States have undertaken to do exactly what you suggest, which is within the State to anoint a particular Agency with the authority as a pipeline moves through a lot of political subdivision, which inevitably they do.

I don't think that the watershed approach that is proposed in the administration's recommendations removes any authority from the States to make that kind of designation. And I would think that that is something that is best left to the States, to determine which Agency should have that kind of responsibility.

The issue of watersheds, again, is to allow for the development of plans that speak to the unique needs of those watersheds. It does not ignore the fact that there will inevitably be roads and pipelines that cross different watersheds. But if a State undertakes to look comprehensively at all of the watersheds within their State then there is an ability to address, as you suggest, a way to solve it.

Mr. LAUGHLIN. I would like someone from your staff to work with me on this approach and see if we can work out an amendment we can live with. Thank you very much.

Thank you, Mr. Chairman.

Mr. BORSKI [presiding]. Mr. Poshard.

Mr. POSHARD. Thank you, Mr. Chairman.

Ms. Browner, I know your job is a tough job, and I appreciate your being here.

In the original discussions of this bill, it may have been in the original draft, I am not sure of that, but there was a discussion of the addition of drinkable as being the water quality standard for this country. Did your Agency agree or disagree with that standard of water quality?

Ms. BROWNER. I think the issue is water——

Mr. POSHARD. Added to fishable and swimmable was drinkable. Did you agree or disagree with that standard?

Ms. BROWNER. The point is that so much of our surface water becomes drinking water. And so to include within the goals and the mission of the Clean Water Act the fact, the recognition that our rivers and lakes are what we drink from the tap in many instances, that was the recommendation, as I understand it.

Mr. POSHARD. Did you agree or disagree with adding the word drinkable to fishable and swimmable? That is all I want to know. I am not being critical.

Ms. BROWNER. I apologize. I am just trying to find out if the specific word, drinkable, was added. I do not believe the word appears——

Mr. POSHARD. It was intended to be added. Did you agree or disagree——

Ms. BROWNER [continuing]. We don't disagree with it being added.

Mr. POSHARD. That is fine. I just want to ask you about your evaluation or observation of the Anacostia. Do we have any long-range scientific studies on the Anacostia River to show whether in fact it is better today in terms of its sources than it was, say, 15 or 20 years ago? And is it better or worse?

Ms. BROWNER. Some things are better, some things are worse.

Mr. POSHARD. Okay. The standards in the 305(b) study come from the States, wherein you determined that—I forget the percentage, I guess nearly 40 percent of the assessed waters are impaired or degraded, and that is by nonpoint source pollution.

Did the States do long-range longitudinal studies in the information they gave to you where you made this assessment?

It says they evaluated those streams and water bodies. How did they do that? Was it scientific data? Was it in the form of long-range studies to show whether in fact it is better or worse today than it was 15 or 20 years ago, and specifically, can you point those studies out to me where I can get that information?

I don't think we ought to be making public policy on the basis of somebody observing at the site whether or not there is an old shoe or a bag of potato chips or in fact a growth on a fish, which may be genetic, as opposed to being caused by the environment. On what basis are we making this assessment, and can you give me those scientific studies?

Ms. BROWNER. We will provide you with the data that we have. This is an instance where the States have been given the authority to undertake these assessments. That is, a division between the Federal Government and the State government. The States were given this responsibility, this authority.

Between the States there is a difference in terms of the kind of skills that they bring to this analysis. This analysis has been going on for a very long time. This is not the first time this analysis has been undertaken. There is a lot of history in this analysis.

We are working with the States to achieve greater consistency across the States in terms of the work that they do in characterizing the health of their rivers and lakes.

Mr. POSHARD. I understand. I just want to make sure, if we are going to pass a bill out of here that is going to say that 40 percent of the assessed waters in this country are either impaired or degraded; and we are going to pass public policy on that and all that that means with respect to cost and so on, that that is done on the basis of good science and not just somebody observing whether or not, on the surface there is something wrong with that stream or body of water.

I think we have a right to demand that what we do here with respect to water quality is scientifically based and not just by observation, or the word you use in the study is "evaluating." I don't know what that means.

Ms. BROWNER. We would be more than happy to provide you with the documents provided us by the States.

[The information referenced above can be obtained from the EPA. The publication number is EPA 841–R–94–001.]

Mr. BORSKI. The time of the gentleman has expired.

Mr. POSHARD. May I ask another question, Mr. Chairman, just very quickly?

I represent an agricultural district, of course. And in looking at the best management practices guidelines that are in the current bill, there is almost no one who agrees that it is possible to achieve the 15-year goals that are divided into five-year performance time frames or three five-year performance time frames to achieve the water quality standards.

Is it likely that we will be asking for new best management practices at the end of each of these three five-year time frames if we haven't, in effect, achieved where we are supposed to be at the end of the five-year goal?

The reason I am asking, Administrator Browner, is because in response to Mr. Mineta's question of deadlines, your most important point was that the difference between the alternative in the bill that is currently before us is one of milepost. We have mileposts in our bill to look at where we are at the end of five years and 10 years and 15 years.

When I look at the Conservation Reserve Program and what SCS has achieved with the conservation practices over the past many years in this country, I think we have achieved significant mileposts with respect to nonpoint source pollution. I think they have done a wonderful job in a voluntary fashion without putting another layer of mandatory controls on the process.

And if we are talking about mileposts, why don't we look at how far we have come already under the voluntary program as opposed to one more mandate from the Federal Government that I don't think will achieve any more than what is being done now voluntarily.

Ms. BROWNER. As I said, Mr. Poshard, in my opening statement, we do believe that there are programs at the State level in many States, not all States, that are important in addressing nonpoint source pollution. We would suggest that it is important that all States seek to address the very real problems associated with nonpoint source, and as a country, that we be able to evaluate the success of specific technologies.

If people are going to be asked to do something and then asked to improve on that, let's make sure we understand how it was successful and how it might not have been successful. And that is the point of having these five-year steps. It provides an opportunity for implementation and review that then appropriately shapes the next decision that has to be made.

Mr. OBERSTAR. Would the gentleman yield?

Mr. POSHARD. My only point is that we made significant progress voluntarily, and that I have no objections to five-year assessments out there under the present plan as opposed to additional mandates.

Mr. OBERSTAR. Would the gentleman yield?

Mr. POSHARD. Oh, certainly, Mr. Chairman.

Mr. OBERSTAR. Mr. Chairman, and if the gentleman yields, I would like to underscore that the nonpoint source program is voluntary until you come to a point of participants refusing to carry out the plan, refusing to implement. At some point, you do have to have a forcing mechanism.

And the bill I introduced, which goes significantly farther than that of the administration or of the Chairman's mark, starts off on a voluntary basis. Farmers in a watershed get together with State and Federal Government agencies and develop the plan that they think best responds to the needs of their area. It is voluntary all the way up the line on a "good actor," "bad actor" basis.

But if in eight years under my bill, I don't know what the administration's language is, but my bill, if after 12 years there is not compliance with that plan that was voluntarily developed, or if water quality standards here have not been met then the EPA and the State can act on an enforcement basis. Goodness knows, 12 years is a sufficient amount of time for people to develop a plan and to agree to come into compliance.

The gentleman's point about voluntary participation is very important but, you know, if we didn't have laws 20 and 30 years ago that imposed penalties and forced actions, we wouldn't have the level of cleanup that we have today, which is insufficient.

I thank the gentleman for yielding.

Mr. BORSKI [presiding]. The Chair thanks the gentleman. The time of the gentleman from Illinois has expired.

The gentleman from New Jersey, Mr. Menendez.

Mr. MENENDEZ. Thank you, Mr. Chairman.

Good afternoon, Administrator. I admire your staying power. Let me just get to three issues that I am concerned about throughout my questions, within this five-minute time frame. One is Section 404 of the act, particularly as it relates to commercial prejudice: are dredging; two, is as it relates to combined sewer costs; and three, intake credits.

You know, you talked about the State Revolving Fund creating 20,000 jobs for every billion dollars invested. And Section 404, the dredging issue, as it relates to the Nation's harbors, and the history of the enforcement of that provision, is what gives me the chills when you speak of a stronger, more flexible Clean Water Act.

This is an issue that even the Sierra Club recently noted at risk, puts at risk 10 million jobs, and nearly $400 billion of economic activity nationwide. You know, the history of the issue as it relates to our harbors is of dueling agencies, the EPA, the Army Corps, NOAA, with moving targets in terms of what is the standards to be met, changed standards, bureaucratic delay that makes permittees have their permits stale, in which at no fault of their own they are often forced to redo tests, often submitted to new tests which weren't the standards when they were in the middle of their permitting process, and for which it is quite expensive for them to perform. And, in many cases, tests that have raised serious questions as to their—you know, the ability to be replicated.

So, I look at Section 404 which was originally a dredging issue, has been over taken by wetlands, and say: One, isn't it time that we separate these areas and establish a separate procedure for rou-

tine commercial dredging so we can get the Nation's harbors for which 95 percent of our foreign commerce comes through?

Second, what are we doing about considering grandfathering in individuals who have their permits in? In my case, we have a district that has the Harbor of New York and New Jersey, it has permits that are hanging out there, in some cases, from three to eight years before the 1991 "Green Book" tests.

What about grandfathering those people in, who didn't have that as a standard?

And what about the question of retesting? Those are some of the issues.

And also as it relates to the question of risk assessment in EPA regulation, we are exponentially increasing our ability to measure contaminants.

My question is: What is our ability to go ahead and determine at what level that some of these contaminants are harmful, number one; and to our ability technologically to deal with the contaminants? These those are serious concerns that I have on this issue which I think is affecting our Nation's ports throughout the country.

Second, on combined sewer overflows, you mentioned how much the new proposals would save, but I would like to hear how much it still will cost. As a former mayor at the time the Clean Water Act took place, in terms of secondary sewage treatment, I can tell that you we had civil disobedience in terms of large numbers of people who have to this day liens on their property as a result of not paying the tremendous increase in costs.

And lastly, on intake credits, I want to know, is it true that EPA holds dischargers responsible for cleaning up pollutants that are present in intake waters as a result of discharges by others?

As I understand this issue: I am an electric plant generator. I take this body of water, whatever it has in it, it has. I use it. I add nothing to it. If I add nothing to it, then whatever is in here, maybe heat, maybe heat, and then put it back in this body of water, I am held to a standard of cleaning up pollutants that I intook in the first place; is that what is happening?

Ms. BROWNER. Mr. Menendez, you raise three issues. If I might, on combined sewer overflow, we do have cost numbers which if we could provide to the committee in writing, we would certainly do, and specifically to you, in the cost-benefit analysis that we did.

Mr. MENENDEZ. Do you have any idea how much it is, though?

Ms. BROWNER. They are going to get the specific dollar amounts so I don't answer inappropriately.

The existing Clean Water Act, if all of the cities who are covered by it were to comply with combined sewer overflow, secondary treatment for combined sewer overflow, it would cost this country $140 billion. The proposal that the Agency announced several months ago will cost $40 billion over 15 years. That is an annual savings of $10 to $12 billion. But we will give you a detailed analysis of that.

[The information received follows:]

5.0 Combined Sewer Overflows

Combined sewer overflows (CSOs) occur in sewer systems that combine sanitary sewage and surface runoff. When storms occur, the combined sewer system (CSS) capacity is exceeded, and the mixture of sewage, untreated industrial and commercial wastes, storm water runoff, and other waste in the system is discharged to surface waters. Human and animal waste, pollutants from industrial and commercial sources, trash, and oil and grease are discharged.

EPA's CSO Control Policy (EPA, 1993) establishes a national framework and clear expectations for the control of CSOs. The CSO Policy is largely the result of a successful negotiations with key CSO stakeholders, including municipal groups, environmental groups and states. It addresses the unique characteristics of CSO controls and balances considerations of the site-specific nature of CSOs and their environmental impacts. The Policy also provides for an evaluation of the cost effectiveness of CSO controls; consideration of a community's ability to pay for CSO abatement; and other factors necessary for developing flexible and cost effective CSO control measures. The Initiative would clarify EPA's authority to implement the CSO Policy and would provide legislative reference in the CWA for this policy.

5.1 Private Sources

The impacts of the CSO provisions on private sources have not been estimated but are expected to be minimal.

5.2 Municipalities

EPA's 1992 CSO Needs Survey estimates that the national costs of CSO control with 85 percent capture and primary clarification is $41.2 billion in 1992 dollars (Metcalf & Eddy, 1993).[11] EPA estimates that these costs will be borne in years 3 to 15 following CWA reauthorization (or in some cases, over longer periods). Annual operating and maintenance (O&M) expenditures associated with these capital expenditures are estimated at $300 million per year. Annual costs for CSO abatement are thus $3.45 billion per year (see Table 19), derived by dividing the total CSO capital needs by 13 years and adding the O&M costs ($41.2 billion ÷ 13 years + $300 million = $3.45 billion). EPA plans to implement the Policy and hence no incremental costs are shown in Table 20.

During the negotiations, CSO stakeholders considered a range of controls and alternatives that achieved various degrees of environmental and public health benefits at different national costs. Figure 2 and Table 15 are examples of the data considered and the relationships that exist between controls and costs. The negotiations focused on the reduction of raw sewage overflow events rather than on the reduction of pounds of pollutants. Raw sewage overflows were viewed

[11] CSO "control" is defined based on the goal of "... the elimination or capture of 85 percent by volume of the combined sewage collected in the combined sewer system during precipitation events on a system-wide average basis..." (EPA, 1993).

as the key concern because they result in immediate violations of water quality standards and created immediate public health concerns for the downstream beaches, shellfish beds and drinking water intakes. With this as a guiding principle, stakeholders focused on the extent of the reductions of CSO overflow events. Four to six overflow events, equivalent to 85 percent capture and primary clarification, was determined to be an appropriate target of control, in the absence of clear data that show the level of control necessary to meet water quality standards. A municipality may demonstrate that another level of control is adequate to meet water quality standards.

Full implementation of the CSO requirements, according to one interpretation that is not shared by EPA, could cost as much as $14.14 billion per year (EPA, 1994d) based on an assumption of 85 percent capture with secondary treatment, as shown in Table 22. The Initiative is proposing to codify the CSO control strategy that could potential save municipalities about $10.7 billion annually in avoided costs.

5.3 State Water Programs

The impacts of the CSO provisions on states have not been estimated but are expected to be minimal.

5.4 Federal Agencies

The additional impacts of the CSO provisions on federal agencies have not been estimated but are expected to be minimal.

5.5 Benefits

The benefits of the Initiative's CSO provisions will be to reduce the discharge of untreated sewage and pollutant loadings associated with CSSs. In the affected areas, this will have potentially major economic and environmental impacts, which are discussed below.

Reductions in Volumes of Untreated Sewage and Pollutant Loadings Reduction from CSOs

On average, CSSs experience 50 to 80 overflow events per year. The number will be reduced to approximately 3 to 4 events. This will have major implications for the water quality of the receiving waters, including:

- Reduce the number of water quality standards (WQS) violations for each system from 100 to 200 days per year to no more than 10 to 20 days per year.
- Reduce CSO discharges from 1,200 billion gallons per year to 180 billion gallons per year.
- Reduce annual TSS discharges from 3.7 billion pounds to 1.29 billion pounds.

- Reduce annual BOD discharges from 1,150 million pounds to 635 million pounds.

- Reduce by 35 to 65 percent the current annual amounts of the following discharges: 19 million pounds of ortho phosphate (PO_4-P), 95 million pounds of total nitrogen, 18 Million pounds of metals (zinc, copper, cadmium, cooper, lead, nickel), and 4 million pounds of toxic volatile organics.

Reduced Uncertainty Regarding Compliance with CWA and Water Quality Standards

The extent of failure to meet water quality and designated uses because of CSO affects the following 1990 305(b) data:

- 503 square miles of estuaries
- 132 shore-miles of coastal waters
- 93 shore-miles of impaired Great Lakes
- 21,360 lake-acres in fresh lakes
- 5,163 river-miles

Policy implementation will streamline the permit writing and water quality standards processes, better define the criteria appropriate to support the designated uses of CSO receiving waters, and result in compliance with applicable state water quality standards.

Shellfishing Restrictions

In 1990, CSOs contributed to prohibitions, conditions, or restrictions on 597,000 acres, or 9.4 percent of the total harvest-limited acreage. Sixteen percent of the limited shellfish harvest areas in the North and Mid-Atlantic are caused by CSOs. Substantial reduction in closing of shellfish beds are expected (see the case studies).

Fish Kills

In EPA's 1988 National Water Quality Inventory, 38 states reported 996 fish kill incidents (EPA, 1990a). Twenty-four of those states reported the number of fish killed: a total of 36 million. Of the incidents reported, 605 were caused by conventional pollutants (primarily oxygen-demanding substances), while 135 were caused by toxic pollutants. Sixteen states reported municipal facilities, which may include CSOs, as a source of fish kills. The controls implemented under the CSO policy will significantly eliminate discharges of oxygen demanding pollutants (BOD) and toxics in concentrations that deplete dissolved oxygen concentrations below those required to support fish resulting in substantial reductions in Fish Advisories.

Beach Closures

According to NRDC, 1,592 days of beach closures or advisories were issued in 1990,

2,008 days in 1991, and 2,619 in 1992. CSOs were implicated as an important contributor to those beach closures.

The presence of plastics and other floatable waste or debris, which in some cases can be traced to CSOs, may also prompt health authorities to close public beaches or issue beach advisories. The floatables problem has become particularly acute in some urban areas, particularly in the vicinity of New York City.

Flooding

Most cities' CSSs were built over 40 years ago. New developments and increased flow often result in sewer surcharge and basements flooding during wet weather. In addition to property damage related to the flooding, clean-up poses serious heath risks. CSO abatement efforts will also help eliminate basement flooding. This has been demonstrated in the City of Portland, Oregon.

Avoided Drinking Water Treatment Costs

Under the CSO Policy, the discharge of undisinfected CSOs to surface waters used as public drinking water supplies will be dramatically reduced, reducing pathogens and bacteria to levels that can be adequately treated by water supply facilities and resulting in savings in the cost of drinking water disinfection and a reduction in human health risks.

Aesthetic Improvements

CSO abatement efforts will eliminate the discharge of condoms, tampon applicators, and other sewage-related floatables that degrade the aesthetic quality of receiving waters, limit recreational uses, damage property values, and threaten wildlife (by ingestion of or entanglement in plastic debris).

Other Effects

Jobs Supported

The estimated number of direct and indirect jobs supported by a $1 billion investment in water and wastewater infrastructure is 16,500, with an additional 16,500 "induced" jobs supported nationwide. According to these estimates, implementation of the CSO Policy will support about 57,000 direct and indirect jobs and another 57,000 induced jobs per year.

Public Access

In concert with the construction of CSO controls, Columbus, Georgia, cleaned up a hazardous waste site, refurbished the shoreline of the Chattahoochee River, and built a bicycle/walking path along the River, thus greatly enhancing public access. CSO abatement

efforts in many other cities will create similar opportunities for significant indirect benefits.

Table 19

Summary of Current and Planned Spending Under the Existing CWA ($millions/year)

Provisions	Private Sources	Municipalities	Agriculture	State Water Programs[1]	Federal Agencies[2]	Total (Quantified)
Pre-1987 Act	$25,286	$17,190	$191	$373	$9,564	$52,604
Nonpoint Source Controls/watershed		$389 - $591	$240 - $389	$125	$234	$988 - $1,339
Storm Water: Phase I	$3,990	$1,650 - $2,555				$5,640 - $6,545
CSOs		$3,450				$3,450
Other Costs	$943 - $1,073	$88				$1,031 - $1,161
TOTALS	$30,219 - $30,349	$22,767 - $23,874	$431 - $580	$498	$9,798	$63,713 - $65,099

[1] Pre-1987 expenditures, estimated to be about $2.7 billion per year for administration and compliance, are not shown here because the cost of complying with the current and future water quality standards could not be estimated. The values shown here are only for administering the program.

[2] Some obligations under the current law, e.g., remediation of abandoned mines are shown in Table 22.

Source: U.S.EPA, Office of Water.

Table 22

Summary of Current and Potential Spending Under Stringent Interpretations of CWA ($millions/year)

Provisions	Private Sources	Municipalities	Agriculture	State Water Programs	Federal Agencies	Total (Quantified)
Pre-1987 Act	$25,286	$17,190	$191	$560	$9,564	$52,791
Nonpoint Source Controls/watershed		$389 - $591	$240 - $389	$150	$234	$1,013 - $1,364
Storm Water:						
Phase I	$3,990	$1,650 - $2,555				$5,640 - $6,545
Phase II	$16,235	$1,785 - $2,760				$18,020 - $18,995
Abandoned Mines					$1,383 - $4,481	$1,383 - $4,581
CSOs		$14,140				$14,140
Other Costs	$943 - $1,073	$88				$1,031 - $1,161
TOTALS	$46,454 - $46,584	$35,242 - $37,324	$431 - $580	$710	$11,181 - $14,279	$94,018 - $99,577

Source: U.S.EPA, Office of Water.

Ms. BROWNER. The issue of intake credits, the Agency does believe that under the current Clean Water Act, we have authority to account for intake credits. In 3948, there is a clarification of that authority.

The issue that you raise of water being taken from a river, run through a plant, and put back into that river, is one fact situation. Unfortunately, it is not the only fact situation. There are numerous examples of water coming from this river, going through this plant, and into another river that may not have the same level of contamination as the first river.

So it is a complex problem that we believe there is authority within the existing law that would be maintained in the reauthorization to address. But in no way do we think that what people would have us do is allow for the degradation of rivers that have not previously been degraded, by moving pollutants—I am not talking to the addition of pollutant, I am talking about moving from one river to another.

Mr. MENENDEZ. What I suggested to you is a zero sum game, what you got in, what you got out. That is the factor I am talking about. Others that you suggest, that you may be polluting waters that in fact were not, is certainly a serious concern. But I would like to know how the Agency is going to deal with the factor that I gave you.

Ms. BROWNER. We—under the situation that you raised where water comes from a river, goes through a plant, back to the same river, we believe that the current law allows us to deal with intake credits. But again, Mr. Menendez, I am very concerned that some have proposed allowing water with certain contaminants to be taken from one river, used by a facility, and then those contaminants to be moved to another river, where they do not presently exist.

The final issue—first issue you raised, is the issue of dredging. It is one that we have I think worked with your office, we have worked with others in your delegation, specifically concerning the New York New Jersey Harbor issues.

I think we have made some progress, I hope you agree that we have made some progress in the last several weeks in addressing the specific concerns. We have published that, took effect immediately, what we refer to as an Interim Final Rule, to address some of the issues you raised.

Six permits were issued on Friday. Again, in an effort to address some of the concerns that you raise, we are now within the Agency, in addition to the work that is still ongoing at the site that you raise, looking at the issue of short-term disposal of the materials that are dredged up, and across the country frequently contaminated, short-term disposal and then long-term disposal. And your suggestion in terms of how to treat these issues in the Clean Water Act is certainly something we would be willing to discuss with you.

Mr. MENENDEZ. Appreciate your answer.

Mr. Perciadepe—let me just say, if I found a glimmer of hope in your Agency, it is him. I hope it doesn't get him fired. But the bottom line is that we still have a long way to go in dredging with an enormous consequence ahead.

Thank you.

Mr. BORSKI. The Chair thanks the gentleman.

May I ask for your further indulgence?

There are two Members who still have not had their first round of questions yet. They each went over to the Floor early to vote, they should be back in a minute.

In the meantime, I am going to suggest a two-minute break. But I would ask for everyone to stay close to their seats and as soon as Mr. Coppersmith and Mr. Oberstar return, we will continue, if you are available.

Thank you very much.

The subcommittee will stand in a brief recess.

[Recess.]

Mr. COPPERSMITH [presiding]. The committee will come back to order after an appropriate clean water break.

Like to welcome the Administrator back.

Mr. Oberstar, or may I?

Mr. OBERSTAR. Go ahead.

Mr. COPPERSMITH. I will use the prerogative.

Administrator Browner, and in absentia Chairman Mineta and Chairman Applegate, I wanted to thank the Chair, the regular Chair of the committee, for including wastewater services for Colonias in H.R. 3948. And as Administrator Browner well knows, at the request of the administration, I am introducing legislation to authorize assistance for water treatment for Colonias.

Specifically, I would like to opportunity to get a number of questions on the record with the Administrator. Specifically, what types of projects do you foresee the Border Environment Cooperation Commission, the BECC, providing financial assistance?

Specifically, as you know, the cities of Nogales, Arizona, and Nogales, Sonora, in the Republic of Mexico, are in dire need of new wastewater treatment facilities, in part due to the problems of managing a river shed that crosses international borders. Funding for new wastewater facilities has been difficult if not impossible.

Could you please outline for me how the BECC, as well as the International Boundary Waters Commission, would address this problem?

Ms. BROWNER. Certainly, Mr. Chairman.

The issues of the people who live along the border we share with Mexico are very significant. We are talking about real and immediate public health issues because of a lack of wastewater treatment, drinking water systems.

I personally saw the NAFTA as an opportunity to create a structure to build the infrastructure to provide the Public Health Services to the people of the border, the American citizens who live along the border today without tap water they can drink, without sewer systems.

The administration in NAFTA created, as you referred, Mr. Chairman, the BECC. We view the BECC as being a mechanism for securing the financing packages that will allow for the investment in the infrastructure needed to address the issues along the border. And it may be that in some instance, it is a combination of private partnerships, it may be there is a rate base that is available.

It is our sense that there will not be one answer that can be applied uniformly for all of the facilities that will need to be constructed along the border, but that the BECC through its membership, which is made up of people from both the United States and Mexico—I will serve as a Member on behalf of the United States—will be a mechanism for leveraging the dollars that we hope Congress will appropriate to secure additional funds to allow for the infrastructure to be built.

And I know that the issues of both the Colonias, I think you spoke of Nogales, the issues of the BECC, are both issues where in order to make funds available for those very worthy projects, we will need authorization. And we are hopeful that those authorizations will be included in the Clean Water Act.

Mr. COPPERSMITH. Thank you.

To follow up, you mentioned flexibility and that there probably is no one answer that will work around the border. A specific issue I would like your comments on is the cost share. States such as New Mexico, I understand, will have a very difficult time meeting the 50–50 cost share included in the current bill, as well as in the legislation that I am introducing on behalf of the administration.

I want to state that we need really further discussion on this issue to ensure that there is flexibility and that all States can participate in the program. I am hopeful that we can come up with a creative solution that ensures the best use of scarce Federal dollars, scarce private dollars as well as scarce State and local dollars.

Could you please comment on the 50–50 cost share, as well as what type of creative solution might ensure full participation along the border and not just in pockets?

Ms. BROWNER. Again, our goal is to address the real problems we see along the border, and we are open to doing it in any way that makes sense and gets the job done in an expedited manner.

The 50–50 match that you refer to, I don't think that is included in the NAFTA legislation with the creation of the BECC. To the best of my knowledge, there was no requirement within the NAFTA legislation that would require States to provide a 50——

Mr. COPPERSMITH. It is the Colonias bill that has the 50–50 match.

Ms. BROWNER. Oh, okay, I am sorry.

There is currently right now—I received—EPA received an appropriation last year for the Colonias, which I think, as you are aware, we cannot make available without the authorization. So we are very eager to see the authorization.

In terms of the—how to ensure that the additional funds that are necessary are secured, we are open to working in whatever way makes sense. And if there is a strong sense that the States do not have the resources available, then I think it is something we should look at on the front end and not secure the authorization to have a problem on the back end.

Mr. COPPERSMITH. Thank you. That is what I was looking for, actually.

I wanted to commend you, Administrator Browner, as well as the Agency. You did not read this part of your testimony and it was submitted for the record, but on page 19 and 20 of the testimony,

you specifically address the environmental problems along the U.S.-Mexico border.

We need to make sure that, as was promised during the debate on the North American Free Trade Agreement, that NAFTA becomes a means for improving environmental quality, that we develop means so that we can address existing environmental problems as well as those we know are coming in the future, so that we can improve the situation that exists.

I am pleased that the administration has recognized that need and has kept its word from the NAFTA debate. I also want to thank Chairman Kiki de la Garza, from Texas, who really is the grandfather of the Colonias issue, as well as Congressman Ron Coleman. They have worked tirelessly on this issue throughout the 1980s and the 1990s, and it is nice to see it finally got on the front burner. That concludes my questioning.

Mr. Oberstar.

Mr. OBERSTAR. Thank you, Mr. Chairman.

Madam Administrator, I congratulate you on your stout and vigorous defense of the administration's position on improvements needed to the Clean Water Act. You have been forceful, you have been persistent, but you need some help.

We need some votes. We also need some institutional memory. And regrettably, my colleagues here who have all had their shot at you have gone. So I will put it nonetheless on the record.

I have been associated with this issue for over 30 years, as an administrative assistant to my predecessor whose portrait hangs on the wall in the center back there, John Blatnik, as administrator of the Public Works Committee staff for several years during the time he was Chairman, and during the time when we wrote the Clean Water Act. And we spent, since 1972—and it should be remembered that bill was colossal, it was a massive advance on the earlier legislation that John Blatnik introduced and got enacted in 1956, the expansion of which was vetoed in 1960, signed in 1961 under Kennedy, and expanded successively.

But the Clean Water Act of 1972 was vetoed and enacted on a bipartisan basis over President Nixon's veto by an enormous margin, almost 10 to 1. It was a bipartisan understanding and agreement that we had to move ahead against the pollution that was destroying the surface and groundwaters of America.

People had forgotten the suds that floated down the Ohio and Mississippi Rivers. People have forgotten the raw phenols that were bubbling and boiling in the Mississippi River by the time that water reached New Orleans.

They have forgotten that the fish disappeared from Lake Erie and that Lake Erie was in the mid-1960s proclaimed to be dead. They have forgotten that the Cuyahoga River caught on fire in the early 1960s, and that it was the clean water program, expending well over $10 billion on the Great Lakes, that restored fish, restored the quality of the rivers discharging into the Great Lakes and into the other freshwater surface systems of this country and into the estuaries.

And yes, the fish are back in Lake Erie, but they are back with sores, with cancers, with toxics. These toxics come from nonpoint source runoff, they come from the toxics that were deposited years

ago and remain in the bottom sediments of not only Lake Erie, but Lake Ontario and Lake Michigan, and key points on Lake Superior. And that this system of freshwater represents 20 percent of all the freshwater on the face of the earth, that the Great Lakes represent 95 percent of all the surface fresh water in America. And that all around the United States, with the banning of DDT, Bald Eagles have made a comeback, except in the Great Lakes, where DDT is still carried in the upper atmosphere from Central America, where we allow DDT to continue to be sold and used and deposited in the Great Lakes and taken up by the fish, which are then eaten by diving cormorants and the Bald Eagles feed both on the fish and on the cormorants and other bird life, and they are still in decline.

If you live anywhere in America, you have five parts per billion PCBs in your body. But if you live within 20 miles of one of the Great Lakes and eat fish once or more a week, you have 440 parts per billion average PCBs in your body. That is not a statement I made up, that was documented scientific evidence presented in this committee hearing room about 10 years ago by Dr. Waylon Swain, a scientific researcher. And he found that in addition to low birthweight and tremors in joints of the body, that PCBs are persistent.

In doing the study, he found that it would be six generations before PCBs would leave the generational strain, because it is passed from mother's milk, from one generation to the next.

We have spent $230 billion cleaning up point sources in America, over the last 20 years since we enacted the clean water program. And yet, we have this legacy all around America of toxics, of waste, of cryptosporidium. That outbreak killed 131 people in Milwaukee, 400,000 were infected, by a parasite that generates through the intestinal tract of cattle and was deposited on the land, and in the spring the runoff brought it all into Lake Michigan where Milwaukee's intake brings the water in, and the water always had been clean, the drinking water treatment plant always had been able to treat whatever was brought in through the drinking water system, except this parasite.

And who died? AIDS victims, some 60 or 70; 30 or 40 were chemotherapy patients, cancer victims undergoing chemotherapy whose immune systems were weakened and were killed by this parasite; and young children, babies. And it could have been prevented by an effective program of nonpoint source control.

I heard one of my colleagues earlier on this side say, oh, well, I don't know about how many acres of wetlands. Be accurate about your numbers; 220 million acres is an understatement.

I served on the Fisheries and Wildlife Committee, many years we held hearings on this subject. The tens of millions of waterfowl that have disappeared from our skies have disappeared not because they have been shot by hunters but because human expansion and encroachment into the habitat has destroyed the nesting and breeding ground of waterfowl along the major flyways, the four major flyways of the United States, to be honest about it.

A strong nonpoint source program is crucial if we are going to even maintain some of the gains that have been made from that $230 billion already spent by municipalities and industry. Industry ought to be up in arms, after having spent $130 billion, saying to

farmers, ranchers, developers, people who scar the land and let the surface runoff into the streams, and say: We have done our part, you have got to do your part now, too. We are not asking much.

I have introduced a bill, I described it earlier, 12 years for compliance. That is not too long to ask to have clean water. That is not too long to ask farmers to do something.

I have talked to the farmers in my district; yes, they don't like it, they think this is Federal Government interference. But I say: You tell us how are we going to do it, this is your land, you know what you have to do?

But it is not fair for farmer "A" to graze cattle right up to the water's edge and let the cattle go into that stream and do what cattle normally do in a stream or anywhere on land, and then have that waste go downstream to farmer "B" who is drawing water from the same stream. That is not right, never has been right.

So they have an obligation. They who earn a living off the land have an obligation to that land. We are not asking too much.

You tell us how you want to do it, then move ahead and do it.

And yes, wetlands are a problem, I understand that. We put a four-line piece of legislation in—a four-line section of the Clean Water Act of 1972, dealing with wetlands. The Corps of Engineers in the greatest miracle since the loaves and fishes, expanded it into 34 pages in the Federal Register. They didn't want this program, they didn't want to administer it, they tried to kill it by regulation.

We are still trying to get out from under that yoke. But that doesn't mean don't protect wetlands. They are the great filtering sources, as you rightly said.

We have had an experience in my district with a peat bog in which one end of it, a particle board plant was discharging wastewater. And by the time the wastewater had traveled the half mile through that peat bog, it had been cleared.

You can't reproduce that. You can't take the peat out of the bog and use it in some contrived commercial fashion. Only a live, living peat bog would clean up that water. We can't ask peat bogs to do that forever. We have to help them.

And I say if we can't get a better bill, if we can't improve upon the Clean Water Act, then we ought to leave current law in place and wait until we have the votes to do it. But this is too important a legacy to pass on to the next generation for us to mess it up. We have got to improve upon it, got to do better than the last generation.

I thank you for being here and I apologize for my enthusiasm, but my heart and soul are into this and have been for many years.

Mr. BORSKI [presiding]. The gentleman's five minutes have expired.

Does the gentleman from New York have a final question?

Mr. BOEHLERT. I do. Not for myself, although I have a lot of questions, but I have one from Mr. Petri who waited patiently and his turn did not come before he had to leave for another meeting. And I will ask this on behalf of Mr. Petri.

Can you tell us your view on whether intake credits should be provided in discharge permits? Although dischargers obviously should be required to clean up pollution which they cause in their plant or facility, many dischargers have expressed concern about

the amount of financial resources that could be required if they were forced to clean up pollution found in intake waters.

Are there particular circumstances where you think intake credits should not be allowed?

Finally, does EPA have the authority to allow for intake credits in permits?

Ms. BROWNER. I will try and be very brief.

We do believe that under the current Clean Water Act we have adequate authority to account for intake credits. 3948 clarifies that authority, and that would be, we think, advisable.

We are concerned, however, that we not find ourselves in a situation of moving pollutants from one river to another. And so we need to be very, I think, precise and careful when we speak about intake credits.

If you are taking the water out of river "A," putting it through the facility and sending it back to river "A," that is one situation. If you are taking the water out of river "A," running it through a facility, and putting it into river "B," that is a very different situation. And they should not be treated as similar situations.

But we believe that we can address the concerns that are raised from river "A" to river "A" under our existing authority.

Mr. BOEHLERT. Thank you very much.

Mr. BORSKI. On behalf of the subcommittee, Ms. Administrator, we want to thank you very much for your testimony and your diligence in listening to all the Members and trying to respond to their questions. As you could tell, there was enormous interest here and many different views.

As I stated earlier, the miracle or near miracle that you performed with Superfund will have to be duplicated here with clean water, and I think can be, if we are to have your enormous talents and devotion to this issue.

Ms. BROWNER. Well, you do, Mr. Chairman, have whatever resources we can bring, whatever expertise we can bring. We recognize the difficulty of the task that is before this subcommittee, the full committee, and this Congress.

I want to say just a few things in closing.

I would like to recognize the leadership and division, the commitment that Mr. Oberstar has brought to these issues for a very, very long time. If it were not for people such as himself, we would not have the quality of water we have today.

The original Clean Water Act was 40 pages long. It is widely viewed as having been one of the most successful environmental statutes in seeking to solve the problem as we then understood it. And he and his colleagues of that time deserve an awful lot of credit for having the foresight to demand that such a law be passed.

I, too, remember the images of the Cuyahoga River burning. I was a teenager and I don't think I will ever forget that picture of a river on fire. The problems that we see today in our rivers and lakes and streams unfortunately are not as visible as the ones of two and three decades ago. But we should not allow ourselves to be confused into thinking that they are any less threatening, that they are any less deserving of attention.

I come to my job as the head of this country's environmental agency, with a great deal of experience, but perhaps the most im-

portant experience is as a mother of a young boy. And I want very much to be able to tell my son that my generation contributed to protecting and improving and making clean the waters of this country.

We have an obligation. We have a responsibility. I believe that by working together we will be able to craft a new Clean Water Act that will give us the tools to address the very real problems we see across this country.

Thank you.

[Subsequent to the hearing, the following was received from Ms. Browner:]

MAY 24, 1994 CLEAN WATER ACT HEARING QUESTIONS FROM CONGRESSMAN SHUSTER TO ADMINISTRATOR BROWNER

Question #1:

Ms. Browner, about a year ago your staff indicated to the Subcommittee staff in bipartisan meetings that the Clean Water Act was the best enforced environmental law on the books - that it has the highest compliance rates and generates more in fines and penalties of all environmental laws. Do you agree with that? If so, why do you want to take a program that is basically working and model it after environmental laws like CERCLA (Superfund) that are fundamentally flawed? Please provide the Committee with a specific comparison of Clean Water Act enforcement with Federal enforcement of other environmental laws under your agency's jurisdiction including a comparison of compliance rates and amount of fines recovered.

Answer #1:

Thanks in part to vigorous enforcement, compliance rates for the Clean Water Act (CWA) are among the highest of all EPA programs. As a result, it is also true that the CWA generates more fines and penalties than other environmental statutes. For example, in FY 93, CWA enforcement generated $27.8 million in civil judicial and administrative penalties, approximately 23% of total penalties assessed. CERCLA (Superfund) enforcement totaled $24.3 million in penalties (22%). RCRA penalties totaled $22.7 million (20%), and the Stationary Source Air program generated $20.3 million in penalties (18%). Rates of significant non-compliance (SNC) in FY93 for major non-federal permittees under the CWA averaged 8.6%. SNC rates for the current quarter are similar. However, data also indicates that, at some period during each year, 20 - 25% of permittees are in significant non-compliance.

Compliance rates available in other programs are difficult to compare with CWA compliance because of the unique nature of each program. For example, under the Safe Drinking Water Act (SDWA), reporting and monitoring requirements for Public Water Supplies (PWS) are significantly less frequent than for CWA regulated entities, and, therefore, data are less readily available, and may also be less reliable. For PWS in FY93, States reported SNC rates for community water systems (CWS) of 3%. However, at the same time, 32% of CWS reported violations.

In the Stationary Source Air program, non-compliance is measured for so-called "known-status" and "unknown status" facilities. "Known-status" means that the facility's compliance has been verified (generally by inspection). "Unknown-status" refers to facilities where compliance information has not been verified. Non-compliance rates for FY 93 averaged 13% for all Class A sources (8.5% for "known status" sources). However, for sources subject to National Emission Standards for Hazardous Air Pollutants (NESHAPS), non-compliance for all sources was 31% (14% for known status sources).

The Administration agrees that CWA enforcement **generally** works well, and we propose no fundamental changes in these authorities. However, the enforcement proposals recommended will correct problems that have arisen in enforcement of the Act and make CWA enforcement more efficient, cost-effective, and responsive to violations that occur.

Question #2:

You indicate in your statement that you sat down with State and local government and listened to their ideas when you developed the Clean Water proposals. If this is so, why is it that organizations representing State and local government seem to be deeply concerned and opposed to the EPA-driven approaches in your package and in H.R. 3948?

Answer #2:

EPA does not believe that the majority of States or State organizations are opposed to the Administration's approach. As the following chronology regarding our interactions with these organizations will clarify, we consulted with the States throughout this process. Although we do not yet agree with the States on every issue, we do believe that such agreement is possible. EPA also believes that both State and Federal environmental officials bring valuable perspectives to the discussion.

EPA consulted closely with the leading State organizations at the early November, 1993 All-States meetings which EPA Assistant Administrator for Water Robert Perciasepe held with State Environment Commissioners. Thereafter, Assistant Administrator Perciasepe held five conference calls with interested State commissioners and State organization staff to discuss drafts of *President Clinton's Clean Water Initiative* before its release on February 1, 1994, in addition to several meetings with Commissioners and other State and local organization representatives and members during that period. These were all genuinely interactive discussions, which, in numerous cases, resulted in substantive changes being made to significant elements of the clean water policy the Administration

was developing -- including some, such as deletion of a proposal for sediment criteria -- which are of particular importance to States.

This responsiveness to, and understanding of, State and local perspectives is centrally, but not simply, a matter of the Administration's commitment to a genuine Federal-State partnership on environmental issues. Also, numerous EPA officials involved with the *Clean Water Initiative* came to their current posts from years in State and local government -- particularly Assistant Administrator Perciasepe, whose nearly two decades in State and local government leadership posts demonstrate a diverse, first-hand knowledge of these perspectives exceeding that of most officials in any of the three branches of the Federal government in Washington. This responsiveness was so marked at the final conference call held less than a week before the public release of the *President's Initiative*, that Commissioners from Oklahoma and Massachusetts both stated that EPA should be congratulated for incorporating into the *Initiative* policies that truly reflected State needs, capabilities and concerns.

At Administrator Browner's release of the *Initiative*, **the Association of State and Interstate Water Pollution Control Administrators** (ASIWPCA) -- the organization of State officials dealing exclusively with clean water matters -- released a statement (attached) which applauded leading aspects of the *Initiative*. In subsequent weeks, several State governors sent letters expressing support for reauthorization much along the lines of the policies in the *President's Initiative* (examples attached).

Reflecting the shared interest in changing important aspects of the Senate's bill (at that time, S. 1114), EPA joined with NGA and ASIWPCA in developing and presenting to the Senate Environment and Public Works Committee detailed legislative agreements on core elements of CWA reauthorization on February 17, 1994, immediately prior to the markup of S. 1114. The straightforward process by which these agreements were developed is another clear demonstration of the moderate, centrist character of the policies in the *President's Initiative*.

Question #3:

States have been criticized for not moving ahead with tough nonpoint source controls. Yet isn't it true that they were not given the help the law envisioned? None of the funds authorized to be appropriated for section 319 for the first three fiscal years of the program were actually appropriated? Isn't it hypocritical to criticize States when again the Federal government hasn't backed up its mandates with funding?

Answer #3:

EPA agrees that, at the outset of the program established in the 1987 Water Quality Act, lack of funding did not substantially hinder the States, since States were not eligible to receive Section 319 grant funding until after their nonpoint source management programs were developed, submitted to EPA, and approved for implementation. After the initial period of program development in 1987-1989, Congress began to provide substantial funds to help States implement their programs. To date, Congress has appropriated approximately $270 million for State implementation of their nonpoint source programs; Under the Clinton Administration, funding for NPS grants under Section 319 of the CWA has increased from $50 million in 1993 to $80 million in 1994 and $100 million in 1995. States provide an additional two dollars for every three provided by the Federal government. With these funds, States have applied a broad range of tools, including public education, financial and technical assistance, demonstration projects and regulatory approaches, to broaden public understanding of nonpoint source problems and promote implementation of solutions to those problems.

However, it has become increasingly clear that, in addition to this increased level of funding, greater focus and better tools are needed to solve the serious water quality problems caused by nonpoint source pollution. As indicated in the recently-published *1992 National Water Quality Inventory*, States now identify nonpoint sources as the leading cause of impairments and threats to waters of the United States.

Given the scope of the contribution of nonpoint sources to our Nation's remaining water pollution problems, it will not be possible to solve those problems without a more significant national effort to address nonpoint source pollution. This will require upgraded State programs, which will include authorities for enforceable State and local implementation mechanisms in their nonpoint programs, but which should also provide flexibility to initially rely as much as possible on successful voluntary approaches. From the outset, States will need to have enforceable authorities in their programs as a means of motivating voluntary activity and addressing situations where necessary implementation of measures is clearly not taking place. *(Clinton Initiative)* Creative partnerships among all levels of government and private entities will also be needed to be successful. *(Note: mechanisms are required for State programs to ensure that necessary management measures are adopted in threatened, impaired or special protection waters, as well as for new sources statewide.)*

Question #4:

Your 1992 Water Quality Inventory indicates that the number one source of impairment of rivers is siltation. Silt is among the top five causes of impairment for all assessed water bodies. Isn't siltation a natural byproduct of erosion which has been going on since geologic time? Does EPA have an estimate of the amount of siltation that is naturally occurring and not the result of agricultural or construction activity?

Answer #4:

While some erosion is the product of natural geologic processes, the degree of erosion occurring today as the result of human use of the land has greatly accelerated these processes, leading to degradation of both the land and the water. Human-made sources of this accelerated rate of erosion include agriculture, construction, forestry, and grazing.

Several attempts have been made by various experts to quantify the amount of human-caused erosion attributable to these various sources, particularly in the case of agriculture. Some of these studies are summarized in "Soil and Water Quality: An Agenda for Agriculture" (National Research Council, 1993). One reported study estimates annual erosion rates in the central United States to have increased from a natural background range of 0.009 to 5 tons per acre to a current range of 3 to 38 tons per acre. In its 1982 National Resources Inventory, the U.S. Department of Agriculture estimated that 40 percent of cropland was eroding at rates higher than the soil loss tolerance level (the level at which soil is naturally replenished, thereby sustaining the soil for future generations), and 20 percent was eroding at twice the soil loss tolerance level.

Urban construction generally occurs on many fewer acres than agriculture in any given year; however, erosion from construction is, on a per-acre basis, greater than it is from agriculture. For example, studies of uncontrolled sediment loads from construction have reported annual rates of 35-45 tons per acre. Similarly, many studies have documented great increases in erosion from improper forestry activities. Soil erosion is considered the most significant pollutant from both construction and forestry operations.

Soil erosion has had a highly destructive impact on many of our Nation's waters. For example, in the Anacostia River that flows through Washington, D.C., erosion from agriculture and urbanization has resulted in such massive sedimentation as to make much of the river unnavigable and marinas entirely unusable. Similarly, sedimentation from logging operations in the watershed of the South Fork of the Salmon River in Idaho has similarly resulted in burying streambeds under many feet of sediment.

More generally, the environmental cost of such unnatural rates of erosion are very high and, thus, require serious attention. Excessive erosion results in siltation of streams, which can smother fish spawning areas, food supplies, and coral reefs, clog the filtering capacity of filter feeding organisms, and clog and harm the gills of fish. It also causes turbidity in the water, which interferes with the feeding habits of fish as well as with human recreational opportunities. It is for these reasons that the States have listed so many waterbodies as having uses impaired by sediment.

Agriculture has begun to make a significant contribution to addressing the siltation problem. The 1985 Food Security Act created two significant programs that deal directly with erosion: the Conservation Reserve Program (CRP) and the Highly Erodible Land Conservation Program, or Conservation Compliance. Approximately 145 million acres of this Nation's most erodible cropland, representing more than 25% of the total, are now receiving erosion control treatments that dramatically reduce water and wind erosion.

Question #5:

Your statement indicates that "there is no scientific basis for a nationwide ranking of functionally distinct and diverse wetland types." Is there any less basis for ranking wetlands into three categories than there is for ranking high quality waters into three rankings under EPA's proposed antidegradation policy?

Answer #5:

EPA's statement with respect to wetlands is in response to proposals to classify or "categorize" wetlands based on their functional attributes. Gaps in our current understanding of wetland functions and values limit the ability to implement a scientifically-sound method of ranking wetlands at a National level. In particular, there is an insufficient understanding of the water quality enhancement function of wetlands, the role wetlands play in regulating local and global climates, and the functions and values of "drier" wetland, i.e., those seasonal wetlands that are saturated for only a portion of the year and are, therefore, often thought to be less valuable. Research efforts are focused towards filling in some of these gaps. However, conducting the research and evaluating the results requires considerable time before such information can be utilized.

Moreover, many misperceptions about wetland functions and values exist which make ranking wetlands accurately difficult. For example, there is a common misperception that wetlands at the drier end of the moisture gradient are inherently less valuable, i.e., the notion that "wetter is better." Similarly, there is a misperception that larger wetlands are more valuable than small wetlands. However, in prairie pothole wetlands, for example, small, temporarily-flooded wetlands are critical to waterfowl and shorebird populations because they allow for

the dispersion of species, which reduces territorial interactions, diffuses predatory pressure and maximizes the availability of nest sites.

Given the limitations associated with our understanding of wetland functions and values, the development of suitable evaluation techniques to rapidly identify and assess wetland functions and values necessary to implement a National ranking scheme has proven to be a difficult task with only marginal success to date. Moreover, development of evaluation methodologies requires making several generalizations and presumptions regarding the importance of particular wetland functions and values. These generalizations may not, in many cases, hold up to scientific scrutiny, and they are not likely to reflect the relative significance of wetlands which are regionally or locally important.

The scale at which such determinations are made is also an important consideration. Classifying or ranking wetlands at a National level would preclude the ability to tailor management decisions to the unique local or regional variations in wetland types, functions and values. When viewed from a National perspective, some wetlands may be perceived to be of lower significance, and yet, when viewed within a particular watershed context, their value to that aquatic ecosystem may be significant. The need to conduct site-specific assessments, as is typically done on a permit-by-permit basis or as part of a local or regional watershed planning effort, is important to ensure the accuracy of such evaluations.

Finally, the fiscal implications of a national categorization program would likely be prohibitive. For example, simply mapping the lower 48 States at a scale

suitable for detailed regulatory use would involve a mammoth undertaking, yielding nearly 14 million maps and costing in excess of $500 million. Assessing the functions of every wetland in the country would require staffing and funding many times that necessary to complete mapping alone -- likely in excess of $50 billion for the lower 48 States alone. By way of comparison, it cost the Federal Emergency Management Agency (FEMA) over $873 million to map just a portion of the Nation's floodplains, and it costs an additional $36 million annually to keep published information current.

It is important to note that the Section 404 regulatory program recognizes that "all wetlands are not the same," and that regulatory decisions must reflect the relative function of the affected wetland, the character of the proposed discharge, and the probable environmental impact. EPA and the Corps of Engineers issued guidance on August 23, 1993 clarifying the flexibility afforded by the Section 404(b)(1) Guidelines to allow regulatory decisions to be based on the relative severity of the environmental impact of proposed discharges. This guidance clarifies that small projects with minimal impacts are subject to less rigorous permit review than larger projects with substantial environmental impacts.

Question #6:

Isn't it true that citizens' organizations have the authority to bring enforcement actions for ongoing violations or where there is a pattern of abuse? What they are prevented from doing is punishing dischargers for violations that have been corrected. Isn't punishment a role for the government and not for private groups that may have an ax to grind?

Answer #6:

In the 1987 decision in Chesapeake Bay Foundation v. Gwaltney of Smithfield, the U.S. Supreme Court, interpreting the language of the CWA citizen suit provision, held that citizens are authorized to maintain suit against only those CWA violators whose violations were "ongoing" at the time the citizens filed their complaint with the court. "Ongoing" was defined to include violations that were either "continuous" or "intermittent" at the time the compliant was filed. The consequence of this decision is that citizens may not maintain a suit against any CWA violator who, by whatever means, ceases his violations at the time the citizens file suit.

The Administration supports a legislative reversal of this decision. We do not agree with the suggestion that suits brought to obtain penalties for wholly past violations are to punish the violator. When punishment is the appropriate response, the United States prosecutes CWA violators criminally. When we, or citizens, bring a civil action, the primary goal is deterrence, both specific and general -- specific deterrence to assure that this violator in no way profits from his violations, and general deterrence to send the message to others in the regulated community that there is no profit in violating the Act. When violators profit from

their violations, by delaying and avoiding expenditures that would have assured compliance, it is important to recoup any benefit gained whether or not the violations have ceased by the time the complaint is filed.

Citizen suits have proven to be an important component of the CWA enforcement scheme, providing significant additional deterrence to that accomplished by the threat of Federal and State enforcement. Unfortunately, the deterrent effect of the threat of citizen suits has been greatly compromised by the Gwaltney restriction. At least 60 days prior to initiating a citizen suit, citizens are required to provide notice of their intent to sue to EPA, the State and the violator. (The purpose for this notice is to allow EPA or the State to bring the enforcement action if they so choose, preempting the citizens.) We support this notice requirement, however, it combines with Gwaltney to allow the violator the opportunity to cease his violations prior to the citizens filing a complaint. Ceasing violations does not necessarily mean installing the necessary treatment equipment. It may simply mean shutting down or limiting production long enough so that violations are not ongoing when the 60-day notice period expires. In the Administration's view, this is an unacceptable result and we do not believe it was intended by Congress.

We believe citizens should be empowered to take legal action to protect themselves and their communities from the serious threat posed by water pollution. In order to assure that violators who have corrected their violations are not inappropriately penalized, we have proposed that courts be required to consider

additional appropriate equities: 1) the duration of the violator's continuous compliance and non-compliance; 2) the efforts made by the violator to comply, both prior to and after the violations at issue; 3) the diligence of the violator in preventing the violations at issue; and 4) the likelihood of recurrence of violations. The Administration proposes that these changes to the citizen suits provision apply only to violations occurring after the effective date of the changes. Also, the Administration proposes that citizen suits be precluded against Federal agencies if EPA (or COE) has initiated and is pursuing or has completed an administrative enforcement action for the same violation.

Question #7:

Ms. Browner, could you provide the Committee with information on each provision of H.R. 3848 which will result in additional costs for State and local government (as well as industry and agriculture) including your estimate of the costs that would be incurred, when, and by whom?

Answer #7:

EPA has not had the time to estimate the costs of the provisions of H.R. 3948 or of S. 2093. Attached is a copy of the Cost Estimate for *President Clinton's CWA Initiative*. To the extent that the provisions in H.R. 3948 are comparable to those in the *President's Initiative*, the costs would be the same. EPA will consider costing out new requirements, as appropriate, when the Congress enacts the CWA amendments.

Reauthorization of the CWA also provides an opportunity to decrease costs for the regulated community when comparably protective alternative approaches can be found. For example, implementation of the storm water management recommendations in the *President's Initiative* would result in annual cost savings of approximately $17 billion compared to the costs associated with a strict interpretation of the current law. As H.R. 3948 proposes an approach similar to that in the *Initiative*, we would expect that the bill would promote similar, significant cost savings.

Question #8:

Please provide the Committee with a description of EPA's implementation of E.O. 12866 and E.O. 12875 as they relate to coordination with State and local governments and the need to address problems with unfunded mandates. Please provide specific examples of how these Executive Orders have improved coordination and addressed the problems of unfunded mandates.

Answer #8:

The Agency is now beginning to implement the two Executive Orders in question. E.O. 12866 requires Agencies to consider alternative approaches and their impact on the regulated community, including State and local governments, when developing regulations. The Office of Water traditionally has included an examination of alternatives when developing regulations under the CWA. In light of the recent Executive Order, however, it is establishing a rulemaking process which specifically requires, for all future and recently initiated rulemakings, an identification of alternative options and an assessment of their impact on the regulated community, especially on small communities. The options and their impact will be closely examined by senior management when selecting a preferred option.

The objective of E.O. 12875 is to establish regular and meaningful consultation and collaboration with State, local and tribal governments on matters that significantly or uniquely affect their communities and to address concerns that these governments may have in EPA rulemakings (to the extent allowed by law). EPA already has a number of forums for consulting with State and local representatives, but will be developing means to enhance this consultation. In this

vein, EPA sponsored a two-day meeting in late June with representatives of State and local governments to discuss EPA's regulation development process, provide an opportunity for State and local representatives to identify which rules and policies they wished to be more intensively involved with, and establish means for future outreach efforts by regulation and policy development managers.

Additionally, EPA is launching a new internal process for developing regulations and policies. Specific steps are being built into the new process to expand consultation efforts in rulemakings. Focusing on rulemakings with a significant impact on State, local and tribal governments, EPA will be developing rule-specific consultation plans for each recently initiated rulemaking or, for rules which have been under development for some time, seeking to consult with key stakeholders prior to publication, as time permits. (In some cases, Court deadlines may limit the extent of consultation possible for rules in the latter case.) Our intent is to provide governmental entities with opportunities to participate throughout the rulemaking process to the extent possible, within the boundaries of legal authorities, and to ensure that economic, policy, and technical analyses adequately consider intergovernmental impacts and issues.

Question #9:

In your testimony, you criticized the Bipartisan Alternative's provisions on nonpoint source pollution as being a weakening of existing law. Could you please describe how these provisions -- which require States to develop and implement control strategies which will result in achieving water quality standards by 2010 -- are a weakening of existing law?

Answer #9:

The Alternative would weaken the nonpoint source provisions of section 319. First, the current section 319 requires nonpoint source management programs to provide for utilization of best management practices "at the earliest practicable date." The Alternative deletes that provision and replaces it with a requirement of "making reasonable progress toward the attainment of standards".

Thus, the Alternative discards section 319's current emphasis upon implementing those best management practices and measures that we know will reduce pollution, and replaces it with an undefined and immeasurable requirement of "making reasonable progress" towards attaining water quality standards. This requirement is immeasurable because the Alternative does not provide a certain date for meeting water quality objectives and hence, there is no way to measure if "reasonable progress" is being made.

The water quality-based approach in the Alternative is similar in many respects to the water quality-based approach attempted for point sources in the Water Quality Act of 1965. That approach failed and was replaced by the very successful approach adopted in the 1972 amendments that focus upon the implementation of proven pollution control technologies, backed, where necessary,

by water quality standards. EPA believes that the basic approach of the current section 319, in which we rely upon proven and economical management practices, offers the most effective method for reducing nonpoint source pollution. That approach should be retained and strengthened.

Second, the Alternative would replace the current requirement that State nonpoint source management programs include "annual" milestones for implementation with a weaker requirement that the schedule simply contain "interim goals and milestones" of indeterminate frequency. Annual milestones are an important tool in assisting States and assuring that longer-term goals will be attained on schedule.

Third, the Alternative would decrease the non-Federal share of the cost of nonpoint source control from 40% to 25%, representing a reduction in the commitment of State government and private parties in the national effort to control nonpoint source pollution. We believe that, while Federal commitment needs to remain strong, maintenance of State and private commitment is equally important to implementing and maintaining practices to protect water quality.

Moreover, it has become increasingly clear that the existing tools provided by the CWA are insufficient to address the serious water quality problems caused by nonpoint source pollution. We need a fundamental upgrading and strengthening of the existing program authorized under §319 of the CWA if we are to make significant progress.

Question #10:

Section 309(l) of H.R. 3948 would provide that the minimum penalty a court or administrative law judge could assess would be the economic benefit of noncompliance for the particular violation. With all the economic variables involved in the calculation of such a figure, how can one be sure the amount will be accurate?

Answer #10:

For more than a decade it has been EPA's policy that, in order to achieve deterrence, the penalty obtained from environmental violators must recoup at least the amount of the economic benefit, if any, that accrued to the violator from his violations. To this end, the Agency has constructed detailed economic models for computing economic benefit.

Because it is difficult, and sometimes impossible, to calculate the precise economic benefit a violator may have enjoyed by delaying or failing to make the expenditures necessary to comply, Congress and the courts have stated that a reasonable approximation of economic benefit is sufficient for purposes of calculating an appropriate penalty. In PIRG of New Jersey v. Powell Duffryn, 913 F.2d 64, 80 (3d Cir. 1990), the Third Circuit Court of Appeals stated,

> Precise economic benefit to a polluter may be difficult to prove. The Senate Report accompanying the 1987 amendment that added the economic benefit factor to [CWA] section 309(d) recognized that a reasonable approximation of economic benefit is sufficient to meet plaintiff's burden for this factor.

Violators should not be able to obtain an economic benefit vis-a-vis their competitors due to their noncompliance with environmental laws. The determination of economic benefit or other factors will not require an elaborate or

burdensome evidentiary showing. S. Rep. No. 50, 99th Cong., 1st Sess. 25 (1985) (emphasis added).

Courts have successfully employed economic benefit as a basis for calculating penalties in environmental cases. This calculation will be no more difficult with economic benefit established as the minimum penalty amount. An absolutely exact calculation is not required. We recognize that, in some instances, there may not be any economic benefit or competitive advantage from noncompliance. Under *President Clinton's Initiative*, publicly and federally owned treatmentworks are excluded from the proposal to base minimum penalties on economic benefit. In addition, the *Initiative* recommends that EPA study the application of its economic benefit model to private and public entities.

Question #11:

Section 309(m) of H.R. 3948 would establish a special fund for fines/penalties collected by EPA. What other agencies have this power. Why? Why should EPA have it?

Answer #11:

Currently, CWA violators pay civil penalties assessed under the Act to the general funds of the U.S. Treasury. 31 U.S.C. 3302. *See, Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 484 U.S. 49 (1987). Then, the Government disburses the penalties it has collected through the usual Federal budget process. *President Clinton's Clean Water Initiative* does not propose amending the CWA to include a special fund for CWA penalty monies.

Question #12:

Under section 402 of H.R. 3948, the EPA Administrator may exempt certain industrial stormwater-only discharges as long as they are not contaminated by contact with raw materials, machinery, or products. Do you interpret this provision as ratifying EPA's decision last year not to require stormwater permits for certain light industries, as contained in stormwater rules that were adopted in final form? Do you believe that a new rulemaking would have to be undertaken to implement this provision or would that previous rulemaking serve the same purpose? If a new rulemaking is required, how long would that take? Would these sources be required to obtain permits prior to finalizing the rule?

Answer #12:

EPA believes that this provision of H.R. 3948 would ratify the portion of EPA's November 16, 1990 storm water permitting rule that exempted from the storm water program those industrial activities that have no exposure (from equipment, waste materials, raw materials, intermediate products, finished products, etc.) to storm water runoff or rainfall. This portion of the rule was remanded back to EPA by the courts.

In order to implement this provision of H.R. 3948, a new rulemaking would be necessary. First, EPA's November 16, 1990 storm water rule only applied the no exposure exemption to light industrial activity, whereas under H.R. 3948, the no exposure exemption would be applied to all types of industry. Therefore, the previous rule would not be sufficient. Second, EPA would need to provide technical criteria in the new regulation which would more clearly define how an industrial facility determines that there is exposure at the facility, and would, therefore, be subject to the permitting requirements.

A new rulemaking on this issue would probably take two years. While the regulation was being developed and promulgated, facilities would not need interim permit coverage as long as the exemption in the statute made this clear.

Question #13:

H.R. 3948 also provides that permits for discharges from municipal separate storm sewer systems generally will not be required to meet numeric effluent limitations of water quality standards prior to December 31, 2009, but no similar exemption from numeric standards is provided for industrial dischargers required to have a permit. What is the scientific or policy basis for this distinction? Is there a difference between the quality of stormwater being discharged by industrial and municipal stormwater-only systems that justifies treating one and no the other? What evidence is there that industrial stormwater-only discharges contribute to water quality impairment?

Answer #13:

There are several distinctions between industrial storm water discharges and municipal storm water discharges that lead to differences in the timing for compliance with water quality standards. For example, discharges from a municipal storm sewer system tend to be a more complex mixture of contaminants due to the wide variety of potential pollutant sources within a drainage area served by the storm sewer system. A municipal storm sewer system could convey storm water from a large area (many square miles) in which there could be numerous potential sources of contamination, some of which would be very difficult for the municipality to directly control. For example, contaminant sources could include metals from automobile brake dust deposited on street surfaces, oil and grease drippings from automobiles on roadways and parking, residential misuse of pesticides, bacteria from domestic animal wastes and illicit dumping of chemicals into the storm sewer system. Control techniques and best management practices may require long-term programmatic efforts by the municipality.

In addition, given the large size of the drainage areas in a municipality, the volume of the storm water flows from the system will be much larger than at a confined industrial facility. Because of these larger flows, it would be very

difficult, and costly, to construct traditional treatment facilities to achieve necessary pollutant reductions to achieve water quality standards. Additional time would be needed by municipalities to develop and implement new best management practices.

On the other hand, a private industrial facility will likely have more direct control over the sources of storm water contamination on its site (equipment, waste materials, raw materials, intermediate products, finished products, etc.) and will be able to develop a storm water pollution prevention plan to eliminate storm water contamination more readily than a municipality. Most, if not all, storm water control techniques an industry will need to implement are proven methods using existing best management practices and technology. EPA and the States have published extensive technical guidance on measures for reducing storm water contamination to assist industry. Under existing NPDES storm water permits, such plans are required to be implemented over the term of their permits in the next four years. Industrial facilities should be better able to review the effectiveness of these plans and make any additional necessary refinements to meet water quality standards.

Question #14:

There are many who would say that the only party that has not lived up to its commitment under section 319 has been the Federal government. Virtually no money was appropriated in the four years following the last reauthorization and only partial funding in the last two years. With enforceable mandates on the States and on individuals in H.R. 3948, what assurance can you give farmers that the resources will be available to assist landowners to meet the mandates of this bill? Isn't it true that the Administration is proposing only a fraction of what H.R. 3948 authorizes and believes is necessary?

Answer #14:

Section 319 of the CWA authorized funding for States to implement approved nonpoint source management programs. Since virtually all States did not complete and submit their management programs to EPA for approval until FY 1989 or 1990, FY 1990 (the fourth year following enactment) was an appropriate year for Congress to choose to begin funding these programs.

Resources devoted to this program are increasing. Section 319 dollars have increased from approximately $38 million in FY 1990 to $80 million in FY 1994. In line with its recommendation to provide more funding for this program, the Administration has requested another increase to $100 million in FY 1995. H.R. 3948 proposes still more Federal funding through Section 319. Substantial additional funds to assist landowners to meet the mandates of H.R. 3948 will be available from States (who must match the federal 319 dollars with at least a 40% share, and many States contribute far more than 40%), the U.S. Department of Agriculture, and other Federal, State, and local agencies.

Question #15:

Doesn't the law currently allow judges to impose penalties based on economic benefit? Why should we diminish the judiciary's discretion?

Answer #15:

Under the present CWA, sections 309(d) and (g)(3), the judge in a CWA enforcement action is required, when determining the appropriate amount of a penalty to impose, to "consider" a series of factors including "the economic benefit (if any) resulting from the violation."

The Administration has proposed that the CWA be amended to require a court to impose a penalty that, as a minimum, recoups any economic benefit that the violator obtained by not timely and fully complying with the law (except in cases against publicly and federally owned sewage treatment works). We do not believe that CWA violators should ever be allowed to profit from their violations of the law. It is fundamental that if enforcement is to have a deterrent impact, violators must not be allowed to profit from their violations. Allowing the violator to profit by imposing a penalty of less than economic benefit not only promotes violations, but also serves to punish the competing business that made all the investments and expenditures necessary to comply, by giving the violator a financial advantage.

The exception to the minimum penalty rule proposed by the Administration for POTWs and FOTWs is premised, primarily, upon the huge dollar amount of the economic benefit that often exists in these cases, due to the large construction, operation and maintenance costs associated with sewage treatment plants.

Experience in enforcing the CWA has established that it is often impractical to seek to recover the full economic benefit from some violating municipalities that operate sewage treatment plants.

Question #16:

What role does risk assessment play now under the CWA? Do you believe that the level of risk is adequately considered in decision-making under the CWA?

Answer #16:

The role of risk assessment under the CWA varies from program to program. When the Agency conducts a risk assessment, the process used is based on the National Academy of Sciences' guidance and is comprised of four elements: hazard identification; dose response assessment; exposure assessment; and risk characterization.

Under section 304(a), in deriving human health ambient water quality criteria, risk assessments for cancer and noncancer health effects, coupled with exposure assessments (such as body weight, fish consumption and water intake assumptions), are an integral part of the criteria development process. Toxicity tests are used in deriving ambient water quality criteria for aquatic life. States use these criteria, modify the criteria to reflect site-specific conditions or use other scientifically defensible methods in adopting their water quality standards. In addition, the Agency is developing guidance on conducting ecological risk assessments and is using case studies to refine the methodologies.

In developing the sewage sludge use and disposal regulations under section 405(d), the Agency used a comprehensive, multi-pathway risk assessment to develop standards for land application, surface disposal and incineration of sewage sludge. Risk assessments also play a role in the development of guidance for issuance of State fish consumption advisories and in the identification of sites

where sediment contamination may cause adverse human health or ecological effects. The national inventory of contaminated sediment sites, now underway, will be used to target sites for further assessment, pollution prevention, or, where appropriate, remediation.

Along with utility to EPA Regions and State and local governments, EPA considers risk in the context of environmental factors when selecting industries for effluent guidelines development under section 304(m). In the development of effluent limitations in a guideline, the CWA requires the Agency to base those limitations on the best available technology economically achievable. Because Congress intended the guidelines to be technologically based, risk is not among the factors considered.

Regulatory decisions made pursuant to Section 404 of the CWA are based on consideration of the relative severity of the environmental impact of a proposed discharge. As such, Section 404 incorporates a reasonable "risk assessment" approach within the decision-making process. For example, most activities which would only have a minimal adverse effect, either individually or cumulatively, are authorized under general permits that require little or no review by the permitting authority. Conversely, for projects which would cause more than a minimal impact, a more detailed analysis is required to ensure that environmental impacts are avoided or minimized to the extent appropriate and practicable. This policy is clarified in an August 23, 1993 EPA/Army memorandum to the field.

The loss or degradation of wetlands can lead to serious consequences, including increased flooding, species decline, and decline in water quality. In the coterminous United States, where over 59% of the wetlands have already been lost, the cumulative effect of additional impacts can be reasonably expected to have an adverse impact on the public interest in protecting these valuable resources. Therefore, the level of review required by the Section 404 program appropriately reflects the risk involved.

Regulatory decisions made under the NPDES program also consider the risk that a discharge may pose in several ways. For example, effluent limits in permits rely upon the risk assessment inherent within State adoption of water quality standards. The Combined Sewer Overflow program is greatly based on meeting water quality (risk-based) goals for defining the necessary controls on overflows.

The storm water permitting regulation focused efforts on facilities or areas where the risk is believed to be the greatest. It established a tiered approach for regulating storm water discharges associated with industrial activity, starting with a minimal general permit approach and, for those facilities which pose the greatest risk to water quality, moving to a more intensively controlled site-specific approach.

Although later remanded by the court, the regulation also exempted "no exposure" industrial facilities and construction sites of less than 5 acres in size based on an assessment that these facilities would pose less risk than others. Additionally, the sludge program requirements are more intensive for "Class I"

facilities and less intensive for facilities with "exceptional quality" sludge, representing another application of a risk-based approach in the NPDES program.

In addition to risk assessment, "risk management" is an integral part of the decision-making processes under the CWA. Determinations of the acceptable level of risk for a particular action is an example of a risk management decision. In their water quality standards setting process, States, through a public participation process, set the level of cancer risk in adopting human health water quality criteria and also changed fish consumption rates to reflect alternative exposure assumptions. Risk management decisions are also involved when States select a particular level of aquatic life use protection in the water quality standard for a particular body of water.

Question #17:

Are the costs of regulatory actions under the CWA adequately weighed against the benefits (that is, the risk avoided) of those actions?

Answer #17:

Again, depending on the program context, the Agency may weigh the costs along with the benefits of taking an action. For example, under section 304(a), the water quality criteria are based on scientific information; costs may not be considered. However, States may consider costs in designating an appropriate use for a particular water body. In another example, policy considerations, within the context of the sewage sludge use and disposal regulation, were evaluated in terms of a variety of risk levels along with the associated costs.

Executive Order 12866 requires the Agency to consider the costs and benefits of major regulatory actions. Generally, the Agency can more accurately estimate the costs of taking an action than monetize the human health and ecological benefits of the action. Costs are based on standard economic methodologies and "real life" experiences. Human health benefits are generally based on cancer cases avoided. Many of the benefits of reducing ecological risks are intrinsic and difficult to quantify, although EPA attempts to monetize them using available techniques.

In developing its CWA reauthorization recommendations, the Administration accounted for both their benefits as well as costs. Our cost-benefit analysis indicated that the annual incremental cost of the recommendations on all sectors ranges from $5.0 billion to $9.6 billion. The annual cost savings (or costs avoided)

for all sectors, associated with the proposed flexible and targeted approaches, range from $29.1 billion and $33.8 billion, compared to the cost of stringent interpretation of current law.

Moreover, the Administration's recommendations would result in certain environmental and monetary benefits. From a physical perspective: nonpoint source controls have a high or medium likelihood of producing measurable water quality improvements in 52 percent of impaired or threatened rivers and 63 percent of impaired or threatened lake acres based on data from 28 States; storm water controls are expected to reduce loadings of urban pollutants by 75 to 80 percent in developing areas and by 15 to 25 percent in already developed areas; implementation of EPA's CSO Policy is expected to reduce pollutant loadings of 2,400 million pounds of suspended solids and 500 million pounds of biological oxygen demand annually; and further control over the discharge of toxic and/or bioaccumulative pollutants will reduce impacts on human health and aquatic life.

From a monetary perspective, the aggregate benefits of pollution control in urban areas should eventually produce quantifiable benefits of between $0.8 billion to $6.0 billion annually, based on household valuation of clean water for a variety of purposes. As several important categories of benefits could not be quantified, additional benefits would also be realized from urban controls including enhanced recreational swimming and boating; avoided costs for water storage, flood control and water purification as natural systems improve; reduced dredging costs as watershed and wet weather programs reduce siltation; lower costs for sediment

remediation over time as toxics and permitting provisions are adopted; and increased biodiversity and overall ecological integrity.

We believe that the Administration's *Initiative* demonstrates a genuine effort to achieve cost-effective regulatory management approaches to improving the Nation's polluted waters based on analyzing both costs and benefits.

Question #18:

To the extent that risk assessment is done now, it has been criticized for piling conservative assumption upon conservative assumption to come up with the worst case estimate of risk. Don't you agree that decisionmakers should be looking at the most likely estimate of risk in order to arrive at more reasonable environmental decisions?

Answer #18:

There are a number of steps in the process of performing risk assessments related to water quality. Some involve the conversion of toxicity testing data to criteria, others the conversion of these criteria into source control limits. EPA has been working on all of these with a goal of more accurate risk assessment.

With regard to the development of criteria, EPA is in the process of drafting revisions to both the aquatic life criteria methodology and the human health methodology. These are both being undertaken in public meetings, with ongoing reviews by EPA's Science Advisory Board. When draft methodologies are complete, they will be published in the Federal Register for public comment. This process should ensure that these revisions will move the Agency toward a realistic estimate of risk.

However, the criteria process revisions will be a relatively minor, though essential, part of addressing the criticisms that EPA has received. This is particularly true in the case of aquatic life criteria, which have little margin of safety because they are closely related to aquatic life toxicity testing. EPA's experience is that many, if not most, of the criticisms are directed at the steps involving the conversion of criteria into source control limits. In practice,

assumptions related to these steps, such as design flows, mixing zones, and a focus on point sources, frequently have more effect on the regulated community than do the criteria assumptions. EPA has provided States with guidance (the Technical Support Document) which was developed with considerable public input and peer review. It allows for substantial State flexibility in the risk assessment assumptions that may be used. Looking at all sources on a watershed basis will provide a way of determining more realistic estimates of risks, as opposed to the past practice of focusing on individual point sources. Addressing the criticisms of overconservative assumptions will, thus, be a joint effort by EPA, States and watershed decisionmakers.

Question #19:

Current risk analysis has also been criticized for not adequately comparing different risks we face in society. Don't you agree that the science of risk assessment should use comparative risk analysis so that we can devote scarce resources to solving the most serious risks we face?

Answer #19:

Government officials responsible for setting environmental priorities obviously must decide how much of society's valuable resources to apply to given environmental risks. That is why *President Clinton's Clean Water Initiative* proposes to broaden environmental controls only in the area of nonpoint source pollution, which the States' own 305(b) reports on current water conditions show is far and away the most serious threat to water quality.

This is also why the Administration has proposed, in *the Initiative*, to reduce sharply the stringency and extent of stormwater and combined sewer overflow discharge regulation from potential stringent interpretations of current law while still addressing the highest priority problems. These proposals would reduce control costs that such interpretations would impose by $27 billion annually, for municipal taxpayers and businesses, to ensure that society's resources for clean water are dedicated to addressing the most serious water quality threats in the most cost-effective ways. Comparative risk analyses can be a useful tool to help guide and target agency decision making, in addition to other information which the agency uses.

However, it is important to be aware that, as The Conservation Foundation reported in its study, "Risk Assessment and Risk Control", "[p]ervasive uncertainty

is one of the fundamental characteristics of many risk assessments. But objective analysts must acknowledge that this "pervasive uncertainty" present in most individual risk assessments can lead to further uncertainty when attempting to make comparisons. Comparative risk assessment can offer a rough, but useful, "ballpark" perspective on relative risks -- as one of several important factors for decision-makers to consider.

Question #20:

What is the best way of ensuring that risk is appropriately taken into account in environmental decision-making?

Answer #20:

EPA believes that the most effective and useful way of considering risk in environmental decision-making is to incorporate it, as appropriate, as an explicit consideration tailored to the operation of specific programs. Thus, EPA has recommended changes to several environmental statutes targeted to provide greater flexibility in setting priorities and directing resources where they will be most effective.

Mr. BORSKI. Thank you very much.

There being no further questions, we will call our next panel, Captain Ralph Pastore, Commercial Fisherman, United Fishermen's Association of New York; Dr. Robert Morris, M.D., Ph.D., Epidemiologist, Medical College of Wisconsin; Joy Towles Cummings, Rancher/Farmer, President/Founder of HOPE, Taylor County, Florida; Gordon Durnil, former Chair, International Joint Commission; Susan Mudd and Malika Sanders, citizens.

We have a very busy agenda left for us this afternoon, and it is my understanding this room will have to be vacated at or near 4 o'clock. So let me suggest to our panelists and ask for their cooperation in limiting their remarks to five minutes or less if it is at all possible.

We understand how important this issue is, but again, there are many more to be heard from yet this afternoon.

Captain Pastore.

TESTIMONY OF CAPTAIN RALPH PASTORE, COMMERCIAL FISHERMAN, UNITED FISHERMEN'S ASSOCIATION OF NEW YORK; ROBERT D. MORRIS, M.D., Ph.D., DIVISION OF EPIDEMIOLOGY, MEDICAL COLLEGE OF WISCONSIN; JOY TOWLES CUMMINGS, RANCHER/FARMER, PRESIDENT/FOUNDER OF HOPE (HELP OUR POLLUTED ENVIRONMENT), TAYLOR COUNTY, FLORIDA; GORDON K. DURNIL, ATTORNEY, FORMER CHAIR, INTERNATIONAL JOINT COMMISSION; AND SUSAN MUDD, STATE PROGRAM DIRECTOR OF CITIZENS FOR A BETTER ENVIRONMENT, ON BEHALF OF THE SIERRA CLUB; AND MALIKA SANDERS, PRIVATE CITIZEN

Mr. PASTORE. I would like to thank the Chairman and the subcommittee for allowing me to give testimony today.

The United Fishermen's Association was founded in 1984 in response to the State Department of Environmental—New York State Department of Environmental Conservation's New York statewide ban on the sale of striped bass. The ban was occasioned by the determination that the striped bass were contaminated with PCBs above Federal guidelines for consumption.

Over 1,000 cottage businesses were economically impacted or totally eliminated by the ban. An estimated 4,500 commercial fisherman were affected. The ripple effects were felt throughout the wholesale and retail fish markets.

One of these wholesale fish markets, Blue Ribbon Fish Company, who specialized in striped bass, estimated losses in excess of $4 million per annum. Loss of the striped bass in the markets created a greater dependence on other marketable species.

For example, one of the species, the blackfish or tautog, which only grows about a pound every five years, could not sustain the additional pressure and is currently in a severe state of decline. Additionally, the loss of the striped bass caused across-the-board inflation on the price per pound of all marketable fish species, which is passed on to the consumer.

Beyond the fish markets, the ripple effect went on to be felt by bait and tackle distributors, boat and motor manufacturers and other waterfront businesses. When the Hudson was contaminated with PCBs, 13 other species were lost besides the striped bass, and

with them the economic viability of the fishermen who depended on them.

I was among the most affected by the striped bass ban as I was totally dependent upon the striped bass resource for all of my income. I lost, however, a great deal more than my income. I lost a traditional way of life, away from the streets, sirens and stop lights of the nearby city. I lost a traditional way of life taught to me by my father.

I grew up a fisherman. In my teenage life I began working as a deck hand on boats. I slowly learned through hands-on experience the skills required to be a successful commercial hook-and-line fisherman.

In life, there is little time to become the best at a sport or profession, and some never achieve that goal. I did, but when the striped bass were banned because of contamination, I lost the ability to exercise and utilize 20 years of experience and accumulated knowledge.

Today, I still operate a boat, but I no longer produce fish. Instead, I operate a skimmer boat for New York City Department of Sanitation inside the world's largest landfill, the fresh kills landfill in Staten Island, cleaning floating debris from the surface of the waterway. So I now fish for garbage.

I spend significant time directing the United Fishermen's Association as a volunteer, at a personal loss of about $10,000 a year. I do it because I am compelled to prevent the contamination of our waterways, so that fishermen do not have their lives torn apart like mine was. I do it because banning harvest and the consumption of seafood is not an adequate solution.

We have seen the results of the weakness of our current Clean Water Act. It is obvious that it lacks the strength needed to prevent this scenario of lost natural resources from reoccurring. We must turn this around. We must begin to bring back what we have lost.

The general public has the right to eat safe fish without the fear of devastating adverse health effects. I should have the right to return to my chosen profession.

Fishing is a way of living in harmony with nature. It must be preserved as a viable part of our Nation's economy.

I live in an area where cancer is very common. In fact, Staten Island has among the highest cancer rates per capita in the country. I believe that consumption of contaminated seafood plays a significant role in this cancer epidemic.

The New York Times reported last week that exposure to common levels of dioxin found in the natural food chain can cause reproductive and developmental disorders, suppressed human immune system, fetal harm and cancers. Winter flounder, which has never been tested for PCBs, dioxin, furans, et cetera, are a perfect example of a fishery that is extensively used, yet remains an unknown health risk in terms of human exposure to contaminants. Winter flounder can be found on the menus of nearly every restaurant and diner in the northeast and is sold as fillet of sole.

The Atlantic States Marine Fisheries Commission has called for a 45 percent reduction in the catch of winter flounder because of a noted decline in their population size. That means that the in-

come of every flounder fisherman in the Northeast will be cut by 45 percent.

I don't know anybody that can live on half of their income—I realize the red light is on. I have two more paragraphs.

Mr. BORSKI. You may proceed.

Mr. PASTORE. The UFA has reacted to the reduction by investigating much of the scientific literature which exists on winter flounder. We found that there is overwhelming scientific evidence to support our belief that reproductive failure due to larval exposure to contaminants may be responsible for as much as 80 percent of the decline in winter flounder stocks, fishing pressure being responsible for the additional 20 percent.

All of the rivers in our region, the Hudson, Raritan and Kill Van Kull, Arthur Kill, Hackensack and Passaic Rivers are so contaminated that they can't be dredged because there is no place to dump contaminated dredge spoils. The sediments can't be ocean disposed because they don't meet the Federal EPA ocean dumping criteria.

The Port of New York is facing navigational instability for our failure to address the need for strong legislation prohibiting the disposal of chemical waste into the environment. During every outgoing tide, the Hudson and its tributaries pump out some 55 billion gallons of water into the Atlantic Ocean.

This plume carries fine particulate sediments, which PCBs, dioxins, furans and other chlorinated substances tend to cling to, spreading this contamination to the Hudson Canyon and beyond, to the edges of the Continental Shelf. Our environment is unhealthy under the existing Clean Water Act, as is indicated by all the assorted problems that our fisheries, food chain, ports, public health, recreational beaches and our wildlife are facing.

New York is not alone. Contamination is rampant throughout the United States. Our environmental statutes have been riddled with loopholes to allow industry short-term profits at the expense of our dwindling natural resources. These statutes must be strengthened and not weakened, now, before it is too late. The loopholes must be removed and the violators punished to the fullest extent or we will lose our natural resources forever.

And I would like to close by just making one last statement. What we put in the ocean today, we will put in our mouths tomorrow.

Mr. BORSKI. Captain Pastore, thank you very much.

We will now hear from Dr. Morris.

Again, let me remind each of you that your testimony will be made part of the record.

Dr. Morris, you may proceed.

Dr. MORRIS. Mr. Chairman and Members of the committee, I thank you for the opportunity to speak to you today.

As a physician and epidemiologist from the City of Milwaukee, it is reassuring that know that the unique perspective that citizens of our city can bring to the debate on clean water will be heard. I suspect you have all heard the statistics that quantify the events that took place in Milwaukee just over a year ago, but the story bears frequent retelling as it is an important parable for this debate.

Milwaukee draws its water from Lake Michigan, generally a remarkably clean water source. The Milwaukee River drains a large agricultural region north and west of the city. As it flows, it picks up the contaminants associated with agricultural runoff, which it carries into the lake.

One of these contaminants is a tiny parasite known as cryptosporidium. Last spring, cryptosporidium oocysts or eggs passed through the city's filtration system in quantities sufficient to infect half of the city's population. Milwaukee residents were forced to boil their water, schools and businesses closed, and hospitals and emergency rooms over flowed.

More than 4,000 people were so debilitated as to require hospitalization. Cryptosporidium contributed to the deaths of more than 100 of those people most vulnerable to the infection, such as cancer patients.

These numbers, however, do not fully tell the story. Modern urban residents depend completely on a complex web of services to provide them with life's most basic necessities. Few experiences provide a more stark reminder of the vulnerability that this dependence implies than living in a city that has lost its drinking water. Most Milwaukee residents still have a lingering sense of uncertainty about their drinking water.

Milwaukee has implemented drinking water standards far more stringent than the EPA's, but as recently as last week, cryptosporidium appeared in the drinking water supply, prompting the city health commissioner to issue an advisory to the citizens to boil their water once again.

I have heard that Milwaukee's experience is being dismissed as a fluke, a strange convergence of events that is so rare as to be considered little more than a curiosity. Nothing could be further from the truth. Cryptosporidium has been estimated to be present in approximately 90 percent of untreated surface water nationwide.

Chlorination, the primary tool for water disinfection in this country, is ineffective against cryptosporidium. Even after treatment, more than one in four water supplies using surface water in this country contains the parasite. If we add another pathogen, such as giardia viruses and bacteria to our list of microbes, the rate of contamination would be substantially higher.

The only drinking water standard that addresses the problem of cryptosporidium uses turbidity as a surrogate measure. The current EPA standard for turbidity allows peak levels two-and-a-half times higher than the highest level reached in Milwaukee during the outbreak.

Clearly, events in Milwaukee could have occurred elsewhere. In fact, they do on a regular basis throughout the United States, though in less dramatic fashion.

The EPA estimates that 700,000 cases of waterborne infections occur each year in the United States just from one parasite, giardia. Published estimates of total infections from all waterborne pathogens range from almost 1 million to 50 million cases a year in the United States, excluding the Milwaukee outbreak.

Realistic estimates place the true number of clinically significant infections at between 1 and 2 million cases per year. Events in Mil-

waukee only demonstrate how slim the margin is between the current tenuous level of protection and a major public health disaster.

It is important to recognize that as recently as 1980, cryptosporidium was seen as a microbiological curiosity, primarily of interest to livestock veterinarians. Only in the past 10 years has the importance of this parasite as a cause of waterborne infections come to be recognized.

The importance of giardia as a waterborne pathogen has also only come to be fully recognized during this period. We have lived in an era relatively free from the scourge of infectious disease, but this may be only a temporary reprieve. It is imperative that we not underestimate our microbiological adversaries, and that we recognize that the struggle against infectious agents will always be with us.

Nature views human beings as an ecological niche waiting to be filled, a resource waiting to be exploited. The power of evolution has brought us and will continue to bring us a steady flow of new and deadly enemies. Manta virus, Legionella, HIV, new strains of tuberculosis. The growing list must stand as a constant warning against complacency. How do we guard against these invisible and perhaps unidentified foes?

Current standards for water treatment do not provide an adequate margin of safety from a public health perspective. This may sound like a job for the Safe Drinking Water Act, but safe drinking water must begin with clean lakes, rivers and streams. The notion that safe drinking water is in some way independent from clean water supplies has led us to place tremendous faith in technical solutions to the problem of safe drinking water. I ask that the links between these two pieces of legislation be carefully examined as the reauthorization is considered. Drinking water treatment is necessary but not sufficient for protecting human health. Safe drinking water must begin with strong watershed protection in the Clean Water Act.

Most outbreaks of waterborne infectious disease begin with the contamination of the source water with animal or human waste. Watershed protection provides a critical first line of defense against waterborne infectious disease. There is no question as to whether or not it is desirable to protect source water. The only reasonable question to ask is whether or not we have the political will and economic resources to accomplish this task.

It is tempting to look at legislation such as the Clean Water Act and see only the cost of compliance. As you ask yourself whether or not we can afford the costs of watershed protection, I urge you to consider the costs of inaction. How many days of work can we afford to lose to gastrointestinal illness? How much French bottled water can we afford to import? To what extent are we prepared to accept the cancer risks associated with the increased degree of chlorination needed as source water quality deteriorates? The cost of not protecting our drinking water are real and substantial.

We in Milwaukee have learned the hard way that regulations protecting America's drinking water supply need serious improvements. There is a clear and present danger in our inertia on this issue. As you consider the Clean Water Act, I only ask that you re-

member the experience of Milwaukee and strive to assure that these events are not repeated.

Thank you.

Mr. BORSKI. Thank you, Dr. Morris.

Ms. Cummings.

Ms. CUMMINGS. Yes, sir.

My name is Joy Towles Cummings and I am a fifth generation farmer and rancher from Taylor County, Florida.

The reason I come before you today is to tell you about what I believe is the most important issue facing my community and many other communities. The pulp and paper industry has spread the most dangerous toxic substances ever created into every living thing on the earth.

Now, you and your colleagues here in Washington have the perfect opportunity to remedy this terrible wrong. I have seen very severe environmental degradation in my home county during my lifetime. I am doing my best to farm carefully, considerately, and sustainably, but I found that is almost an impossible task when the air, soil, water, and the food chain, have been contaminated by a not-so-good neighbor.

For 40 years, the local pulp mill, by using chlorine to produce cellulose for Procter and Gamble's bleached white disposable diapers and other such products, has badly polluted the Fenholloway River. State agencies have tested and found that the mill's effluent has contaminated the surface and groundwater, poisoning the water supply of the people, the fish, and the wildlife in Taylor County, with hundreds of organochlorines, so complex that only a few can be chemically identified.

In 1987, the EPA found that the few fish that can still live in the dead Fenholloway River are very highly contaminated by dioxin. The Fenholloway where the mill dumps its effluent is Florida's only industrial river.

A 1947 State law classified the river as an industrial river and the county as an industrial area. That law, still in effect, has allowed the only industry in the county to become one of the worst polluters in the entire Nation.

The Fenholloway is not fishable, or swimmable, or drinkable. The lack of local, State and Federal action for so many years to remedy the situation should be very embarrassing to our local officials, the State of Florida, and the EPA.

The situation where I live is very serious. We will soon be marking the third anniversary of the meeting in Taylor County between the State agencies and the EPA, where they explained to us about how our water wells have been contaminated by the mill's organochlorine poisoned pulp mill effluent. Not much has changed where we live since that evening three years ago.

The pulp mill continues to poison the groundwater, our wells, the Fenholloway, the Florida aquifer, the fish, the wildlife, the food chain, and the Gulf of Mexico, every day with dangerous organochlorines. And I would be willing to bet that some of you here have eaten some of the fish from the Gulf of Mexico.

EPA allows the company to continue to operate on an expired, inadequate 1984 NPDES permit. BER and EPA still do not regu-

late the mill's discharge for the entire 22-mile length of the Fenholloway River.

There is no mixing zone. Twenty-five square miles of sea grasses from the Gulf of Mexico are still dead with more dying from the mill's effluent. One of the most valuable estuaries in Florida is being continually contaminated by the toxics resulting in loss of shellfish and fish. Still the only warning signs from consuming fish due to the dioxin contamination have been post bid, my friends, in the environmental group Hope. Not by P&G, not by the EPA.

P&G Buckeye still uses the sludge in the effluent settlement ponds with gaping sink holes. The company also dumps thousands of tons of toxic sludge on to the wetlands, the few we still have, which are headwaters to all the creation and rivers in the county. The EPA assures us they will sometime in the future complete studies on the safety of this common questionable pulp mill practice.

The agency still does not take responsibility for the problems resulting in our falling through the gaping holes and the loose weave of regulatory agencies. The company still gives away water to the residents who live within a two mile area of the river.

The company's inclusion, one, our local industry and control government has run city water lines for several miles out into the county to selected areas instead of cleaning up the ongoing source of contamination.

They say the native chemical test has never been completed to show whether or not the city water is safe for human consumption. In the river, the female mosquito fish are exhibiting hormonal and sexual changes. The female fish have taken on male sexual characteristics.

Scientists tell me if the fish are exhibiting this type of hormonal change, we should heed the warning, because those fish are our canary in the coal mine.

Our county has become a toxic unsustainable tree farm with all its wetlands drained so that more pine trees can be planted.

The independent health studies have shown that the leukemia/non-Hodgkins lymphoma rate in our county are twice the average rate in Florida. My friends and I know too many people with cancer; too many children with birth defects and learning disabilities. We know too many with hormonal and immune system problems. It is disgusting but at the same time eye-opening to learn that the knowledgeable people in the EPA correctly refer to our children and the population of our county as having diminished potential.

The EPA estimates our mill is the third worst in cancer risk of all the millions in the EPA's 104-mill study. The EPA estimates the risk of cancer from eating fish in our area is 8 in 400. If you eat fish often or if you are a subsistence fisherman where I live, the risk is 4 in 10.

The company still engages in a complete green wash of the truth while the EPA still downplays the seriousness of the situation. Consequently, the majority of the local citizens do not understand the severity of the problem and many of them still drink from poisoned wells.

I ask you now to think of the anxiety we feel in knowing our tap water is filled with effluent. Think of how you would like to shower

in stinging water. Think of how you would feel if you had to bathe your sweet little baby in toxic well water.

Think of the sick and elderly who are not able to carry heavy cases of bottled water but must do so because their well water tastes and smells so much like pulp mill water that they cannot drink it.

Look at this, taken six miles away from the discharge pipe, and think how angry we are because solutions are not being implemented. How much of this do you want in your drinking water?

We have already done everything I know to do. I have written all the letters. I have testified at all the meetings. I have demonstrated. I have done everything I know. I have even served contaminated dish dinners to Carol Browner in an effort to help them understand. I have been here to Washington to see Ms. Browner, trying to get some help for my community. I have even delivered live contaminated fish in an aquarium to Ms. Browner at the EPA here in Washington, all to no avail.

Ms. Browner before she came to Washington was the Secretary of Florida's DER. Ms. Browner stated in the public meeting that something must be done about the serious pollution in Taylor County. Ms. Browner made that statement just a few months before the pulp and paper industry executives convinced her to reduce dioxin standards for the entire pulp and paper industry in Florida.

Ms. Browner's proposal was delayed and will be defeated. Ms. Browner still has not been held accountable for that dirty deed up until today. Now you have the perfect opportunity to correct past wrongs, and now you can do something to protect our health and the environment.

This is not only a problem where I live. There are 103 other pulp mill communities in the United States, and downstream from those mills, there is also fish contamination. Hopefully ours is the only community so far that has groundwater contamination.

I hope and pray that I am conveying the concerns of the people in the other pulp and paper industry communities. Last week some of the findings of the EPA's assessment of dioxin were revealed. Communities in the pulp and paper industries await the entire truth.

The EPA says flatly dioxin is likely to present a cancer hazard to humans and dioxin probably increases mortality in humans. The EPA says there appears to be no safe dose below which health damage does not occur. Obviously, dioxin's cancer affects are worse than the EPA previously thought.

Four years ago the pulp and paper and chlorine industries campaigned to force the EPA to undertake a thorough review of dioxin. It is now very clear that the reassessment has not turned out the way the industry has hoped it would.

Here in Washington you have been learning about how the tobacco industry has covered up. Wait until you find out the whole truth about what the pulp and paper and chlorine and chemical industries have covered up.

I know what is happening in the rest of the world. All we have to do is look at the IJC and the Great Lakes and Canada and many countries. The world is passing us by. What happened to that good

old American spirit of being first in technology, solutions, and finding the answers to difficult problems? The answers are available.

All of the 104 chlorine bleaching pulp mills in the United States need to commit to chlorine phase-out time lines. All these mills continue to cause serious environmental damage every day. Every day that the industry is allowed to continue to discharge poisons into the air, water, and soil means that permanent damage is being done to the surrounding community and the environment.

Now the EPA is finally admitting that dioxin and other chlorines produced by the pulp and paper industry are more dangerous than previously thought. I don't think another one needs to go without chlorine in my area or our community.

Ms. Browner has been to Taylor County and she has seen the pollution there. And I believe that if you will ask her, she will tell you ours is one of the most egregious pollution situations in the entire nation. Ms. Browner was right three years ago. Something must be done.

The mill must make an investment in modernizing the Perry mill. This investment is necessary to end the danger to our community and mill workers and ensure the competitiveness and viability of the mill. The company must stop poisoning our groundwater and we still must have the jobs.

There are two positive steps you can enact. You can start to use chlorine-free paper. My testimony is printed on chlorine-free paper, and I don't believe you can tell the difference.

There is a bill that is before you this year, House H.R. 2898. It should be adopted now. It is imperative the act be passed for the sake of my community and the other communities which are being poisoned unnecessarily. On behalf of all pulp mill and paper mill communities, I am asking you to take these two steps.

If you don't adopt these measures, please tell me what to do next. I have tried everything. But I am still being poisoned. Tell me which regulatory agency I am supposed to go to next? Which elected official is going to help us? How are we going to get these mills cleaned up? And who among you is going to stand up to the pulp and paper industry? How many people must die before you act? The seriousness of the problems caused by the chlorine industries and chlorine used in pulp mills demands your action. I know how serious it is because it affects my friends and family every day.

The provisions of the 1972 act have not been enforced in many areas of our country. Lax enforcement can no longer be tolerated. We simply must remedy past mistakes. Now is the time to strengthen the Clean Water Act. Please take action now to stop the poisoning of my community and many more like mine.

I would like to say one more thing. I read a little bit about the two proposals that you have been talking about today. Neither of those proposals, as far as I can see, take any significant steps toward reducing our exposure to very toxic chemicals. Neither of them take any significant steps toward eliminating the type of drinking water contamination that sickened other 400,000 people and killed 104 in Milwaukee. Neither take any steps toward restoring and protecting our threatened wetlands and fisheries habitat. In fact, both proposals take significant steps backward by promot-

ing rampant wetland destruction and less stringent controls on industrial and sewage pollution.

Mr. APPLEGATE. Thank you.

Mr. Durnil, I would like to try to remind you if we can stay within the time limitation that we have set, because we are going to be here an awful long time. We will take your written, prepared statements and make them a part of the record, and they will be read, they will be reviewed, they will be considered.

Mr. DURNIL. I am an attorney from Indianapolis. I was appointed by President George Bush as the United States Chairman of the International Joint Commission and confirmed by the Senate in 1989. Prior to that, I served eight years as the Indiana Republican Chairman and campaign management positions for Governors, Senators, Congressmen, mayors, and worked on presidential campaigns.

My four-and-a-half years with the International Joint Commission brought me face to face with a number of facts and suspected facts that had not previously caught my attention. And I will stop reading there and let you read the rest of it.

I want to make just a couple of observations. One is I observed this government and the Government of Canada and the provincial and State governments attacking this overall problem of pollution from the tail end, with a lot of regulators, a lot of harassment of business, a lot of money, and not really getting to the real problem, which is up front.

I have seen it in governments when they enact competing laws, and the Administrator spoke to that a little bit. But I think my overall judgment is that as a Republican, as a conservative, is that humans can probably logically manage wetlands. Humans can manage forests. There is a lot of things that humans can manage. There is a lot of pollutants that maybe humans can manage. But one thing I am convinced of, after dealing with the scientific community, international community, over the last four and a half years, is that humans cannot manage chlorine.

And until we get to the point where we set a date certain off into the future where chlorine as an industrial feedstock is going to be terminated, we are not really going to be dealing with the really serious problems that are facing us. Thank you.

Mr. APPLEGATE. Thank you very much, Mr. Durnil.

Susan Mudd, a resident of Milwaukee, Wisconsin. I understand your husband is a mayor.

Ms. MUDD. Yes.

Good afternoon, Mr. Chairman, Members of the subcommittee. Thank you for the opportunity to share a Milwaukee resident's experience with you.

I am the other mother of a two-year-old boy, Benjamin. As you alluded, my spouse is the mayor of Milwaukee. I am here to tell you we need mandatory clean up plans for all owners of watersheds to keep what happened in Milwaukee from happening to you in your community.

Fifteen months ago my son had a very bad day where he was crampy, miserable, cranky, and had very bad diarrhea. He was not on antibiotics at the time, did not exhibit symptoms of flu or other

diseases that one learns as a parent to watch for, and had not recently started any new food group.

Luckily, the next day, when I would have called his physician had the symptoms persisted, he seemed better. I might have never known the cause of the incident were it not for the fact that many other people I knew started having similar experiences. Within days, numerous colleagues were missing work.

Almost anywhere one called, people weren't there. Suddenly it seemed that virtually everyone in our community was sick.

One evening, while I was trying to care for my 11-month-old son and make dinner, my husband called to say he expected to be home very late that night, there were meetings going on to ascertain if our city's water was contaminated, and the cause of this outbreak. Several hours later he called me to say we should boil our water and then in moments he was going on the news live to issue a city-wide boil advisory.

Then Benjamin tested positive for cryptosporidiosis. Cryptosporidium was in our drinking water. What? How? Why? When? Where? For how long? The questions were everywhere. The answers, elusive at best. It changed our lives in Milwaukee forever.

Day after day, my husband was in meeting after meeting with State, city, and Federal health and public works officials trying to learn how the cryptosporidium had gotten into our water and what could be done to get it out. City public health officials had to close one of Milwaukee's two drinking water plants. Most importantly, the confidence of our citizens and neighbors was shattered.

The boil advisory went on for 8 days, affecting 880,000 people. It was in effect on Easter Sunday, prompting one friend to say, one I will never forget, boiling my water to wash the lettuce I was to serve my family and an out of town guest for Easter.

The advisory was only lifted when in answer to my husband's daily question to all the public health officials congregated in Milwaukee from around the Nation, would you drink this water? They finally all said yes. From Milwaukee residents, however, the trauma continued. Even after the boil advisory was lifted, people were still sick. And some were dying. People still felt, understandably, nervous about drinking the water.

At last count, as you know, more than 100 people died due to cryptosporidium in our community, and more than 400,000 were sickened. Lost work and health bills cost our community more than $54 million. And that was for only an 8-day advisory.

The inevitable search for the responsible individuals began, including finger pointing at almost everyone in the health and water departments, trying to find someone to blame for the sicknesses and deaths.

To this day, we still do not know the exact cause of last spring's crypto outbreak. Was it the local slaughterhouse or rendering facility? Was it the cows upstream, all dumped into the Milwaukee River or the harbor which both flow into Lake Michigan and south into the water intake facility where the crypto entered our water?

We do know that Milwaukee's water met all Federal and State drinking water standards. What does that tell us? This means our drinking and clean water standards are clearly inadequate to protect public health.

We have been reminded frequently by State officials over the years that Wisconsin has the best polluted runoff program in the Nation. Wisconsin's program over the last 15 years has spent $75 million of State tax dollars alone, in addition to Federal tax dollars, that clean our States' rivers and streams. The Milwaukee River watershed had for several years been included in that program.

But, as Wisconsin's nonpartisan Legislative Audit Bureau recently reported, no project has yet produced demonstrable watershed-wide improvement in water quality. This voluntary program gave this result despite spending millions in local and State and Federal funds.

We also have been reminded Wisconsin has a rule which is supposed to protect our water from animal manure runoff. This rule adopted years ago was not adequate to protect our water supply. By design, it only affects farms with 1,000 or more animal units, cows for example. This means in the Dairy State most of our dairy farms are not regulated.

These two voluntary programs failed us. In short, all current Federal and State laws failed to protect the drinking water of our Nation's seventeenth largest city. Two in five of our population was sickened.

Nothing can be done to restore the lives of those Milwaukee victims nor can anything be done to make up for the trauma, illness, and costs experienced by most of our residents. But no one else, no matter where they live, whether it be a city larger than ours or a community of 600 or fewer, should ever have to experience what we did in Milwaukee last year.

Last week, the Senate voted overwhelmingly to weaken our safe drinking water laws. The following day, as the press clippings show, the city of Milwaukee again had a drinking water scare, issuing a boil water warning to people with weakened immune systems. Despite the tragic outbreak one year ago, Congress continues to drink bottled water at taxpayers' expense but to weaken our safe water laws, while citizens in communities across this country continue to suffer. This is inexcusable.

In the last year, Milwaukee has taken actions on its own to upgrade its treatment, monitoring, and testing procedures, spending nearly $1 million of our own money to modify our treatment testing procedures to include new filtering systems.

I have got less than a page to go.

Milwaukee's water system is now one of the best in the country yet we still have problems. What does that say for communities which have not made the improvements that we have made? What will it say about our elected Representatives if you fail to vote for a strong Clean Water Act? This cannot and must not happen.

The level of denial of the possibility for repeats of the Milwaukee experience is extremely high and totally unwarranted. Crypto is not just a Milwaukee experience. Within the last year, boil advisories have been issued not only in other communities in Wisconsin but also in Washington, DC.

Just Sunday night, Wisconsin's natural resources officials announced that cryptosporidium is likely in Congressman Petri's district, in Lake Winnebago, the drinking water source for hundreds of thousands of people. Cryptosporidium has also been found in

Green Bay and Port Washington water intakes in Wisconsin. The U.S. Centers for Disease Control and Prevention estimate almost 1 million people are sickened each year due to contaminated water and also 1,000 people die each year.

Whenever I travel now, including here to Washington, DC, I have a nagging doubt in my mind. Are the water officials wherever I am doing all they can to monitor the incoming water quality? How often are they testing for crypto and other contaminants? What is being done in their region to stop the sources of the poisons? We have learned that until we get at the sources of pollution and upgrade our testing and treatment procedures, we can never be sure of safe drinking water again.

Other cities must carry out efforts like Milwaukee's on monitoring, testing, and treatment. But in addition, we know now that the only way to stop crypto and other deadly parasites from getting into our water is to keep it out of the water.

To keep our water safe and clean, this committee should adopt mandatory control plans from every landowner, whether they are urban or rural, in impaired or threatened watersheds. The Wisconsin experience demonstrates the need for this.

Congress must also fully fund polluted runoff programs. One-half of the U.S. water quality problem should get more than 2.5 percent of clean water funding.

And finally, we ask that Congress strengthen citizens' and EPA's enforcement authority and oversight to ensure that Federal, State, and local governments meet clean water standards. Please protect the health of your constituents, my neighbors, and every other American.

Thank you very much.

Mr. APPLEGATE. Thank you very much, Ms. Mudd. We appreciate your testimony.

Malika Sanders.

Ms. SANDERS. Greetings. Today, as I sit here with you, my mother, a beautiful, energetic, committed, freedom fighting woman is being held hostage, and those are her words, by a life threatening disease, breast cancer.

As I sit here with you today, she undergoes treatment, the disruption of her life as an attorney, a mother, and as an activist for the liberation of her people. All of this possibly simply because she settled in a little town called Selma, Alabama, one of the many homes of the civil rights movement, to commit herself to continue the work of her ancestors, to meet the goals of those who were beaten and died on the Edmund Pettis Bridge: Human rights for all people. It was there she unknowingly was exposed to organochlorines and other toxic chemicals that possibly contributed, discharged by a pulp and paper company.

But I didn't come here to tell you a sob story. I have come to raise the question about why this has happened to her and many other women like her. Why is there even a possibility that these people's lives have been turned upside down because of the legal allowance of deadly chemicals to contaminate life-maintaining substances, our water, and our air? Is it simply a matter of profit above people?

I realized a very long time ago that this is a child, woman, and people of color hating society; therefore I guess I don't really have to ask why there are disproportionate numbers of pulp and paper mills in African-American communities around the U.S. or why the research showing a direct link between organochlorines and breast cancer has not caused an urgent outcry to stop the senseless killing of women.

It is clear this Nation has had a better success rate at creating problems for its people than solving them. And taking into account the tremendous resources that this Nation has within its grasp, the people can only get the message that our problems are not truly on the list of priorities for the governing body of this Nation.

To kill or not to kill for profit. And the sake of big business. It is disgusting to me that this is even a question before us. Even after the long history of evil that I have witnessed being practiced on my community, the black community, as well as the Native American community and the poor community. I cannot conceive of the type of evil that propels the continued senseless destruction of the mother earth and all her inhabitants.

What do I mean by evil? Well, I will tell you exactly what I mean. How else can you explain the ongoing usage of poisonous, nature altering, and life threatening substances when research shows it is unnecessary to use chlorine in the production of paper, and it would be actually more profitable in the long run not to do so?

But then why change? After all, it is only murdering, yes, murdering poor people and people of color. Certainly we can afford these few casualties for the benefit of profit.

The people say no. No, we will not accept this unrighteous wielding of power that destroys us. We will not accept environmental genocide. We will not accept environmental racism. We will not accept environmental classism or deemphasizing the women's human rights.

Someone must put an end to the unrighteous acts that are destroying the very fiber of human life, liberty, and the pursuit of happiness. There is no choice but the right choice. And that is zero tolerance for organochlorines and all other toxic and poison chemicals that now permeate our waterways and resources.

Ladies and gentlemen, I am simply here to serve notice that if you won't end the sinful destruction of human life and all God's creations by any means necessary, the people will. The solution is pollution revolution.

Mr. APPLEGATE. I thank you very much to each of the members of the panel. We are going to recess now for probably until about quarter of the hour. The buzzers that you heard ring, you two ladies, were not for you, they were for us, saying we have to go over and vote. We will go over and vote. We will return and we will see if any of the Members have any questions for you. This committee is in recess for 15 minutes.

[Brief recess.]

Mr. APPLEGATE. The committee will convene if everybody will take their seats.

I would say this, again, thank you for the very good testimony that you had, and Ms. Mudd, you had mentioned in your testimony

that the way for this to be prevented is in prevention rather than a cure, and of course we do not deal with the Clean Drinking Water Act, which is where the cure generally is. We are dealing with the Clean Water Act where the prevention is.

And we hope that through the good graces of all of our Members and with the testimony that we are receiving, that we will be able to put together a package that will in fact bring about prevention and stop some of this terrible toxicity of our waters, biological, and every other way, because, as you have pointed out so succinctly, the dangers and what it has cost all of you.

And so I think your message to this committee and to the country through this forum I think is an extremely important one.

Mr. Boehlert.

Mr. BOEHLERT. Dr. Morris, you said that 10 years ago cryptosporidium was a microbiological curiosity. Do we have a lot of potential microbiological curiosities out there right now? Are there new pathogens we have got to be concerned about?

Dr. MORRIS. Well, I listed some pathogens that have appeared sort of out of the blue recently, including legionella that is responsible for Legionnaire's disease, HIV, new strains of tuberculosis, and I think that we need to be very careful. We need to recognize the fact that we do not have full knowledge of the pathogens out there that may threaten us, and 10 years from now there may be a new parasite or virus we hadn't recognized before that is responsible for human disease. The fact that cryptosporidium causes as many infections as it does and that it was not known 10 years ago should be a very clear warning to us to recognize the limits of our knowledge.

Mr. BOEHLERT. How would you respond, then, to those critics of H.R. 3948, and the Chairman and I are the cosponsors of that legislation, who say, wait a minute, you guys, slow down a little bit, let's just give the existing law a few more years to work and see how it plays out? How would you respond to that?

Dr. MORRIS. I think it is clear the existing laws are not working, because of what happened in Milwaukee, and because it happened with water that was meeting guidelines.

So to me it is sort of astounding and somewhat appalling that there is even the consideration that we would be rolling back standards in any way.

I think we need to be more aggressive with our clean water standards.

Mr. BOEHLERT. Obviously, I agree, because it is my bill that we are discussing.

Ms. Mudd, I want to thank you very much for your very strong testimony. And this is probably not a fair question to ask the panelists, but I am going to ask it of you, because you are the first lady and you talk to the mayor all the time, I assume.

Ms. MUDD. Whenever I can.

Mr. BOEHLERT. As a former county executive, I know your time is not your own. Has the city of Milwaukee had a chance to look at H.R. 3948 specifically? I know you want us to be responsive to the need to move forward with clean water legislation, but have you had the opportunity, speaking for the city, now, and I think it is fair to ask you to do that, to examine this particular legislation?

Ms. MUDD. It is very fair of you to ask the question, but in all honesty I have not spoken with my husband about the specific provisions of this particular bill—of your proposal. I do know that the city has gone on record in support of numerous positive improvements to both the Safe Drinking Water Act and Clean Water Act reauthorization, and I would be glad to check for you with those who represent the city officially such as those who lobby on behalf of the city on the specific provisions.

I have no reason to doubt that the city would be in favor of these strengthening provisions. But I cannot honestly say that I know that the city has looked at the specific provisions. So I apologize for that.

Mr. BOEHLERT. Is the mayor active in the National League of Cities?

Ms. MUDD. He is more active in the U.S. Conference of Mayors. He differs with the U.S. Conference of Mayors on many of their environmental provisions where he believes they are not strong enough.

Mr. BOEHLERT. I would encourage him to be an articulate defender of reason.

Ms. MUDD. I will pass that along.

Mr. BOEHLERT. If you think it is not fair, tell me, but have you looked at our bill, and what do you think about it in terms of the specificity, Mr. Durnil?

Mr. DURNIL. I have not looked at the bill.

Mr. BOEHLERT. I want to thank the panelists. Each in your own way has contributed something very significant to these hearings. I want to particularly commend all of you for the passion of your testimony. I think it is very important that we hear from people like you, and that not only we hear you, but we listen. Thank you very much.

Ms. MUDD. Thank you for listening to us.

Mr. APPLEGATE. Thank you, Mr. Boehlert. Mr. Poshard.

Mr. POSHARD. Thank you, Mr. Chairman. I will be brief in my statement.

The testimony, Dr. Morris, that you, Ms. Cummings, and Ms. Mudd have given us, particularly with regard to your experience in Milwaukee and in Florida, it is very riveting; it is something I think we should all pay attention to.

I noted the words that you used, Ms. Mudd, that we should have mandatory plans on all landowners in impaired or threatened watersheds. I don't know that too many of us disagree with that, mandatory plans in impaired and threatened watersheds. But I am not sure I agree that every landowner in unimpaired or unthreatened watersheds should have to comply with those same mandatory plans.

I think that is part of what we are debating here: not to find a way to improve the egregious assaults on the environment that occur, whether they be in Milwaukee or Florida or Illinois or other anywhere else, but the process by which we get there in the least mandated way.

I think that is the debate that is before us here, not to accomplish the objective that all of us desire, but how we get there.

I appreciate your testimony, and hopefully we can come to some solutions in this committee and this Congress that reach the effect that you desire, but do it in a way that I think is more reasonable than this bill entails.

Ms. MUDD. Thank you. If I could comment on your remark, one of the things that we have learned with Wisconsin's program, which has been considered one of the Nation's models in the nonpoint or polluted runoff arena, is that many, many landowners, farmers, as well as urban landowners, do get involved in voluntary programs, and much initial progress can be made through cost sharing programs to help farmers and others participate.

The problem we found is that there are a few bad actors who don't come in under a voluntary program, and their actions can undermine all the progress that is otherwise made through the contributions and the involvement of those in volunteer programs.

So we feel very strongly that it needs to be all landowners, not just 50 percent, not just 70 percent. It needs to be all landowners, because each landowner contributes something to the problem, and thus we all need to act to improve the situation.

And in terms of your other point about impaired threatened watersheds, at this point most of our watersheds are either threatened or impaired, so unfortunately what that means is that it will probably in the long run involve many more people than we had otherwise hoped.

Mr. POSHARD. As I indicated before, and I appreciate your response, there is real debate among us about how that determination is arrived at, whether in fact it is merely observation. We are more interested in seeing how that analysis takes place, and the hard and fast data that determines that standard, and that hasn't been forthcoming here.

So just to say that they are impaired or threatened and not base that on any significant data or any longitudinal studies of any consequence, but rather on just simple observation or assertion, that is not good enough for policymaking in this country for something that is so important to all of us. And we have a right to ask for that. We have a right to see that before we commit $15 billion or $20 billion or $30 billion to a process that may not be totally necessary.

That is all I am saying.

Ms. MUDD. And I don't disagree with you. My only concern is that Milwaukee's water and water supply met all the Federal and health standards. So we are now convinced that those are not adequate and that the impairment is there.

Mr. POSHARD. Thank you.

Mr. APPLEGATE. Thank you, Mr. Poshard. Mr. Gilchrest.

Mr. GILCHREST. Thank you, Mr. Chairman.

Mr. Durnil, you made a statement earlier where you said humans cannot manage chlorine. Could you clarify that and then, in the clarification, can you tell us if it is possible to make paper products using chlorine safely, or is it impossible?

Mr. DURNIL. I am not sure it is. I think from my perspective there are industries who are more concerned than just the paper industry, or equally concerned, certainly. The whole thing of vinyl and plastics. I have heard people claim that half the jobs in the

world may be somehow related to this subject matter, so it is a very serious and big subject matter.

But my understanding as a lawyer, as a layman, is that chlorine and organics, they are not predictable in how they are going to react when they mix with our compounds. I think that is it. So far we have not been able to manage those the way we have managed other natural systems. These are not natural—dioxin is not natural. Dioxin is a by-product.

Mr. GILCHREST. So you are saying——

Mr. DURNIL. The predictability of how they will react——

Mr. GILCHREST. Dioxin is a sometimes by-product of the use of chlorine, but not always?

Mr. DURNIL. I am not a scientist to answer the always question. My answer is that it is not always created intentionally. It probably doesn't always create it, but that is how it is created, as I understand it.

Mr. GILCHREST. So you are saying it would virtually be impossible for us to manage through regulation this substance known as chlorine?

Mr. DURNIL. I think that is right. I think we have not been able to do that yet.

Mr. GILCHREST. In the particular category of paper products, for example, would you have a recommendation, whether to make them in that particular industry alone, whether to make them with or without chlorine?

Mr. DURNIL. The recommendation the commission I was on in 1992 made was chlorine as an industrial feedstock be sunset; an orderly process, with a timetable to be set in cooperation with industry.

Mr. GILCHREST. Has that timetable been suggested—is there a timetable now?

Mr. DURNIL. No. The President's recommendation, there is a similar one from the Government in Canada, is very similar to that, the proposal that was made here. But, no, there is no timetable.

Our judgments, and we are all Republicans on our side and conservatives on the Canadian side, would be that industry would be better able to arrive at that kind of a timetable than would we or would government.

Mr. GILCHREST. Who would be better to arrive at the timetable?

Mr. DURNIL. Industry. They won't do it unless they are pushed, obviously, but they need to be at the table had that timetable is set.

Mr. GILCHREST. Is there a time frame where people—government and industry—will sit down at the table to discuss the sunsetting of chlorine?

Mr. DURNIL. That is the next process. That is what the commission is doing now. I am not with the commission, but they are discussing the transition process that needs to go on so that there is not the socioeconomic disruption.

Mr. GILCHREST. So there is a relatively clear consensus that chlorine usage should be sunsetted?

Mr. DURNIL. Amongst the group of us who met at a series of scientific and economic round tables over a four-year period. We have

a task force made up of a whole variety of people. We accumulated information from a lot of sources. And that was the only conclusion that we could come to.

Mr. GILCHREST. So your conclusion, then, to a degree, I don't want to put words in your mouth, is that using chlorine, because it creates toxic—it has a by-product of a toxic substance, we are better off not using it, and then we essentially cannot make paper products or other products safely if we use chlorine?

Mr. DURNIL. We know the effects of DDT, of dioxins, a lot of those. We are asked to believe, even though we know the adverse effects of those that the other chlorine organics are not harmful, as those are. That is the problem.

Mr. GILCHREST. I see.

Mr. DURNIL. And I was somewhat concerned when I saw what the President asked for has been taken out of the bill. I wouldn't want a study to delay action, as studies often do. But the best thing that could happen, I think, would be for the facts to get on the table, to have a real national study of chlorine, let the facts get on the table and let the public make some choices.

Mr. GILCHREST. I have a few more questions but I see the red light is on so I will stop. Thank you, Mr. Chairman.

Mr. APPLEGATE. Is the gentleman through?

Mr. GILCHREST. My red light is on.

Mr. APPLEGATE. Okay. You are through. Mr. Borski.

Mr. BORSKI. I have no questions, Mr. Chairman.

Mr. APPLEGATE. Mr. Quinn.

Mr. QUINN. No questions, Mr. Chairman.

Mr. APPLEGATE. Our distinguished Chairman isn't here. Ms. Shepherd.

Ms. SHEPHERD. Yes, thank you. I would like to ask whoever on the panel feels like they would have the answer to this question.

When Carol Browner was here, and it really refers to cryptosporidium and pollutants that are in drinking water, when Carol Browner was here she talked about our reliance on the technology to clean water up after the fact, and how much smarter it was to keep it from being polluted in the first place.

I would like to inquire about the cost difference between doing those two things, number one, and, number two, is there a way, if—let me put this differently.

If we felt that we had laws in place that protected water adequately, how would we be able to know that it was drinkable anyway? Wouldn't we have to go through the same thing in any case to ensure it is drinkable before people would have confidence in it?

Dr. MORRIS. I am not sure I would be quick to address the economic issue in terms of relative costs of protecting the watersheds versus the cost of treatment. I think we have to do both. And I think that really the Safe Drinking Water Act and the Clean Water Act should be looked at in tandem to find the most cost-effective way to some of the problems and to give us safe drinking water.

But in terms of the technologies, you make the technological problem of cleaning the drinking water much easier if you start with clean water. It is a real challenge to actually get some of these compounds or these parasites and pathogens out of the drinking water.

So we need all the help we can get.

Ms. MUDD. I can only partially respond to your question, but I will try to give you the information I have got. We know that it cost us at least $54 million last year in Milwaukee to have the outbreak that we did in terms of lost work time and health costs. We have spent $1 million so far to improve our testing and monitoring and filtering capacity so that that is treatment, in other words, that we are looking at.

The city right now is studying various treatment options that would be better than our current capacity. Right now what we know is no matter how much chlorine you dump into the water, which is the traditional way of disinfecting water, it won't stop people from getting cryptosporidiosis.

There are other options out there such as ultraviolet, such as ozonization, which are being studied, but we are, frankly, not sure yet which will work how much of the time.

The estimates I have seen which are very preliminary would indicate that the cost of modifying our water treatment plants would be less than the cost that we had from the outbreak last year. But that is only looking at it from a treatment perspective. It would clearly be much less costly over the long run to not have to continually treat and every year do the operation and maintenance and ongoing upgrading to treat each new thing that we find, and to improve our system upstream whereby we don't have these pollutants come in. The kinds of things we looked at in terms of keeping cows out of streams are really relatively low-tech options.

What I can see about the high-tech versus low-tech nature about what is going on, it is clear, I don't know the exact numbers, it will be cheaper in the long run to do the prevention than to do the continuous upgrading of the treatment system.

Ms. SHEPHERD. I had to leave just as you were talking about the cows, and I apologize for that. It is not just keeping the cows out of the streams, is it? What they do on the ground washes into the streams, and so it is a little bit more complicated for a farmer than keeping them out of the streams.

Ms. MUDD. You are right. There are additional steps that are necessary. That is sort of the visual image of what we have to achieve, but it is also manure, not just the cows in the streams.

Ms. SHEPHERD. Thank you. Thank you, Mr. Chairman.

Mr. APPLEGATE. Thank you, Ms. Shepherd. Mr. Hayes.

Mr. HAYES. No.

Mr. APPLEGATE. No questions? Is our Chairman around anywhere?

Mr. GILCHREST. Mr. Chairman, while we are waiting, can I get in a question?

Mr. APPLEGATE. Sure.

Mr. GILCHREST. Dr. Morris, would you have any recommendations for us or for any large city or municipality that has to treat water, given that this is all fairly preliminary, do you have any initial recommendations?

Dr. MORRIS. It is always easier to remove something that is not there in the first place. And so I think it is going to take a substantial coordinated effort to really reexamine drinking water in this

country, because it is something we have taken for granted for a long time, and we took it for granted in Milwaukee for a long time.

I think it is going to take watershed protection, and the kinds of things that would be involved in the Clean Water Act, and it is also going to take improved monitoring and improved treatment of drinking water.

And as I said earlier, we also have to be careful that we don't just spend our time fighting the last battle and finding the battle against typhoid when the enemy is cryptosporidium, that we have to be prepared, we have to be cautious in a way that gives us a margin of safety in our drinking water with which we are feel comfortable.

Mr. GILCHREST. There a specific list of sources for cryptosporidium?

Dr. MORRIS. Animal waste is a primary source of cryptosporidium. It is found in sheep and cattle in particular. It is also present in human waste. So those are the major sources.

Mr. GILCHREST. Thank you. Thank you, Mr. Chairman.

Mr. APPLEGATE. Thank you, Mr. Gilchrest. And again, once again, thanks to the panel for appearing in this forum. We appreciate all of your input. Together, hopefully, we will be able to work out the solution to the problems. Thanks again.

Our next panel will consist of—the topic will be wetlands, and our panel members, if they would come up to the table, will include Thomas N. Thompson with the National Association of Home Builders; Robert Szabo with the National Wetlands Coalition; Terry Schley, National Wildlife Federation, Al Goetze, Maryland fisherman, and the Sierra Club National Wetlands Committee, Totten Heffelfinger.

We of course are very hopeful you will be able to stay within the time constraints. We have a five-minute buzzer, both for the witnesses and for the Members. We will start off with Mr. Thompson of the National Association of Home Builders.

Welcome to the committee, Mr. Thompson, and each of you.

TESTIMONY OF THOMAS N. THOMPSON, PRESIDENT, NATIONAL ASSOCIATION OF HOME BUILDERS; ROBERT G. SZABO, COUNSEL, NATIONAL WETLANDS COALITION; TERRY SCHLEY, COUNSEL, FISH & WILDLIFE RESOURCES DIVISION, NATIONAL WILDLIFE FEDERATION; AL F. GOETZE, MARYLAND FISHERMAN; TOTTEN P. HEFFELFINGER, CHAIR,, SIERRA CLUB NATIONAL WETLANDS COMMITTEE, CHAIR, STEERING COMMITTEE, CAMPAIGN TO SAVE CALIFORNIA WETLANDS

Mr. THOMPSON. Thank you, Mr. Chairman, and Members of the subcommittee. My name is Tommy Thompson. I am the current President of the National Association of Home Builders. On behalf of our approximate 170,000 member firms, I certainly appreciate the opportunity to appear before this subcommittee today on the most important issue of the reauthorization of the Clean Water Act.

Mr. Chairman, let me be very clear on one important point from the outset. The National Association of Home Builders wants the Clean Water Act to be reauthorized by Congress this year. We fully

recognize the value of this important law for protecting the integrity of our Nation's navigable waters.

While my written statement, which I would like to submit for the record, addresses in great detail the theory and policy behind our position on wetlands, as well as other aspects of Chairman Mineta's substitute to H.R. 3948, and the bipartisan proposal, I would like to focus my oral presentation on practical examples of why the NAHB position makes sense.

Chairman Mineta's substitute amendment to H.R. 3948 presents several areas of concern for home builders. NAHB believes that any legislation aimed at reforming our Nation's wetlands protection measures must incorporate the following concepts:

A definition of a jurisdictional wetland, a classification scheme that offers protection of our wetlands based upon their function and their value; a plan to truly streamline the permitting process; an effective wetland mitigation banking system; and a plan to compensate landowners for the lost value of their property.

The National Association of Home Builders recognizes the importance and value of our Nation's wetlands, and we want to protect them and protect the environment. However, the current system for regulating wetlands simply does not work. It lacks balance between environmental protection and the need for economic development and jobs in our communities. Also, it is unquestionably a barrier to affordable housing.

Indeed, the current system is a nightmare full of overlapping jurisdictions, costly delays, and burdensome confusion. One example of the inefficiency surrounding the Section 404 program, is the fact that according to an extensive study performed, the average time it takes for a decision to be reached on an individual Section 404 permit is 373 days. That is over one year.

Most of the home builders that I know have neither the luxury of time nor money to wait a year while their permit application is buried deep in the Federal bureaucracy. Unfortunately, although the substitute amendment purports to put an end to these inefficiencies, it will only perpetuate the status quo.

Under H.R. 3948, the permitting process can still take 300 days or more. In many parts of the country, the building season, as you know, lasts only six to eight months at best. So whether it takes 300 days or 373 days, to many builders, either effectively means a year.

There needs to be a strict and unenforceable deadline, like the 180-day time frame provided for in the bipartisan proposal. Time permits me from going into specific detail here, but I would submit several detailed wetlands case studies for the record, along with the following illustration.

Mr. Chairman, in San Jose, California, a man-made canal runs through a parcel of land which had been purchased for the purposes of building single family homes and moderate income rental housing. At some point this canal began to leak, and the water leaking from the canal, as you might expect, encouraged grass to grow in that area, much like what we would find in the lawns of our houses around the country.

As a result of the leak in the canal and the subsequent growth of grass in this area, the owner of the property was required by the

Corps of Engineers to mitigate extensively for the loss of the wetlands in this area. Both single family and rental housing projects were pushed back 12 months, and will ultimately increase the cost of the projects by up to $1 million apiece.

Contrary to what some people believe, the profit margin on home building projects is not enough to compensate for this kind of increase. Therefore, that $1 million must be passed on to the prospective home buyers and moderate income renters that will live in these homes.

Running through these same properties is a pristine stream, an area certainly anyone would agree and recognize as a wetland. The owner not only preserved this stream, but expanded the wetland area surrounding it. I mention this to emphasize that there is simply no logic whatsoever to granting a grassy area surrounding a leaky canal the same level of protection as a valuable and environmentally diverse wetland, such as the stream that I mentioned. Therefore, a statutory definition of a wetland is critical to true reform, as is the classification of wetlands according to their value and their function.

There are many more examples which I would like to submit for the record. I urge the Members of this subcommittee, your colleagues on the full committee and certainly the Congress, to read through these actual examples. It is important to note that while development is among the most regulated industries with relation to Section 404, only 7 percent of the total national wetlands loss throughout the entire history of this country can be attributed to urbanization and development.

You are faced with an opportunity to truly reform the way wetlands are managed in this country in a manner which provides equal consideration for the environment and those people that must live and work within the environmental laws of our country. H.R. 1330, The Comprehensive Wetlands Management and Reform Act, I think provides that balance.

I urge the subcommittee to support the provisions of this most important legislation, which is incorporated in the bipartisan proposal, when you mark up legislation related to the reauthorization of the Clean Water Act.

Mr. Chairman, I thank you and the Members of the subcommittee for this opportunity to present our views and look forward to your questions.

Mr. APPLEGATE. Thank you very much for your testimony.

And I would say to each of you that your testimony, without objection, will be made a part of the record of this committee.

Robert Szabo.

Mr. SZABO. Mr. Chairman, thank you. I am Bob Szabo, counsel to the National Wetlands Coalition. It is a group of about 70 different entities. A full list of the members is attached to the back of the testimony, a cross-section of the regulated community.

Our group came together in September of 1989 to participate in this debate over the Federal wetlands regulatory policy, and we have been doing that ever since. We support the goal of no net loss of wetlands, when expressed in terms of functions and values.

We believe that if you modify your program, you can achieve that goal, with the help of the private sector. We believe that the cur-

rent 404 program is broken. We join the home builders in being for passage of the Clean Water Act, because this is our vehicle to correct the wetlands program. So we encourage you to pass an act this year and to fully debate and design this program.

The wetlands program suffers from two major problems. First of all, as Mr. Oberstar said this morning, it evolved, it was not designed by Congress. I think he said well that not since the loaves and fishes has so much been made with so little legislative language in this case. It has evolved through court decisions and agency interpretations. The chronology of that evolution is on the back of this testimony. And we the people who are regulated ask that you design it now from the beginning to make it work.

Number two, the second problem is in that phrase our Nation's wetlands. The difficulty is that they are not owned by the people, most of them. They are our Nation's wetlands base, there are about 1,004 million acres of wetlands left, but 75 million of them have the inconvenience of being owned by private citizens.

So you are regulating from the Federal level, requiring permits from not one but two agencies, about what 75 million can—can be done on 75 million acres of privately owned property, an area, by the way, about two and a half times the size of my home State of Louisiana.

Inevitably, horror stories like you have heard are going to come forth when you are regulating what most counties don't do, what most States don't do, but what you are doing, not only through the Corps but through the EPA, with consultation from two other agencies.

We believe wetlands are important. We believe you won't achieve your goal without having a system that incorporates the private sector into doing what you want them to do. We think you must define wetlands. They have never really truly been defined.

Right now they are being regulated to the outer limits of the term navigable waters or waters of the United States. All of those wetlands are not what we might call wetlands. Water can be saturated to—I mean, ground can be saturated to the surface for 14 days a year, if it is hydric soil, and gives rise to hydrophytic vegetation. It never has to have water on the surface and it can be a regulated Federal wetlands. It also includes swamps and marshes and bogs and things we all think of as wetlands.

We believe that once you have defined wetlands, all wetlands are not created equally. Some are more important than others. You should classify them and moderate your regulation based on how valuable the wetlands are. We think that you should regulate some activities that aren't being regulated, that is excavation and drainage of wetlands.

Because this is an evolved program, it only regulates discharge of dredge and fill material. We think a single agency should implement the program. Tell them what to do, give them the money, give them the resources, hold them accountable, but it would help the citizenry if you regulated through one voice for the Federal Government.

Let the States and localities come up with wetlands regulatory plans that work for them and then delegate the program to them. You are kind of partway there with your watershed management

plans in the bills that are before you. Let the States develop plans that work in their States, and then get the Federal Government out of the way, but monitor those plans. If they don't work, take them back. But let's let the States design and the localities design programs that can accommodate the various concerns that need to be dealt with.

Mitigation banking works. The Federal wetlands bank—the Florida wetlands bank in Florida is outstanding. We need to be sure, we think, that mitigation banking is something that is encouraged. There are no maps of wetlands. There are no notices near the property records in the county courthouses. People are buying land not knowing they are buying wetlands. If you are going to regulate it, map it. Post some maps near the property records so people will be on notice. Put notices near the property records that there is such a program as the 404 program and this is what the citizenry should do.

And finally, there will inevitably be cases where landowners have to give up their property for the good of the public and, in those cases, you need to figure out a way to compensate those landowners for that giving to the public good.

We believe that Mr. Hayes' bill is the right bill on wetlands. We support that bill and the concepts therein. However, Mr. Mineta's substitute has several important and positive provisions. And I know my time is expired, but let me quickly state them. The alternatives analysis, flexibility is very positive. The President's plan called for it, Mr. Mineta has done it in his substitute.

The administrative appeals process in Mr. Mineta's substitute is the best one we have seen. It does what the President's plan talks about doing. You have been—your bill, this bill is better on mitigation banking than the other competing bills except for the Hayes bill.

We like the fact that it recognizes private property rights by repeating the Fifth Amendment, for whatever legal impact that has. What we don't like about it, however, is that it has some very broad language about what is to be regulated. That broad language allowed this program to evolve to the problem it is today. And it is that kind of broad language that should be avoided.

Thank you very much.

Mr. APPLEGATE. Thank you very much. Mr. Szabo, was it, did I get that right?

Mr. SZABO. Either one, Mr. Chairman.

Mr. APPLEGATE. Either one, okay.

Ms. Schley. Okay.

Ms. SCHLEY. Good afternoon. I work for the National Wildlife Federation and am cochair of the Wetlands Working Group of the Clean Water——

Mr. BOEHLERT. Pull the mike closer.

Ms. SCHLEY [continuing]. Good afternoon, I work for the National Wildlife Federation and am cochair of the Wetlands Working Group of the Clean Water Network, a coalition of nearly 500 environmental groups. Thank you for inviting me to testify today on the proposed wetlands provisions to H.R. 3948.

If you vote for the committee substitute or the Hayes substitute, you are voting against wetlands protection. In other words, you

would be voting against flow control for downstream landowners, you would be voting against clean drinking water for millions, and you would be voting against jobs for commercial fishermen and many others.

We oppose the committee substitute for three reasons. If enacted, the committee substitute will, one, severely weaken wetlands protections; two, increase confusion and landowner resentment over the 404 program; and three, dramatically increase wetlands losses. The committee substitute we believe is bad for wetlands protection, but the Hayes substitute is far, far worse for wetlands protection.

We oppose the Hayes substitute for three reasons. If enacted, the Hayes substitute will completely eviscerate existing wetlands protections, replacing them with a sham program. Second, the Hayes substitute would guarantee not just a net loss of wetlands functions, values and acres, it would also guarantee a virtually total loss of wetlands, protecting very few wetlands and requiring very little mitigation in return.

Under the guise of takings and private property rights, the Hayes substitute would also saddle taxpayers with $10 to $45 billion in debt, according to the Congressional Budget Office. And that is a conservative estimate.

Since the Hayes substitute largely mirrors the provisions of H.R. 1330, and we have testified on that bill before this committee in the past, I will focus my comments on the committee substitute.

The committee substitute will weaken wetlands protections by creating vast new loopholes through general permits. It will weaken wetlands protections by creating more exemptions for agricultural expansion. The committee substitute will also create more confusion and likely reduce protection for wetlands by requiring EPA to revise the 404(b)(1) guidelines, the heart of the wetlands program, in order to rank wetlands according to functions and values.

Such a rulemaking would be expensive, time-consuming, and extremely divisive. It is also completely unnecessary. The Clinton Administration has already issued guidance showing how all wetlands are not equal and how the differences in wetlands are already considered in the program.

The committee substitute would also create widespread confusion and wetlands loss by authorizing weak wetlands management plans. This means essentially that you would be subject to very, very different wetlands standards from watershed to watershed. This would be a nightmare for compliance. It would also be a nightmare for a lot of the States. Many of the State wetlands programs are modeled on the Federal 404(b)(1) guidelines, and this would throw all of those programs into confusion.

In addition to weakening wetlands protections, the committee substitute would make it less likely that these wetlands losses would be compensated for through successful mitigation.

The committee substitute authorizes sham mitigation banks. These mitigation banks would allow you to destroy wetlands before you have created any in the bank. The problem of failing to require mitigation up front in the bank, in addition to the few environmental safeguards that are in the mitigation banking provision, means that the mitigation banks are just not likely to be success-

ful. I mean, essentially, the failure to require mitigation in advance is like saying to someone they can withdraw money from the bank before they have deposited any.

As a result, we believe the committee substitute would result in a net loss of wetlands, because wetlands losses would be increased and we don't believe that there is much chance that we would see good mitigation that would actually be accomplished.

We urge—we do note on a positive note that the subcommittee has reaffirmed the private property protections in the Constitution and rejected the Hayes bill payment provision and we laud the subcommittee bill—the committee bill for that. We urge the committee to maintain the line in the sand it has drawn on takings payment provisions, and we urge you to strengthen, not weaken, the protections for wetlands.

This concludes my remarks and, I look forward to your questions and to working with the subcommittee.

Thank you.

Mr. APPLEGATE. Thank you, Ms. Schley.

Mr. Goetze.

Mr. GOETZE. Mr. Chairman, I think my—I thank you for the opportunity and Members of the committee for the opportunity to testify today on the clean water authorization. Can you hear me all right, sir? You want the microphone more? Normally the walls go a little bit.

I am—perhaps my presentation today is going to be different, at least I think it is going to be, than anything I have heard so far, and I came early this morning. I am a fisherman for 60 years and from Maryland, a food industry participant. I mean that I have worked in the food processing industry, which consists of red meat, poultry and seafood, all of my adult life. I have also owned property in Tidewater America, and I am not just saying Maryland, because it isn't very much different anywhere else.

During the last decade, I have represented the State of Maryland on the Atlantic States Marine Fishery Commission, and that is for nine years, and six years on the Mid-Atlantic Fishery Council. With both of these various essential fishery management organizations, I have worked to try to provide leadership in the development of a unified marine habitat agreement between all 15 States from Maine to Florida, all three councils, and the appropriate Federal agencies.

I still think I am too loud.

There is a dimension in this debate, however, as I have seen it today and heard it so far, that is not understood or, in my opinion, even mentioned. I will try to develop that for you. What is missing is a strong overriding concern for a major section of our economy, our economy. What is missing is a concern for the sale of seafood products, the income derived from recreational fishing, the tidewater industries which are all around our coast, not just in Maryland, and most importantly, the fishermen and the property owners.

The outcome of this debate to reauthorize the CWA directly affects the economic interests of millions of these citizens more than any other group. Let me explain.

Commercial—without a healthy viable fishery, commercial fisherman face bankruptcy—and you can hear about it every day right now—and vessel loss. Suppliers and community businesses are suffering. Seafood dealers and processors lose money, shift to imports. Recreational fishermen stop or seldom fish. Charter boats and community businesses cut back. But more important than any of that, homeowners, renters and tourists who are the community that represent the population of tidewater and fresh water, watersheds, they are losing asset value every day, and quality of water—and quality of water and quality of life every day.

What happens to the value of your property when you try to sell it? The water quality supports this healthy, viable fishery, or denies it, makes property valuable or worthless. Now, considering that our U.S. fishery represents 30 percent, could represent, could be that and it is not, but it should be, 30 percent of the world's supply, and further that 40 to 60 percent of our population, 40 to 60 percent, in year 2020, is estimated will live in tidewater watershed areas, the socioeconomic dimension of the fishery's importance would appear to be enormous. So, the issue then, perhaps from my point of view, and maybe you ought to consider this, it is not just what the environmentalists want done, but rather what is at issue is the economy, the American economy.

In 1993, I had addressed a letter to the editor of our local paper on the eastern shore. The economic issue, when put on a scale balance, I said, far outweighs the exclusive private property development rights and is a very disturbing revelation. Although the marine habitat in our bay is a publicly held resource, step by step, we are losing it because of man's polluting activities.

The leading marine scientists and fishery managers from State, Federal and private affiliation agree that the most important of a long list of significant polluting activities is wetlands, due to the loss of development.

I see that my time has passed very quickly, and I regret that because I had a lot more. You do have my full statement.

But I would like to say in conclusion, I think the committee ought to recognize that the Federal regulation passed by Public Law 103–206, the Atlantic Coast Fishery Management Act, and also the reauthorization of the Magnuson Act which is before the Congress, will require the following: The Secretary of Commerce will require habitat determination sections for each species, approve as fishery management plans, and the SMFC, the councils, and the Secretary, will be elevating to the Army Corps of Engineers and EPA their objections and determinations not to accept the continuing degradation of the environment.

I do think that there are many of us out there, I would say millions of us out there, who ask the following question: If we are to be subjugated, we, the property owners, fishermen, the seafood industry and the business interests are to be subjugated by this bill to the demands of the developers and the speculators who would reap financial gain by their disregard for the fishery management plan's requirement, then we ask, how will we be compensated for this taking? How will we be compensated for the taking that will affect all of us?

I thank you for your time and will be available for comment.

Mr. APPLEGATE. Thank you, Mr. Goetze.

Mr. Heffelfinger.

Mr. HEFFELFINGER. Mr. Chairman and Members of the subcommittee, my name is Totten Heffelfinger. I am the Chair of the National Wetlands Committee of the Sierra Club. I also happen to be the Chair of the Steering Committee of a coalition called Campaign to Save California Wetlands, which is composed of about 140 organizations in California dedicated to protecting California's wetlands. And as such, I represent, as a volunteer, I might say, a great many people who are concerned.

I have made a long trip from the west coast on very short notice today because I feel deeply about the need for a good Clean Water Act with improved wetlands protections. I couldn't agree more with Congressman Oberstar that this committee should not approve any bill which falls short of that goal.

Last week I testified before the Regional Water Quality Control Board responsible for San Francisco Bay area, where I come from. At issue was a proposal for the Board to assume from the Corps of Engineers some of its permitting authority under Section 404 of the Clean Water Act. At the end of my testimony, one of the Board members commented that decisions on wetlands should be made at the local government level, like any other land use decision.

I am confident that many Members of this subcommittee, perhaps most, understand that things like flooding, wildlife and water quality are more than local and land use issues, more even than regional or State issues. Floods in the Mississippi have told us what we should have known before, that what an upstream owner does to his wetlands could be a disaster to those living downstream in different counties, different States, even in different countries.

Recent reports on the decline of wetlands dependent fish have told us that fishermen from Canada to Mexico can lose their livelihoods because the great San Francisco estuary and other coastal wetlands are in decline and northwest rivers are full of silt. Hunters and bird watchers up and down the West coast have watched the decline of migratory birds throughout the Great Pacific Flyway as the wetlands of California's coast and central valley declined to 10 percent of their historic acreage.

Wetlands loss is a national, in fact an international problem. If the current unacceptable rate of wetland loss is to be abated, the Federal role in protecting and restoring wetlands must be strengthened and not weakened. Local government, even State government, is not likely to have the vision, the incentive and the scope or will to do the job. The point here being that the Federal Government, this law, the Clean Water Act, which is the primary vehicle for the protection of our Nation's wetlands, has got to be strong, strengthened, and not all delegated to State and certainly not to local agencies.

Unfortunately, far from strengthening the protection of wetlands at a Federal level, the wetland provisions proposed for H.R. 3948 will drastically weaken the existing system of Federal wetlands protection under Section 404 of the Clean Water Act, and accelerate wetlands loss. Some of the proposed amendments will virtually eliminate wetland protections at all levels of government. Declines of fish and wildlife populations will increase, floodplains will in-

creasingly disappear, siltation and pollution of waterways, lakes and estuaries will increase as riparian vegetation is destroyed, and wetlands are replaced by urbanization.

I need not discuss the more draconian proposals that have been lifted from H.R. 1330 and are in the so-called bipartisan amendments that are before you. Ms. Schley has very adequately commented on the problems of those, the disastrous impact of which would destroy the Nation's wetland system. These have been discussed and are well-known to you.

Unfortunately, other proposed amendments contained in the document entitled Amendments in the Nature of a Substitute to H.R. 3948, that is the primary amendments that you are looking at for wetlands protection, will also greatly increase the rate at which wetlands are being destroyed and will compel us to oppose the bill. I have summarized on Attachment A of the written statement I have given you the provisions that caused us the most concern and I submit those for the record.

An issue that requires special mention, because it is so fundamental to avoiding wetland loss, is the need to protect existing wetlands as a first priority. Compensatory mitigation, whether in mitigation banks or in other forms, will not achieve no net loss and will certainly not replace all of the functions lost from the destruction of existing wetlands. This has been adequately documented by the National Research Council and its publication called Restoration of Aquatic Ecosystems. I won't discuss the current guidelines. Ms. Schley has referred to those and I don't have time.

I would like to say that the provisions of H.R. 3948 dealing with rewriting of the current guidelines will cause tremendous and disastrous impacts. For example, the seasonal wetlands around San Francisco Bay provide critical habitat for over a million shore birds and hundreds of thousands of ducks and other water birds and endangered species. They are invaluable for flood control and water quality improvements, and generally to enhance the quality of life. But under the proposed wetland amendment, many of these would be lost to projects which are not water dependent such as shopping centers and housing, and which should be located on less environmentally sensitive upland sites. These are the very wetlands which through restoration could provide mitigation from destructive projects elsewhere that cannot be avoided, but many of them look dry.

In the arid west, many of our wetlands and especially those I am speaking of, look dry for much of most years. They do not pond very often. Nonetheless, they provide very important wetland functions.

So I will close by saying that we have advocated and continue to advocate to this committee to adopt modest improvements to Section 404 of the Clean Water Act that are contained in H.R. 350, which would emphasize the protection of existing wetlands without which you cannot avoid no net loss, and would reduce the loss of wetlands and at the same time provide additional exemptions for ongoing farming and a fast track for processing minor permits.

Thank you for allowing me to speak to you today and I would be happy to answer any questions.

Mr. APPLEGATE. Thank you very much, panel, for your testimony, your input. And let me just ask you a couple things here. I am going to turn it over to the more professional people we have here.

I notice that the National Association of Home Builders criticizes the Mineta substitute for increasing the number of agencies involved in wetlands regulation. They state on page 7 of their submission that we added the Soil Conservation Service to the mix by allowing that agency to do jurisdictional determinations in agricultural lands.

Do you oppose the SCS involved in doing delineations?

Mr. THOMPSON. Mr. Chairman, I think that is certainly one of the problems that we are most concerned with, is the myriad of agencies that are involved in regulating wetlands today. You deal with one agency such as the Corps, try to abide by their interpretation, only to have that interpretation questioned or if not vetoed by another agency. You start the process with one agency, which requires a submission of certain alternative analyses and pieces of information, only to have another one ask for additional information. Such duplication just further confounds a permitting process that is dysfunctional.

We believe that if there were one agency to deal with, as well as a clear definition and a classification by value and function, that not only would the process work more efficiently, but it would do a much better job of protecting the true pristine and most important wetlands in this country.

Mr. APPLEGATE. Why don't we just take the Corps out of the mix, give the SCS?

Mr. THOMPSON. Well, again, I think that probably would be acceptable if the SCS was just the one agency. I think that would be acceptable.

Mr. APPLEGATE. Yes, yes. Because I know the farmers and those particular—that industry, of course, would favor SCS, because they work with them, because they know something about their particular end of it. But the thing with the wetlands is that it is a completely different mix in and of itself. Just going to ask Mr. Szabo, you state that you believe that the definition of the Federal jurisdiction of wetlands must require water on the surface for at least 21 consecutive days a year.

Are you talking about actual water that you can see or are you talking about—you know, wetlands doesn't necessarily have water on it. You can have it underneath, if you see cattails, generally speaking, that is what you got. You are talking about actual water that is laying there, surface water?

Mr. SZABO. Mr. Chairman, one of the problems today is nobody is on notice of where a wetland is, they are not mapped. So the idea of seeing water on the surface for three weeks a year might give the citizenry some notice that this is a wetland that requires a permit.

I know that it doesn't—that that is a subset of the scientific definition of a wetland, but I think one of the jobs that we would hope the elected officials would do is decide that a subset is what should be regulated, and provide a means for people to know that they are in regulated territory. And so the idea of water on the surface is

to give people notice that they are operating in what might be a wetland.

Mr. APPLEGATE. What about do you have any definitions as far as minimal number of acres or size?

Mr. SZABO. I personally think, the coalition believes and I think the Hayes bill addresses, that you ought to cut out the smaller parcels from the program, like under an acre, and just leave those out of the program, or cover them by a general permit.

Mr. APPLEGATE. So an acre and a half would be all right?

Mr. SZABO. If you want to regulate an acre and a half, you know, the Congress should drop out the lower end, we believe, because those folks don't have the money to have lawyers to help them through the system. They should be educated as to what to do about wetlands, but the idea of—today, as you have heard from the study that several people have referred to, all of the effort of the government is going to these small parcels, basically. We think that that is not where the big issue should be.

Mr. APPLEGATE. Okay. Well, I want to hear some of the dialogue that some of the other members who have been very intensely involved in this ask with you. And so I am going to recognize Mr. Boehlert.

Mr. BOEHLERT. Thank you, Mr. Chairman. I am not sure I want to be recognized. After listening to this panel, I think I know what Woody Allen had in mind in his essay on his address to graduates. He probably had this hearing in mind, because that essay says something like this.

More than at any time in recent history, we have arrived at the crossroads. One road leads to hopelessness and despair, the other to total extinction. Let us pray we have the wisdom to choose wisely. I mean it is just—think about that.

It is so frustrating because my environmental friends who acknowledge that I am green, tell me I have sold out to the business community. My business friends who know I am a strong environmentalist, say, hey, there you go again, Boehlert, you are just in their hip pocket. And yet I am hearing from everybody that what we have got, H.R. 3948, is an unmitigated disaster. And I don't share that view.

And my concern is—my concern is we may end up with nothing. And guess what? Are we going to suffer all across America if that is the case.

Terry—Ms. Schley, let me have you respond. I would like you to just focus on the two bill—we have to deal with political reality, incidentally, you know. I would like to pass a law that heaven exists here on earth, I really would like to, and I think I would get a lot of cosponsors and I am sure we would have a unanimous vote, but there is not much chance heaven is going to exist here on earth.

Why don't you deal with the reality of the two bills that are before us, H.R. 3948, and the so-called bipartisan substitute. Incidentally, H.R. 3948 is a bipartisan bill, Mineta and Boehlert. Give me the principal differences between the two as you see them.

Ms. SCHLEY. That is an excellent question.

Mr. BOEHLERT. Pull the mike up so we can hear an excellent answer.

Ms. SCHLEY. Sure. Just to give you the quick and dirty answer is——

Mr. BOEHLERT. No, this is clean, we are staying clean here.

Ms. SCHLEY. The clean and pure answer is that the difference is a difference of degree. The Hayes substitute would completely eviscerate this wetlands program. So while we do have—we have very significant and very real problems with the committee substitute, the Hayes substitute is far, far worse. And I cannot emphasize that enough. Some of the things I could point to are the fact that if you adopt that 21 days of saturation at the soil definition for wetlands, you write off about 50 percent of the wetlands in this country, including large portions of the Everglades, Great Dismal Swamp, you know, things that the general public understand to be wetlands. It is—that definition has not been supported by any reputable scientists that I know of.

In addition, if you adopted the Hayes substitute, what you would do is simply take the existing program, which although it is not flawless, people at least understand, and replace it with a completely new program that divides wetlands into three classes, type A, type B, and type C. It writes off all protection for type C wetlands, the so-called low value wetlands, gives virtually no protection to type B wetlands, and doesn't even give you inviolate protection of the type A, the supposedly most valuable wetlands.

In addition, it says that labeling a wetland—at least up to 20 percent of a county—type A wetlands, is automatically considered a taking. This creates about, well, up to about $45 billion worth of taking liability, and because it has no nuisance exemption, discriminates against neighboring landowners.

You know, essentially you would be compensating somebody for their inability to fill in their high value wetland, when if they had filled in that wetland, they would have flooded their downstream landowner. You are compensating somebody for a right they have never had. They never had the right to hurt the adjacent landowner.

Mr. BOEHLERT. So am I hearing you correctly, H.R. 3948, the committee substitute is the lesser of two evils, but you don't like that one either?

Ms. SCHLEY. It is the lesser of two evils, and yes, we do have some real concerns with it.

Mr. BOEHLERT. All right. So if we are not able to make some accommodations, are you suggesting that no action is better than some action by virtue of H.R. 3948? And do you realize the risk you are taking with that position?

Ms. SCHLEY. I understand exactly what you are saying, and unfortunately, though, we would very much like to see a Clean Water Act, but we really, in good conscience, our members cannot support changes to the Clean Water Act unless they strengthen wetlands protections in the Clean Water Act, so that that really has to be our bottom line position.

Mr. BOEHLERT. Well, then I would hope you would go forth to your members and come up with two or three realistic requests to accomplish to give us some guidance.

Ms. SCHLEY. We would certainly love to take you up on that, and I hope our written testimony also addresses that. There are—you

know, of course we are strong supporters of the Edwards bill, but there are also a number of provisions in the Studds-de la Garza bill, and also the Senate bill, that we do support.

Mr. BOEHLERT. Well, I see the red light on. It is just so unfortunate, because this is so important. But there is some understanding you have to have. Quite frankly, the Edwards bill doesn't stand a snowball's chance in you know where of succeeding. You might like it, I might like it, but it is not going to happen. And we have to deal in everyday reality up here as we move forward to try to protect the people's interest.

And in all fairness, I haven't had a chance to digest your voluminous testimony, because we just got it, but I will go over that very carefully. And I know the red light's on, but Mr. Heffelfinger, I want you to address the same thing that I asked Ms. Schley about the comparison between the committee substitute, H.R. 3948, and the so-called bipartisan alternative, and whether H.R. 3948 is better than nothing or nothing is better than H.R. 3948.

Mr. HEFFELFINGER. Well, let me say first, since I just arrived here last night, the full text of the so-called Shuster-Hayes substitute has not been given to me. I only have a summary. But I understand it is very much the same as H.R. 1330 and I can speak, therefore, on that basis.

And I think pretty much the problems we have on it are the things that building industry representative said that he didn't like about your bill. In other words, he wants a definition that requires this period of ponding. We went through all that with the delineation manual ruckus during the last administration, and after it was field-tested, those who did the field-testing came back unanimously and said if you insist on 21 days of water at the surface and ponding during the growing season, you are going to lose an enormous number of important wetlands from this country. So that is a difference there.

I think of the classification, Ms. Schley has ably discussed that, there is no scientific basis for it. There is not enough money to pay compensation to all the landowners that you would have to pay compensation to, to save pristine wetland, and therefore wetlands protection would just pretty much cease.

Those are the—those are the worst part of it. The strict deadlines on streamlining, where, you know, it is 60 days or 100 days within which the Corps has to decide whether or not to issue a permit without any exemptions and otherwise they are deemed grant, is going to kill wetlands protection. Because a lot of these agencies are understaffed, frankly, and things come up at the last minute and, of course, you have to have NEPA exception exceptions and things like that.

The mitigation banking is a tremendous problem. Regardless of what some may say, mitigation banking has not been shown to be an effective means of replacing lost wetlands functions. It is very expensive to restore wetland. We know we are doing one around San Francisco Bay, it is not a mitigation bank, but it is costing maybe $80 million to restore some tidal wetlands and they won't be there for 10 to 20 years. So it just doesn't—is not an effective way, it is no substitute for protecting the existing wetland.

Now, as to your—as to your second question, which is problems, you know, specifically what is wrong with H.R. 3948, you have in Exhibit A of my testimony the things that concern us the most. Things I didn't mention in my testimony, for example, are the administrative appeals process.

We have no trouble with an administrative appeals process, but when you give it the rights only to the landowner, not even to some downstream landowner who might be hurt by the nuisance of the wetlands destroyed in the upstream of him, and certainly not to members of the public who might be very concerned because they have lost their fishing sources or for some other reason, it just isn't fair. An administrative appeal process has got to be fair, it has got to be equally applicable to all sides of the question to be acceptable to us.

And then one other thing that we are very concerned about is the expansion of the so-called prior converted cropland exemption, which, mind you, we have no problem with farmers being given exemptions for ongoing farming practices. But when you want to give a person who is farming what is basically something that basically still has wetland functions, even though it is being drained so that it doesn't show water all the time, you want to give an exemption to that farmer so that shopping centers can be built, we can't go along with that.

We look at the central valley of California and we see new towns being proposed all over the place. Farmland will be lost, farmed wetlands will be lost, regardless of the values that they are providing. And what you are proposing in H.R. 3948 is a big expansion of what is being administratively done in that area right now. And I don't know how many millions of farmed wetlands we will lose if that goes through.

Mr. BOEHLERT. So you recommend, and I know the time is up, you recommend we just drop the wetlands provision of H.R. 3948?

Mr. HEFFELFINGER. To tell you the truth, if it is not improved, if it is not at least as protective as what is in Section 404 in the regulations now, we would rather it were dropped.

Mr. BOEHLERT. Thank you.

Mr. APPLEGATE. Thank you.

Mr. Inhofe.

Mr. INHOFE. Thank you, Mr. Chairman. I will make this very brief. But let me ask Mr. Thompson to answer the same questions that the others have answered.

In your testimony, you talked about the concerns over the provisions in H.R. 3948. Very briefly, what would those concerns be if you were just to name two or three?

Mr. THOMPSON. Well, Congressman, I think the——

Mr. INHOFE. Because we are talking about five different bills here, and I would like to focus on H.R. 3948 what do you find most offensive about it?

Mr. THOMPSON. I think in contrasting and comparing the Chairman's substitute versus the bipartisan alternative, I think H.R. 3948 just serves to continue the problem that our community has with wetlands regulations.

As Ms. Schley talked about, we all are confused. I think that H.R. 3948 is very broad in terms what actually would be regulated.

It still doesn't address the abridgement of property rights or the whole streamlining process for permitting, which it still is open-ended. It doesn't give a set, certain, definitive time in which permits would be issued because there could be additional information asked for that can delay issuance of the permit.

And I think the key point that we are still here trying to talk about is that we don't have any objection to the important and necessary regulation of the important wetlands in this country. We are trying to deal with those wetlands that are marginal and don't have the same value and function as pristine wetlands in this country but that are still being regulated as if they had the same value and function. All wetlands are not the same, and they need to be classified and regulated accordingly.

What would be a travesty is having a subdivision and you end up with one acre that has to be mitigated and it sits out in the middle of a subdivision and becomes a mosquito-infested area forever in perpetuity, that's not serving a value or function to anyone.

Mr. INHOFE. And you don't feel, Mr. Thompson, that this bill does give you a firm, understandable definition of wetlands?

Mr. THOMPSON. I don't think it does. I think the definition is too broad. We still don't know what we would be dealing with.

Mr. INHOFE. And I agree with that, too. Ms. Schley, you heard them mention the length of time it takes to get a Section 404 permit as being over a year. Does this bother you?

Ms. SCHLEY. It bothers me because it is extremely misleading. The study that was referred to was published by Beverage and Diamond, a law firm that works for the home builders. And all that looked at was a very, very small subset of individual permit actions. The vast majority, over 90 percent of the activities authorized under the 404 program, are authorized under general permits on an average of 19 days.

Mr. INHOFE. All right. So you disavow the authenticity and the accuracy of the report?

Ms. SCHLEY. I think that the——

Mr. INHOFE. These people, is this a professional operation or are they an in-house, pro-industry, anti-environmental group?

Ms. SCHLEY. It is a law firm and a consultant, an environmental consultant, teamed up to write this report. And the report is fine if it is taken in context. But it is not—it isn't being used in context.

Mr. INHOFE. I see.

Mr. THOMPSON. Congressman, if I could just quickly for the record, I would like to submit the study, because I take strong issue and opposition to what she said.

First of all, one of the authors of this is a very recognized and reputed former government employee who is a consultant, an engineering consultant now on the environment. He studied over one half of the individual Section 404 permits issued in 1992 and found that for those permits he studied, that the average time was 373 days, not 19 days. It is a very extensive study, and I think it is very creditable.

[The information may be found on page 614.]

Mr. INHOFE. Yes, I'm looking at it right now, and I do see that. I know there is a disagreement.

Well, let me ask Ms. Schley a different question then. If it were to be found to be true that it does take an average of 373 days, would that offend you?

Ms. SCHLEY. Well, I think it would be—it would certainly leave me with more questions.

Mr. BOEHLERT. Will you please pull the mike up?

Ms. SCHLEY. I am sorry. It would certainly lead me to ask more questions. I would want to know why it took so long. And when we went back and looked at that study and really took a detailed look at that, a lot of that time was spent in the pre-application review process.

A lot of that time in some of these—the subset of permits that they were looking at were problematic permits. They were individual permits that were more difficult cases. And a lot of times what took so long was the Corps working with the permit applicant negotiating with the permit applicant.

Mr. INHOFE. Well, I would like to pursue that, but I had one very significant question I wanted to ask. In your testimony, you talk about that the bill's payment provision, would cost the taxpayer somewhere between $10 and $45 billion.

As I understand it, if you take value away from property, three things can happen. Either you take the value away and you get compensated—think about these three. You take the value away and you get compensated; you take the value away, you don't get compensated; or you don't take the value away.

Of those three, what would be your choice?

Ms. SCHLEY. My choice is to stick with the Constitution and let the courts decide when value has been taken away, when a taking has occurred, and we fully, fully support the Fifth Amendment to the Constitution, and the courts doing their job in determining when a taking has actually occurred.

Mr. INHOFE. But you just said that your problem with this is what it costs the taxpayers, because they are taking away the value and to compensate them, would cost between $10 and $45 billion.

Ms. SCHLEY. The problem that I have with the payment provision in the Hayes substitute is that it is a distortion of the Fifth Amendment to the Constitution. And this—what the Hayes payment provision would do would be to require the taxpayers to pay people to compensate them for the value of their land in instances in which no court would recognize a taking has occurred under the Fifth Amendment.

Mr. INHOFE. Doesn't the court use a benchmark of some 95 percent of the value? So that if I have a piece of property that has been in my family for four generations and I have been told when it was passed from generation to generation what can be done with it, and then they say, no, you have only 50 percent of the value, then that is not a violation of the Fifth Amendment?

Ms. SCHLEY. Let me put this in context. On average, only 4 to 6 percent of all 404 permits are ever denied. So it is very, very rare that you are going to end up in a situation where a person has a permit denial and then needs to go into court. But then when you look at the situation, even if you have a permit denial, that doesn't mean that you are precluded all economic use you can make of the

property. There are frequently other economic uses you can make of that property.

Mr. INHOFE. Of a less value, perhaps.

Mr. Szabo, do you have any comment to make on this?

Mr. SZABO. You are correct, Congressman, that the court has been very restrictive in what it finds to be a taking under the Fifth Amendment. The Lucas case, which is a leading case, was 100 percent devaluation of the property, resulting in a taking. It was a recent Claims Court case that says the 93 percent devaluation causes qualifies for a taking.

The kind of situation that most members think about, 70 percent devaluation, et cetera, is not covered by the court's interpretation of the Constitution. Moreover, I would make two other points. Most people couldn't hitch up and fight the government for 10 years to get into court, to try to get compensation. Large corporations can, but most people cannot.

Number two, the very designation of land as a wetlands is a devaluation. You may never ask for a permit, but the very fact that you have been designated as a wetland drops the value of the property precipitously, and the local tax base precipitously. So that is what I would say.

Mr. INHOFE. So it can be value, and still not reach the benchmark that is considered value. And the interpretation the courts have is a constitutional provision that says property rights should not be taken without just compensation.

Ms. SCHLEY. If I may add just two sentences, though, the Tucker Act under current law awards attorney's fees in successful takings cases. So it is not as if people don't have access to the courts. If you have——

Mr. INHOFE. Wait a minute. Awards attorney's fees. You mean if the individual whose property has been taken, whose value has been taken, he should not be awarded attorney's fees?

Ms. SCHLEY. No, what the Tucker Act says is that if—say I had owned a wetland and I thought that——

Mr. INHOFE. No, not owned a wetland, owned a piece of land that they later on decided was a wetland.

Ms. SCHLEY. Okay. Say I owned a piece of property and I go to get a 404 permit and my permit application is denied, and then I hire an attorney and I go into court and I say that there has been a taking and I win, and the court determines that there has been a taking. Under the Tucker Act, I would be entitled to be reimbursed for my attorney's fees.

Mr. SZABO. Mr. Inhofe, let me jump in if I may. Florida Rock is a situation down in Florida where a limestone company 15 years ago began to try to get compensation. It has been up and down the court system. They recently went back down again from the appellate court because the court said the lower court had improperly presumed that the market was made up of informed purchasers, and that was not appropriate. They should understand the market was made up of uninformed purchasers that might not know about the 404 program, and go back and see what they would offer for the property.

The point is, they have been 15 years in the carrying. They haven't gotten attorney fees yet. If they ever win, then they get attorney fees.

Mr. INHOFE. What is the number of successful taking cases out there, do you know?

Mr. SZABO. Well, the number—the 404 takings cases that the claims court has decided are either three or four. I think it is four, actually. But none have been past the Supreme Court and past that stage at this point.

Mr. INHOFE. Thank you, Mr. Chairman.

Mr. APPLEGATE. Thank you, Mr. Inhofe.

Mr. Hayes.

Mr. HAYES. Thank you. I really want to ask Mr. Heffelfinger a question. It is a Federal crime to murder a U.S. Marshal. If we repeal that, can you murder a U.S. Marshal without it being a crime?

Mr. HEFFELFINGER. I am sorry, would you say that again?

Mr. HAYES. It is a Federal crime to murder a U.S. Marshal. If we repeal our Federal statute, can you murder a marshal without it being a crime? Is it therefore legal to kill a U.S. Marshal if we repeal it?

Mr. HEFFELFINGER. I can't answer whether——

Mr. HAYES. Then I will suggest you also can't answer the question about the Hayes bill. When you do delineation, and when you simply are looking at a Federal statute under the 1972 Clean Water Act, if you say the Federal law does not apply to certain classifications of property, it doesn't mean we are reclassifying San Francisco. It doesn't mean we are telling California what properties to apply its State law to. It doesn't mean the Florida statutes are repealed. It means we are going to give the statutes a part of the program.

They shouldn't be under Federal supervision, not that it goes away. You don't lose an inch of wetland if the local jurisdiction deems in its wisdom if these areas are going to continue to be monitored by the people who know them best at the State level. Only if you have the unmitigated arrogance to believe only the Federal Government can determine zoning in San Francisco, does it behoove you at least to say that the government is all powerful.

Mr. HEFFELFINGER. Is that a question?

Mr. HAYES. It used to be, but you can't answer it, so I will go on. This is not a hostile question, even though I am not in good humor.

Suppose I told you that Louisiana, we have a case of property owned by the Catholic Church. They want to make it into a duck preserve. Fish and Wildlife approves it. The Corps of Engineers approves it. Fish and Wildlife says, We want more salinity, more fish. Corps of Engineers says, More ducks. Fish and Wildlife says, More fish.

There is no supermarket. There is no shopping center. It is two Federal agencies fighting with each other. They throw that on Carol Browner's desk. That is the kind of scenario that is your enemy. I represent three parishes, in South Louisiana which produce a quarter of the commercial fishing in the United States, and within 10 miles of their boundaries and the coast, I want you

to name a shopping center for me. I want you to name a residential subdivision development.

Their permit has been held up for 10 years on trying to preserve wetlands, except that of the Department of the Interior. It got its permit and didn't have to go through mitigation. It got a permit to destroy wetlands to save other wetlands, something private landowners can't ever seem to do.

If you want to know why all these folks around this country say that these issues are genuine, it is for the very simple reason that they are. I don't want to legislate for Maryland. You have got State laws that ought to cover the gap between what ought to be the Federal framework and what is unique to your estuary system, which is worth billion of dollars in the Chesapeake Bay.

Likewise, I have got the bottom of the Mississippi River. That part is different. I have got the Corps of Engineers that built banks on that river and changed forever the wetland configuration of Southwest Louisiana. I have got coastal marshes where doing nothing is killing them. Not California and not pristine light beaches in Florida. I have got coastal marshes where doing nothing is costing $40 million.

All I am asking this committee to do is understand that Maryland is not Louisiana, neither of them are San Francisco. They probably don't want to be, by the way. Nevertheless, the point is the latitude of judgment has got to belong to individuals.

The only other point I want to make is the lawsuit. We talked earlier about nuisance cases. Business quote: The general rule is that while property can be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. That is not the Hayes bill. That is Oliver Wendell Holmes.

Judge Smith is quoting him in the case of an environmentalist who handled 404 permit issues who found out his own subdivision of south Texas was subject to a 404 violation, so a cease and desist was done. The government had great options. One of them was to build the House on estimates. That is on page 3. These aren't realistic options. This is realistic lawsuits. There are realistic takings.

I will close by quoting from Judge Smith, because it is the summation of the point we are trying to make.

He says this, not me. His case represents in sharp relief the difficulty that current takings law forces on both the Federal Government and the private citizen. The government here had little guidance from the law as to whether its action was a taking in advance of a long and expensive course of litigation.

The citizen likewise had little more procedural guidance than faith in the justice of his cause to sustain his long and costly lawsuit. There must be a way to balance goals with fundamental individual rights. There is a better way, and it sits within this committee.

If constitutional government and the Legislative Branch does not do its job, the court is shackled with the Fifth Amendment to protect citizens from their Congress and their bureaucrats. That is why this debate should be held.

Al, you made the most important statement here today. You say, let's puts it on the table and let the chips fall where they may. That is the only definition of legislative responsibility there is. I

will applaud you for saying that. Let's separate what is good and bad public policy, or at least I can go home and show folks we had a fair vote on it. Our fishermen will all be better off for that process.

I thank all of you for coming.

Mr. APPLEGATE. Wow.

Ms. Shepherd.

Ms. SHEPHERD. I guess I just have a question or a need, I suppose, to tie this to the previous panel's testimony, which is the thing that really concerns me. If wetlands—we are talking about wetlands as if they are somehow a luxury that we could do without, and that is one possibility, or else they are an instrument of torture that the Federal Government has devised to implement on States, and all of the gradations in between that.

The thing that concerns me is that you have water systems that have strange critters in them, that we can't get out. And in fact in the case of cryptosporidium, I guess the only way we can get it out is with chlorine, which is an even strangeer critter that is more dangerous than cryptosporidium.

So we seem to be creating a black box for ourselves. I know you can't sell homes in subdivisions that can't turn on the tap and get a glass of water.

Now, do you believe, those of you who are more or less hostile to wetlands regulation and would like to see it as weak as possible, do you believe that wetlands really are the kidneys of our water system, and if they are, if you do, and if you do believe they are, you are therefore advising us to go with one kidney, or with no kidneys, and just see how it works out?

Mr. SZABO. Who are you addressing the question to?

Ms. SHEPHERD. I will address it to you.

Mr. SZABO. First of all, I object that you think we are hostile to regulation. If you read the Hayes bill, it is not hostile to regulation. It in fact adds activities to be regulated. All it says is you should make distinctions between high value, medium value and low value.

The articulation about the Hayes bill is just incorrect. I would encourage you to read it. No one is here saying repeal 404. No one is here saying wetlands are not important. What I am saying is you have to accommodate the wetlands regulatory program to the reality that 75 percent of these wetlands are privately owned, that States are different.

If you take south Louisiana, 2 million people live in jurisdictional wetlands. They are not going to leave. If you burden them with these regulations, they can't move, they get in trouble. All we are saying is make these regulations work.

We agree with the values of wetlands. Not only that they are the kidneys, but they are the flood control system, they are the storm surge, they are the habitat for the microorganisms that give rise to the shrimp, that give rise to the fisheries. We understand that. And we agree with that.

What we are saying is the system you have got today was not designed to work, and weigh and balance these other concerns which we are bringing to your attention.

Ms. SHEPHERD. But since the Hayes bill would allow more wetlands to go without regulation and would allow more wetlands to be filled in, and would, you know, basically dampen any ability that we might have to protect a large proportion of these wetlands, my conclusion is, we will lose wetlands. That is where I get to my question about the one kidney.

So are you saying the country can go on one kidney? I mean, that is your judgment.

Mr. SZABO. No, that is not what we are saying. What we are saying is go back and take a look at the wetlands that are really functioning wetlands that should be regulated. You are regulating today a lot of things that if you were to walk on them you wouldn't think they were wetlands. If you have walked around some places in your district, many Members have gone out and looked at things that are in trouble with the corps that don't look like wetlands.

We are saying function your program on the functioning wetlands, the kidneys that work, and make them work so that people who own these kidneys, if they knew today they were kidneys they wouldn't do anything with, they wouldn't want to own them, but they began to own them before they knew that or before the government regulated them. And you can't say, because all the people can't afford to pay for it, you have to pay for it. You have got to weigh and balance these legitimate interests.

We think the Hayes bill is the best way to do it. We think, for probably the reasons Terry and her colleague disagree with the Mineta substitute, we think the Mineta substitute begins to move in the right direction. We just think it doesn't go far enough.

Mr. THOMPSON. I just might add quickly, speaking for home builders, we are not hostile toward the regulation of wetlands in this country. As I said in my testimony, and I firmly believe it, the pure wetlands in this country need to be regulated.

We are not asking for the ability to develop all the wetlands in the country or exempt ourselves from the obligation of protecting those wetlands. What we are hostile to is a program that is dysfunctional, that does not work, that is not fair, and doesn't have any balance in it.

What I know about wetlands is dealing with it in the real world. When it takes 373 days to get a permit, that is not right. The cost associated with those delays are huge. Is that balanced in terms of providing protection for wetlands? What about the cost of housing our children in this function? The dysfunction is what has to be addressed.

The whole issue is about not knowing what you are dealing with when you go and buy a piece of property that has no visible sign of a wetland. It is not saturated. It doesn't have the vegetation you would normally see on a wetland. It doesn't have visible signs of the other characteristics. So you buy this piece of property with good intentions, only to have someone come along and use an example or definition you are not privy to, and all of a sudden classify this as a wetland. It is just not right.

I think, if anything, the application of the Hayes bill would strengthen the protection of wetlands, because people would know what they are dealing with. They would go out and look and see if it had the three characteristics typically found on wetlands. They

would know if they are dealing with a wetland, and buy it knowing they are going to have to deal with some significant delineation and mitigation. That is the crux of this issue.

I might add that it is unbelievable, considering people think development is taking all the wetlands away from this country, that only 7 percent of the loss of wetlands that has taken place in this country comes from urbanization. The majority of it comes from the natural evolution of the ground. It comes from agricultural uses. It comes from coastal areas, reclaiming the coastal property. It doesn't come from the cavalier granting, if you will, of Section 404 permits.

Ms. SHEPHERD. Thank you.

Ms. SCHLEY. Just a quick response. The Hayes bill would remove protection for so-called drier wetlands. The way it redefines wetlands would remove all protection for them. Those drier wetlands provide $70 billion worth of filtration functions.

Mr. SZABO. Why can't you pay the landowner for it then?

Sorry.

Ms. SHEPHERD. I think the question that we have to decide, to answer your question, is that—I mean, clean drinking water is a common need for every single human being in the country. And I suppose the answer to your question is that for exactly the same reason that I am very grateful they are not going to allow in my city a 7-Eleven to be built right next door to me, which could happen, and fortunately we have a zoning law against that, and I think for the same reason, if we decide that it is important for our drinking water—I am not sure that the country has decided that wetlands are important for our drinking water. And that I think is probably the tragedy, because I am convinced they are.

Thank you, Mr. Chairman.

Mr. APPLEGATE. Thank you. I think I will go to Mr. Gilchrest. He has been sitting there patiently throughout the whole hearing.

Mr. GILCHREST. Thank you, Mr. Chairman.

I want to take all other Republicans that aren't here, they have proxied me their time.

Mr. APPLEGATE. You have 15 minutes.

Mr. GILCHREST. I know that Mr. Szabo and Mr. Thompson are overworked, but I am just going to ask them a couple of questions.

We talk a great deal about delineation. We talk a great deal about property rights and everything else in between. Specifically with delineation, Mr. Thompson and Mr. Szabo have said that we need a statutory definition of a wetland.

Can either one of you give me an idea who should give us that definition? Where should we get the definition of a wetland?

Mr. SZABO. It seems to me that before this debate is all over, whether it is over in this Congress or another Congress ahead, I think the people have a right to expect that their elected officials are going to define wetlands.

Now, if you don't feel like you have enough information——

Mr. GILCHREST. That was just the buzzer. I want you to tell me——

Mr. SZABO. I am about to tell you.

Mr. GILCHREST [continuing]. Who should give the definition so it becomes statute for a wetland. Should it be Wayne Gilchrest, who

is a history teacher? Should it be Jimmy Hayes, who has another type of life? Who should—or should it be a scientist?

Mr. SZABO. As between you, it should be Jimmy Hayes.

Mr. GILCHREST. I will say that Jimmy Hayes said before that he didn't want to regulate wetlands in Maryland. And I am really glad. Should it be a scientific definition, based on good science, or should it be basically, in my opinion, a haphazard—which would come out of Congress, because we have 435 different definitions of wetlands.

Mr. SZABO. I am not ready to believe that everybody in Congress is haphazard.

We think you should get guidance. I think that you have four agencies at least involved in this process. I would ask for guidance from them. You have a National Academy of Sciences study that is supposed to come in in November.

But I think once you get your science, you have to apply policy to that science.

Mr. GILCHREST. I agree with you. I think we have an agreement.

I am going to move on, because we agree on that. Mr. Gilchrest agrees with the wetlands coalition, or the coalition agrees with Mr. Gilchrest, whatever.

We made several references to the Hayes bill. One characteristic of the Hayes bill as far as I understand it would be that no more than 20 percent of any county in the United States could be classified as high value wetland. And that 20 percent would then be compensated. But the low value wetlands would not be compensated.

In a situation like Louisiana where you have I don't know how many counties or parishes down there but many, some of those parishes or maybe some of those counties have, according to the scientific definition, more than 20 percent of what could be then classified as high value wetland, should the Federal Government through that legislation tell Louisiana what can be compensated and what can't be compensated?

And I want to read a statement, and I am looking at what the Federal Government should do, and what local communities should do.

In a Supreme Court decision called Penn Central, 1978, they make this comment: "Communities clearly have the authority to adopt laws and regulations that are designed to protect and enhance the quality of life of their citizens."

Now, it seems to me if we adopted 1330, Louisiana would have no choice, at least through a Federal compensatory regime, to compensate anybody who might fall into the definition of a high value wetland.

Mr. SZABO. Let me try—to answer your question, you have to understand the context of Hayes bill. The Hayes bill says break the weapons into three categories. The type A weapons are presumed to be not usable by the citizens. Therefore they are presumed to be takings. Therefore a system is set up to negotiate, so you don't have to go to court.

Mr. GILCHREST. These are no longer presumed. This is a scientific definition.

Mr. SZABO. I understand. But the presumption of a type A weapon is it would be treated as a compensible action by the government. The Hayes bill, the Members are putting together, I think, we were concerned about local tax base, and therefore they put an upper limit of 20 percent so that there would be some tax base left in their districts.

The Hayes bill does not take away a person's right to go to court under the Fifth Amendment, whether it is a type A or type B or type C wetland, to get compensation.

Now, type Cs are not subject to regulation. They are monitored under the Hayes bill. So a B or an A, you could still go to the court under the Fifth Amendment.

If the State of Louisiana chose to compensate people, I suppose it could vote tc compensate people.

Mr. GILCHREST. Is there a length of time that this value system for wetlands is to be completed? And who is to complete——

Mr. SZABO. I think the Hayes bill talks in terms of 10 years from the time of enactment. Each parcel that was delineated, the corps would say whether it was an A, B or C. I would note that the government has been doing a national wetlands survey, aerial maps, which I think has been given to the biological survey as the first action to complete.

So government is kind of along the way of doing some form of wetlands mapping.

Mr. GILCHREST. You made a comment before that States do not offer wetland maps.

Mr. SZABO. I said that the Federal program is not mapped. The Federal 404 program is not mapped. I know your State of Maryland, under its non-title wetlands program does have maps that it posts around the State, what is regulated under the Maryland program. You don't have that for the Federal program.

Mr. GILCHREST. Doesn't every State have a contingency of Soil Conservation Service who over the period of many years have a map of wetlands?

Mr. SZABO. I don't think that is so. I don't know that to be true.

Mr. GILCHREST. It might be a good idea——

Mr. SZABO. I think the Soil Conservation Service has mapped wetlands under the swampbuster provision. Maybe they have done that. But that is agricultural land.

Mr. GILCHREST. Well, maybe the fact that most of the Eastern Shore is agricultural, all of the Eastern Shore is now mapped——

Mr. SZABO. I think your district is covered pretty much by two programs, the swampbuster program and the 404 program. All districts aren't like that—I mean, all congressional districts aren't like that.

Mr. GILCHREST. I see my red light is up, Mr. Chairman.

Mr. APPLEGATE. Not only that, but we have eight minutes to get over and vote on the Harman amendment, increase of C–17s.

With that, we will recess for about 15 minutes or so, and we will be right back. Don't go away.

[Recess.]

Mr. APPLEGATE. If everybody will take your seats, we will get the hearing back on track.

Again, I appreciate the panel staying while we go over and do our duty.

I would like to recognize Mr. Geren.

Mr. GEREN. Thanks, Mr. Chairman.

I am glad Mr. Gilchrest is back. I wanted to follow up with his line of reasoning. He was proposing one of the most radical reforms in the history in the Congress in limitations of our powers, suggesting we should only legislate in areas we know something about.

Mr. GILCHREST. Should I comment on that, Pete?

Mr. GEREN. No, I won't yield you any time. Just a cheap shot.

I say that facetiously, but I think there is an important point there. I think part of the problem we have had in this whole wetlands area has been Congress' unwillingness to step forward and take the heat on it, make a tough decision. If it makes half the people at this table happy, good; if it makes everybody unhappy, good.

You think ultimately it is the responsibility of the Congress to deal with this issue. There is a tendency, too often, it seems to me, either intentionally or unintentionally, for Congress not to get into the nitty-gritty of some of these issues, leave too much to the folks who work in the agencies, and they are asked to work in areas they shouldn't have to. We should make those decisions and have to live with the consequences.

The wetlands issue is part science, but a lot of it is policy and trade-offs. Those are the sorts of things your elected officials are supposed to do for you.

I am concerned that some of the groundwater provisions could perhaps be carrying this in the same direction. One of the basic—or one of the expansions in the Mineta bill does deal with the groundwater. I am concerned that unless we live up to our responsibilities as a legislative body, we could end up pitching this issue into the bureaucracy as well, and we could have the same kind of quagmire with groundwater as we have lived with with the wetlands over the last several years or last decade.

I would like to ask the panel to speak to that issue, and concerns, and perhaps start with Mr. Thompson. If you could speak to that issue and help develop what concerns that you might have on that point.

And I would like to hear from some of the folks on the panel address it as well.

Mr. THOMPSON. Thank you, Congressman Geren.

I personally agree with your assessment. I think it would be a mistake, and furthermore not productive, to extend jurisdiction of the Clean Water Act into the area of groundwater. I think right now, groundwater is regulated, as the Members of the subcommittee know, primarily by both some Federal laws, depending upon the level of contamination, but primarily regulated by the States, water quality and so forth, because they best know the needs for their people. That is where I think the legislation ought to lie, with the States.

But the other problem is I think it would be a mistake to extend authority of the Clean Water Act, because this is a complex issue, it has some incredible ramifications. I think that if in fact groundwater would be a candidate for inclusion within the Clean Water Act, it would be a gross mistake to do that without holding hear-

ings on this most important subject first which have not been held to this point.

I think we need to consider the practical implications of groundwater and what it would mean in terms of adding the arm of the Federal Government into this arena.

First, as a home builder, it would have significant implications for our industry, because we currently now are involved in using, through State authority, the natural filtration of the ground, particularly in a couple of areas like retention ponds. I develop subdivisions, and quite regularly to meet runoff requirements, to not accelerate downstream run off, et cetera, we are required by our local planning and zoning commission to build what I call a retention, or as some people say, a detention, area. These are EPA-approved best management practices.

The water goes into the retention area, it is held back, using the soil to filter the water and so forth, and it works fine. Another area is that if in fact the arm of the Federal Government was extended into groundwater, I think it could end up in the back yards of a lot of homeowners across this country in the sense of it would perhaps regulate septic tanks which are quite widely used throughout this country, particularly in rural areas and areas that don't have public water systems.

The septic system, as you know, is regulated by States, and it also uses the ground as natural filtration. H.R. 3948 would have significant consequences to that.

So I think in summary it would be a mistake. I think your concern is very salient in the sense that what we might do is if we broadly move into groundwater and add it to the Clean Water Act, I think we will be back here in two years trying to clean up the problems with groundwater that are inherent in wetlands today.

Mr. GEREN. Thank you.

Mr. SZABO. Congressman, I certainly agree. I think Congress should go into issues with knowledge and forethought, knowing what your objective is, with some idea of what kind of regulatory system you are setting up.

Ms. SCHLEY. I would just like to emphasize I think it is very important for Congress to look at how to keep groundwater clean, especially considering the fact that we have very, very limited abilities to clean groundwater once it is contaminated, and also frequently those groundwater supplies aren't replenished unless in some instances they are replenished by isolated wetlands.

So I think it is a really critical issue for Congress to focus on.

Mr. GOETZE. I think the groundwater problem is reflecting in a similar way to the problem that we have with whether or not we have enough wetlands to sustain a viable fishery, and also sustain good water for homeowners and people that want property in tied water to be satisfied.

The more concentration of new homes, new development, the need always for new wells to be drilled into existing aquifers greatly threatens whether or not those aquifers will be able to compensate or supply the need.

And we have evidence, certainly in Maryland and the mid-Atlantic, as far as I have heard and understood it, that this is a problem.

Now, whether it belongs in this bill or not, it certainly, though is a matter that is going to have to be addressed as the shrinking number of wetlands should be addressed by this bill.

Mr. HEFFELFINGER. I don't profess to speak for the Sierra Club on this issue, because it is a little outside of my area of expertise, but I can tell you that—well, we have one recent case in California where toxics from a refinery have gotten into the groundwater, the groundwater is now appearing along the coast and threatening some estuaries and some beaches, and probably there are cases like this, it seems to me, where the Federal agencies do have a legitimate area of regulation, because this may affect not just one State or certainly one local area, but could affect a larger expanse of our coastline, or even Mexico or Canada.

So I am not sure where the limits are to regulating groundwater pollution. But I don't think it can be ignored by Federal law entirely.

Mr. GEREN. Thank you. I don't think anybody would suggest that it should be ignored. But I think that at least, from what we have seen in this Congress, we certainly have not developed much of a record on it, nor have we confronted the Congress or the Members of the committee with the kind of tough choices that we should ask ourselves to make before we see ourselves opening up a whole new area of Federal jurisdiction and pitching something to the enforcers or the EPA or whatever without working through the tough tradeoffs and tough issues that would be a part of that initiative.

I see my red light is on. I appreciate it, Mr. Chairman. Thank you.

Mr. APPLEGATE. Thank you, Mr. Geren.

Mr. Ewing.

Mr. EWING. Thank you, Mr. Chairman.

To anyone on the panel, I would pose a question, and a brief answer, if you want to answer it.

Am I wrong, aren't wetlands very different in different parts of this country, from the coastal areas, the mountain areas, to the Great Plains? We talk about wetlands, but they are very different. Does anybody disagree with that?

Isn't it also that when you are regulating wetlands, whether you are in a rural area or an urban area or a developing area, it makes a big difference? Anybody disagree?

Mr. GILCHREST. I would, but I will talk to you later, Tom.

Mr. EWING. I am trying to get you out of a lot of trouble.

Mr. HEFFELFINGER. I am having a hard time answering that. Our rural areas are so quickly becoming urban areas in California, I hesitate to say that.

Mr. EWING. That is different from rural areas and many other places in the country where there are is a rather small amount of development, if any.

I guess the thing I am trying to get at, and we have experts here on both sides of the issue, and you all know it is a contentious issue. I want you to know that as a Representative I know it is a contentious issue. And I hear from both sides.

But regulating wetlands from Washington, when there is such a variety and such a difference, doesn't seem very practical. And particularly when we try and paint them all with the same brush.

Mr. HEFFELFINGER. Let me comment on that, because this is something I touched upon in my statement. First of all, we are talking about definitions. Some of the bills that have been proposed in the Congress so far have suggested that there be a basic wetlands definition, in fact, I think there are wetlands definitions basically the corps taken, taken from the present regulations that have been incorporated in some of the bills.

But then the delineation process is one which is intended to cover a lot of different kinds of differences in wetlands, of which you speak, in other words, a whirlpool is not like a salt marsh.

And there are proposals in some of these bills, and I think they make a certain amount of sense, there ought to be some regional differences in the way wetlands are delineated. We long have said in California, and up and down the West Coast that we have a different problem from other parts of the country.

We are an—we have an arid climate. Our wetlands don't tend to pond, at least during the growing season, and sometimes not at all. But they still have a saturation just beneath the surface. So groundwater is still important.

Mr. EWING. I want to go on, but I appreciate that inciting. I think we do agree they are very different.

Mr. THOMPSON. Congressman, I think you are right on point. That is why I think the State assumption aspect of this issue is so important, to be able to allow States that are best equipped to make the decisions that affect their people, because all wetlands aren't the same. Obviously, wetlands they are different in Louisiana than they are in Kentucky. But they all have different value, and they have different environmental function.

The States should be allowed, based upon the composition of their land, to make those decisions.

Ms. SCHLEY. Just briefly, I agree with you that wetlands serve a myriad of functions and values. I think that is true not just State to State, but from watershed to watershed from backyard to backyard, that what is really important is to look at the vast array of functions that each wetland provides, and the place in which it does, so I think it is important to get back to the 404 program as it exists right know.

The Clinton administration has issued guidance that made it absolutely crystal clear that not only do EPA and the corps recognize that not all wetlands are considered equal, but that they have the flexibility to deal with these inequalities between wetlands and also the inequalities and different impacts——

Mr. EWING. We don't need to do that necessarily from the Federal level. You can do that at the State level. I want to go on to another question.

Are any of you at all concerned about the classification of wetlands in this country? Do you all feel that we have an excellent classification system? You know, we throw out figures about so many million acres, we have lost so many million acres. I believe we never knew how many million acres we had, and we don't know how many million we have lost because we don't know how well it is classified.

Ms. SCHLEY. The studies that we have been talking about aren't studies from National Wildlife Federation. The statistics we are re-

lying on come from U.S. Fish and Wildlife Service. The U.S. Fish and Wildlife Service says that historically we have lost 100 million acres, which is approximately 50 percent of the wetlands base in the lower 48 States.

Mr. EWING. So you are basing your facts on what the national wildlife——

Ms. SCHLEY. No. I am basing my facts on what the United States Fish and Wildlife Service says.

Mr. EWING. But the rest of you, do you feel comfortable with the figures thrown around?

Mr. SZABO. I think the governmental agencies cannot tell you today where the wetlands are or how many acres they are. They can't map them. They don't know where they are. They can't tell you how many we are losing annually. But they say certainly we have had 200 million in colonial times. That doesn't strike me as——

Mr. EWING. In central Illinois they sat at a desk, in the Soil and Water Conservation Office and told you where the wetlands were. And it doesn't work that way. They can't tell you from a desk and an old map where the wetlands are.

Ms. SCHLEY. I think there is that effort going on, and you are right, a lot of those are desk delineations that SCS does under the swampbuster program. But the Fish and Wildlife Service has done a very extensive effort throughout the United States that is part of the wetlands inventory.

Mr. EWING. I don't think it has got to central Illinois yet. Mr. Heffelfinger, one last question, my time is up. You seemed to refer to in your testimony that the big floods of last year on the Mississippi were the result of the destruction of the wetlands.

Mr. GOETZE. I think you have a different gentleman in mind.

Mr. HEFFELFINGER. He was talking about me.

Mr. EWING. Yes. Kind of lived through that. I believe there would have been some flooding if all the wetlands were there.

Mr. HEFFELFINGER. That is very likely, but there is no doubt that that floodplain in the Mississippi basin, a lot of the floodplain that was one wetland area has been, you know, developed——

Mr. EWING. Are you suggesting the floodplain on the Mississippi ought to extend 14 miles back from the center of the river? Have you been out and visited that area?

Mr. HEFFELFINGER. No, I havenCongressman.

Mr. EWING. I think it is not realistic to suggest that and I think it is not realistic that all flooding as a result——

Mr. HEFFELFINGER. I don't think I ever said that in my testimony. What I did say is that flooding—wetlands are not a local problem, because what is done upstream wetlands in a riparian area, in a waterway, can very well affect the experience of downstream owners. I don't think anything can dispute that fact.

Mr. EWING. I don't disagree with that. It just bothers me to hear the loose conversation that the floods in the Midwest were the results of wetlands. That scare tactic isn't quite honest. And I think we want to be honest in this debate.

Mr. HEFFELFINGER. I think there is abundant evidence that the lost floodplain along the Mississippi has contributed to flooding experience in downstream areas on the Mississippi. I mean, maybe

you dispute that, but I have heard it over and over again, I think from reliable sources.

Now, all of that floodplain wasn't necessarily wetlands, and I never said it was. So if I did say it was, I correct the record. I didn't intend to say that.

Mr. EWING. Thank you, Mr. Chairman.

Mr. APPLEGATE. Thank you, Mr. Ewing.

Mr. Barcia.

Mr. BARCIA. Thank you, Mr. Chairman. I would like to thank you for the distinguished panel that is assembled to speak to a very sensitive issue in this clean water reauthorization debate.

I represent the 5th District of Michigan. We have over two thirds of the State's coastal wetlands in my district. Due to the makeup of the region, we also have a tremendous amount of wetlands as well. I think we are close to Minnesota—we have somewhere around 10,000 inland lakes, in addition to a tremendous amount of coastline along the Great Lakes.

This has for many years caused various problems, not only for businesses and farmers, but average citizens, homebuilders and many others who save, invest, in a small piece of property, and then find out they can't get a permit, can't erect a fence or pave a driveway to their home. It causes a tremendous amount of grief and frustration and outright anger and frustration directed toward all levels of government.

This problem is exacerbated by the fact that in many instances a wetland under current law is not identifiable to the layperson. Consultants charge excessive fees for surveys and their results are not guaranteed. And the government, even though Michigan runs its own program—and I was in the State legislature back in 1980 and 1981 when we passed Michigan's regulation of wetlands, back in my home State—it takes forever to grant permits, and certainly they are in many cases not approved.

Although tourism is a large and growing industry which relies in part on a clean environment, all of these problems put a tremendous amount of pressure on the economy of my district.

I would also like to just say that in my district, we have not seen the net loss of wetlands, because we have a lot of areas that haven't been developed. Should our people be punished because, for example, Cape Cod was developed in the 1700s?

Just recently the Bay City Times, my hometown newspaper, as well as regional Chambers of Commerce and others, expressed outrage directed toward the Corps of Engineers and the EPA for designating our Bay City Park, which has about a half million visitors a year come through it, because last year some cattails grew on the shoreline. DNR, the Michigan Department of Natural Resources, could not get a permit from itself to maintain the beach front.

So now we are going to mitigate three or four acres, creating additional wetlands at the State park property inside the boundaries of the park, to create in effect basically 550 feet of shoreline, or about one city block.

And this has been used for over 70 years. It is the largest State park in our Michigan State park system. It creates a tremendous amount of consternation and anger and frustration from people

who would like to take their families to the beach and let their children swim and enjoy the public area.

Most of the shoreline is privately held in our area. So it is viewed as something that is directed at working people, lower-income families who cannot in fact afford their own lot on the beach.

Can the panel suggest to the committee how this situation might be affected by House Resolution 3948 and other proposals before the Congress? What would you suggest would make for a reasonable policy, which could protect our wetlands, but not be an excessive burden on development needs?

Mr. SZABO. Let me take the first crack at that. H.R.—the Mineta substitute, I can't remember the number right now, the part I like about it is it gives some flexibility in the practicable alternatives test. So there is some flexibility given in the Mineta bill that is not in current law. And that is positive. And I think that would help your area.

I think, of course, the Hayes bill is better, because it would deal with this more straightforwardly. And I also believe that any effort to give the wetlands program to the States—now, Michigan has a program, but Michigan did not have the power to develop its own program. It had to basically adopt the Federal Government's program.

And I think the localities should be given flexibility, tested to see if their program will result in no net loss of wetlands and help enhance the wetlands base, and if they meet that standard they should be flexible, and if that were so, then the Federal Government should be out of the way. That would let them cut the bark out of the program and make the accommodations that are needed.

Mr. THOMPSON. Congressman, I might add, too, I think you make an interesting point, but in the study alluded to earlier, wetland regulation in the real world, it was interesting to note what the facts really are about wetland losses and mitigation that I think serves to belie some of the emotion that is out there about losses.

This study looked at all the permits in 1993 that the corps issue, and it deducted from those facts that there was about 11,600 acres, I think, that were impacted as a result of being allowed to have a permit, but there was over 15,000 acres that were mitigated as a result of that.

So not only was there not a loss, but there was actually more acreage provided and made into a wetland that was taken away or impacted.

Ms. SCHLEY. Congressman, I think it would be helpful, and I would like to request now, permission for us to submit for the record the response that we have to this survey, this study, the so-called real world study that home builders have been referring to.

Just quickly, I would like to note that the mitigation that is being referred to here, this is a small subset of activities for which they required mitigation. Most of that mitigation, we don't know what actually happened in the real world.

When the State of Florida went back and looked at its mitigation, the permits for which they required mitigation, over half of the permittees had never bothered to even try to comply with the permit—with the mitigation requirements in their permits.

Out of that half that did, only about a quarter of them actually successfully conducted those mitigation projects. So I don't think you can assume just from looking at permit statistics and say, Gee, there was a lot of mitigation required, that that has resulted in actually replacing some of those wetland losses that were suffered.

In addition, it doesn't tell what you kind of stuff you lost and where did you lose it and are you replacing similar functions and values basically where you lost them. It is a huge, huge problem.

But I would also just briefly—I know we don't have much time—I would also like to answer the first part of your question, which was basically for the little guy, what is in the committee substitute.

And I think there are a number of provisions, and just the ones that come to the top of my mind are, there is assistance for small landowners provision, there is a 90-day permitting deadline, there is an administrative appeals provision, a 30-day provision saying that the corps has to figure out in 30 days whether or not a permit application is complete.

There is a training program. There is an education and information program. There are a number of things I think that exactly address the concerns that you are talking about.

We have some environmental concerns about some of the implications of some of those solutions. And I would like you to—those are fully discussed in our testimony.

[The information may be found on p. 499.]

Mr. GOETZE. Your statement about Michigan as it might relate to all the States that I am familiar with, from Maine to Florida on the East Coast, that is completely different and has no relationship apparently, because in almost every instance in Tidewater we are looking at finite wetland resources. There aren't any more.

What we have, if you talk about Cape Cod, there is very little new development in Cape Cod. And almost—in terms of areas like Maryland and Virginia, no matter where you go back from the marsh line where you are in hip boots in water, you can go 30 miles and still find wetlands that relate to that watershed, because here is the peninsula, and on the one side is a river and oneside is a broad creek, and everything in the middle 30 miles up goes to the river.

And with it, it drains all kinds of problems with pollutants and so forth.

Mr. BARCIA. Just to comment on your thoughts, if that were the case, we wouldn't have a problem in our Bay City State Park, would we? If wetlands weren't being created, because it wasn't being designated a year ago, and this year it is.

In Michigan, 29 townships have drafted their own definitions of wetlands as well, and in Meridian Township in Bingham County, if a parcel of land, 1/25th of an acre is moist for more than a year consecutively, it is a wetland.

So I don't see how the wetlands are not being added to the roster of those federally protected designations if in fact the definition of wetland changes. Aren't we adding tens of thousands or millions of additional acres throughout the country, and specifically in Michigan?

In fact, we tried to get a preemption. We said enough is enough. We have a Federal definition of a wetland. We also have a State

definition of wetland. Now we have 29 different interpretations or definitions at the local level of what constitutes a wetland.

So, you know, if what you are saying was true, then our Bay City State Park beach front would not be considered a wetland, because you are saying they are disappearing and finite.

The fact is, hopefully when the land—when the water table is lower, and that hopefully at some point that beach will revert and be declared not a wetland any longer, when the flora and fauna that exists on it currently disappears as a result of lower lake level.

Ms. SCHLEY. But we were talking about the Federal program, not State or local definitions of wetlands. Of course—and I think Bob would agree with me—State and local government always have the right to regulate more stringently if they choose.

Mr. SZABO. What I really agree with is you have as much wetlands as you define as wetlands. I certainly agree with that.

Mr. BARCIA. In our area, we have more than our people starting it. Actually, the main problem we have is being able to find a piece that isn't designated to build a home or driveway or whatever. To get any type of permittable activity is a major, major battle in the State of Michigan.

Ms. SCHLEY. But I think that is where we get back to the National Academy of Sciences study, that we need to look at—the Hayes bill, the Hayes bill talks about 21 days of saturation at the surface. That is not a scientific definition. Scientists have demonstrated that you can have hydrophytic vegetation in seven days of saturation of the root zone.

Mr. APPLEGATE. Listen, I appreciate this banter back and forth, but we still have another panel of 10 yet to go through before we leave here this evening. And so we are going to cut this off.

I thank you, Mr. Barcia.

Mr. Gilchrest has a short question, I would suggest the answers be the same.

Mr. GILCHREST. Thank you, Mr. Chairman.

I just want to make two quick comments: Number one, I wanted to thank Mr. Al Goetze for coming from the First District to give his testimony, I certainly appreciate that.

And number two, you don't even have to answer it, but I just want to leave with this note possibly. Should we pay people not to pollute? Just a little thought.

Thank you, Mr. Chairman.

Mr. APPLEGATE. Yes, sir.

Mr. GOETZE. You might remember this old bumper sticker, it does tell a lot about what happens. And also no fishing, no crabbing, no swimming.

Mr. APPLEGATE. That is a very good ending.

Thank you very much.

Thank you, panel, for your participation. It was very good, very educational, very meaningful.

And now for our last panel, if I can find my sheet, I think you know who you are.

The next panel is on industrial and point source issues. We have Alan Bahl, the Chamber of Commerce; Anita Dawson, Chemical Manufacturers; Duane Marshall, American Forest and Paper Association; Romer Wilsek, Food Industry Environmental Council; Dale

Heydlauff, Edison Electric Institute; William West, the American Iron and Steel Institute; Jessica Landman, Natural Resources Defense Council; Phil Brick, American Mining Congress; Phil Hocker, Mineral Policy Center; and Beatrice Brailsford, Snake River Alliance.

And you will just have to do the best you can. We wanted to keep this last panel down a little bit smaller than this, but we kept getting requests. And now it is twice as big as the table.

Mr. BOEHLERT. Mr. Chairman, while you are getting organized for the last panel, I just would like to make one observation.

Mr. APPLEGATE. Mr. Boehlert, go right ahead.

Mr. BOEHLERT. We were pressed, you and I, pressed by this largest subcommittee in the Congress of the United States to have these hearings, because there was such wide interest on the part of the Members of the subcommittee. I noticed the great attendance.

Mr. APPLEGATE. Yes, I would have to agree, because there was so much opposition, that not knowing that much about the substitute, that they demanded that we hold hearings. And so we did.

Those of us who were ready to sort of move forward, are here. All right.

First, I guess what we will do is we will start with Mr. Bahl with the Chamber of Commerce, and then let me just give you this.

Then we will go with the American Forest and Paper, the American Iron and Steel, Edison Electric, Chemical Manufacturers and Food Industry Environmental Council.

We will go in that order, if you can remember what that is. We will start off with the Chamber.

TESTIMONY OF ALAN BAHL, ENVIRONMENTAL ENGINEER, UNIVERSAL FOODS, REPRESENTING THE U.S. CHAMBER OF COMMERCE; ANITA DAWSON, MANAGER, ENVIRONMENTAL AFFAIRS, AMERICAN CYANAMID CO., REPRESENTING THE CHEMICAL MANUFACTURERS ASSOCIATION; DUANE MARSHALL, UNION CAMP CORPORATION, REPRESENTING THE AMERICAN FOREST AND PAPER ASSOCIATION; ROMER WILSEK, DIRECTOR, ENVIRONMENTAL AFFAIRS, KRAFT GENERAL FOODS INC., REPRESENTING THE FOOD INDUSTRY ENVIRONMENTAL COUNCIL; DALE E. HEYDLAUFF, VICE PRESIDENT, ENVIRONMENTAL AFFAIRS, AMERICAN ELECTRIC POWER SERVICE CORPORATION, REPRESENTING THE EDISON ELECTRIC INSTITUTE; WILLIAM L. WEST, DIRECTOR, ENVIRONMENTAL AFFAIRS, LTV STEEL CO., REPRESENTING THE AMERICAN IRON AND STEEL INSTITUTE; JESSICA C. LANDMAN, SENIOR ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL INC.; PHIL BRICK, CHAIRMAN, WATER QUALITY COMMITTEE, AMERICAN MINING CONGRESS; PHILLIP N. HOCKER, PRESIDENT, MINERAL POLICY CENTER; AND BEATRICE BRAILSFORD, DIRECTOR, SNAKE RIVER ALLIANCE

Mr. BAHL. Thank you, Mr. Chairman.

My name is Alan Bahl. I am an Environmental Engineer for the Universal Foods Corporation. Universal employs approximately 5,000 people to produce key food ingredients such as flavors, colors,

yeast and spices. The 23 facilities Universal operates in this country employ relative small numbers of people, many less than 100.

These facilities are located in many States represented on the subcommittee here, including California, Wisconsin, Texas and Maryland. I am testifying today on my experience with the current clean water regulations and concerns with H.R. 3948 on behalf of the U.S. Chamber of Commerce.

Universal and the Chamber fully support the goal of improving the quality of U.S. waters, but believe that it must be done in a rational, science-based, cost-effective manner. We appreciate the opportunity to offer our perspective on the status of clean water regulations and the impact of this bill.

Six of us seated here at the table are representing several industry segments all severely impacted by Clean Water Act requirements. These segments include the chemical, steel, paper, food and utility industries and the U.S. Chamber.

These groups and others which this bill will impact are the primary engine of the U.S. economy. As such, we are very concerned that H.R. 3948 will create new requirements that will severely impact us, and in turn the economy.

Our general concerns with this bill are, number one, the final benefits and costs of the 1987 amendments have not yet been fully realized. Therefore, the necessity for several of H.R. 3948's provisions have not been clearly demonstrate.

Number two, H.R. 3948 continues the flawed command and control approach.

Number three, H.R. 3948 continues to focus on municipal and industrial point discharges, which are not the primary source of pollutant to U.S. waters.

Four, H.R. 3948 will not significantly improve the quality of U.S. waters.

Five, H.R. 3948 costs far outweigh its benefits.

Six, H.R. 3948 does not address the concerns with the Great Lakes Initiative that had been raised by the Council of Great Lakes Governors, municipalities, industry and Members of this Congress.

Seven, H.R. 3948 can stifle economic growth through its antidegradation procedures.

And number eight, H.R. 3948's enforcement provisions will create needless litigation with no environmental benefit.

Also, as you know, many government entities are correctly concerned about unfunded mandates. However, this subcommittee must recognize that H.R. 3948 imposes unfunded mandates for those represented here. Every dollar spent on compliance is one less dollar available for technological improvements, research, pay raises, health care coverage, and competitive advancements. The subcommittee should therefore keep this in mind when deciding whether a provision will really achieve substantial risk reduction.

Now, I would like to provide you with an example from Universal Foods Red Star Yeast Division, which demonstrates that the 1987 amendments and other laws have not been fully implemented and they are already very expensive:

One of our Bakers Yeast manufacturing facilities is located near Lake Michigan. As part of its process, it requires a large amount

of noncontact cooling water. Though materials of construction are such that there are no additions of pollutants by Universal, the facility uses municipal water which is drawn from Lake Michigan.

After noncontact cooling, the water is discharged to its original source, unaltered but for temperature. Under several probable versions of the Great Lakes Initiative, Universal will be required to eliminate this discharge and move to closed-loop cooling. This could conceivably cost over $4 million, a considerable sum for one environmental concern at one plant, in a division with 1993 revenue of only $160 million.

As this example shows, the benefits and costs of existing law have not been fully realized. The requirements of H.R. 3948 as drafted will significantly add to these costs and further deteriorate our competitive position. We believe that the bipartisan alternative contains many elements which would compliment the 1987 comments, and other existing laws, while eliminating those costly provisions from H.R. 3948 which would create little environmental benefit and reduction in risk. We ask that the subcommittee seriously consider these elements for the bipartisan alternative.

I want to thank you for the opportunity to express our views on this bill, and will be pleased to answer any questions.

Mr. APPLEGATE. Thank you, Mr. Bahl.

Mr. Marshall.

Mr. MARSHALL. Mr. Chairman, my name is Duane Marshall, I am Director of Environmental Affairs for Union Camp Corporation. I am testifying today on behalf of the American Forest and Paper Association, a national trade association of the U.S. forest products and pulp and paper industry.

The Clean Water Act affects us at all stages of our manufacturing process, from our raw materials to our finished products. This impact on our industry is unique. Therefore, our interest in this reauthorization is substantial.

We appreciate the time in which Mr. Mineta and the committee staff have spent with us to try to address our concerns, and we look forward to continued discussions with them.

Mr. Chairman, AFPA beliefs the Clean Water Act has been a true success story, as others have said here earlier, one that has resulted in improvements in the Nation's water quality. The statute gives EPA the broad authority it needs to address virtually all water quality concerns.

Moreover, the act is based on strong Federal–State relationships which result in effective implementation of its requirements. If there is one message we would like the subcommittee to hear this afternoon, it is this, that the Clean Water Act works.

EPA does have the authority it needs to solve most of our Nation's remaining water quality concerns. We urge you to avoid many of the provisions set forth in H.R. 34—or 3948, as now written, and urge you to look at the bipartisan alternative. We support the statements made by the other industry representatives here today in addressing the various point source concerns.

For my part, I will discuss two issues, antidegradation as it relates to both point and nonpoint sources, and treatment ponds.

I respectfully request that AFPA be able to submit additional comments on these issues for the record.

Dealing first with antidegradation, the Clean Water Act currently mandates State adoption of antidegradation policies to preserve uses in water quality. AFPA supports EPA's current regulations governing antidegradation, because they adequately address changes to the operation of existing facilities or the siting of new facilities that may adversely affect an official water quality use by the discharge of additional pollutants into a receiving water.

One of our primary concerns with the extensive antidegradation provisions in H.R. 3948, is that it could effectively prohibit growth. For example, the language in the bill could mean that antidegradation waivers would not be allowed even if they were justified on the basis of important social or economic development.

In addition, the recognition of short-term or temporary exceedences is critical to the successful implementation of an antidegradation policy, with States being given the ultimate authority for incorporating this notion into State water policy. We recommend the Congress require EPA to inventory the current status of State antidegradation policies developed and implemented since the Federal regulations were promulgated, and report to Congress on the effectiveness of those policies.

Only after EPA has made an assessment of current programs, and in particular evaluated the benefits of State-tailored approaches, should Congress consider any changes to the current antidegradation policy.

Turning attention to treatment ponds, navigable waters are defined in Section 5027 of the Clean Water Act as all waters of the United States. Courts have interpreted this term very broadly. There are numerous cases in the past several years where EPA has brought enforcement actions or threatened enforcement actions because dischargers were discharging without an NPDES permit into the surface impoundments they owned or operated, because such impoundments were allegedly considered navigable waters, also known as waters of the United States.

EPA has acknowledged that this approach puts persons trying to comply with the law in a position where EPA may occasionally bring an enforcement action for unauthorized discharges to a water body the discharger regarded as its waste treatment system. Virtually any industrial municipal or agricultural impoundment could be considered a water of the U.S. by EPA.

H.R. 3948 does contain some modifying language. These provisions are desirable, but they do not go far enough. The most important provides exclusions from the definition of navigable waters, but limits the scope of those exclusions.

By implication, Congress will be assumed to have intended to include waste treatment ponds as navigable waters for all other purposes of the Clean Water Act. This would subject waste waters to NPDES permits for discharge into the treatment systems designed to accommodate them.

AFPA suggests among the alternatives of this section language that would exclude these impoundments from the definition of navigable waters in the definition section of the Clean Water Act, Section 5027, rather than just Section 404, to clarify that discharges to such waters are not subject to permitting requirements of both 404 and 402.

Thank you for the opportunity to be here today, and I will be pleased to respond to questions at your discretion.

Mr. APPLEGATE. Thank you very much, Mr. Marshall.

Mr. West.

Mr. WEST. Mr. Chairman, Members of the subcommittee, my name is William L. West. I am the Director of Environmental Control for the LTV Steel Company, which is located in Cleveland, Ohio. I am appearing today on behalf of the American Iron and Steel Institute.

Since the passage of the Federal Water Pollution Control Act in 1972, the implementation of the act and its subsequent amendments have centered on the control of point sources, and in particular, industrial point sources. Industry has made great strides in the intervening years in reducing their discharges of pollutants resulting in significant improvements in water quality.

Progress has been substantially slower in the public sector than the private sector, especially in addressing the persistent water quality problems resulting from inadequately treated sewage, combined sewer overflows, urban runoff, and nonpoint sources. It is in this context that we review the provisions of H.R. 3948, the Water Quality Act of 1994.

While the proposed bill does address for the first time these persistent sources of water quality problems, it does so in a measured pace that recognizes the tremendous resources required to address the problems. At the same time, H.R. 3948 would initiate major new programs that address the most controlled source of pollutants, the industrial sector.

Today, I would like to discuss two issues of major concern with the bill, the groundwater provisions and intake credit issue. Section 404 of H.R. 3948 requires permits for all discharges into groundwater and Section 305 of the bill requires that EPA establish effluent limitations for such discharges.

Any applicant for an NPDES permit must characterize all known or suspected releases onto the ground or to groundwater that have a hydrologic connection to surface waters, and describe any measures that will be taken to eliminate such releases.

These groundwater provisions impose an ill-defined and unnecessary burden on NPDES permittees, without sufficient evidence that discharges to groundwater associated with point sources are causing water quality problems for surface waters.

Extending permit requirements to incidental nonpoint sources that may be discharging to groundwaters is similarly unjustified at this time, considering the uncontrolled water quality impacts of nonpoint sources, combined source, overflows and urban runoff on surface waters.

Several specific concerns arise from review of the bill and are as follows: The provisions requiring EPA to establish guidance for effluent limitations for discharges to groundwater contain no standard. No consideration has been given in either Section 303 or 404 of the actual eff ct of discharges to groundwater on surface water quality.

It is unclear what "no other Federal law directly addresses the activity resulting in a discharge" means, and what is the scope of discharges or releases these provisions are intended to cover?

These provisions could result in massive expenditures and the closure or replacement of surface impoundments that are key parts of existing treatment facilities, with little or no benefit to the environment. It is unclear what information or degree of investigation will be required to foresee or demonstrate a direct hydrologic connection between groundwater and surface water in the proximity of the discharge.

The concepts contained in this bill concerning groundwater are ambiguous, and will conflict with or be duplicative of other Federal or State programs addressing groundwater quality, such as the Safe Drinking Water Act, RCRA corrective action, and provisions in State programs. The groundwater provision should be significantly modified to achieve a workable provision.

Turning to the issue of intake credits, the substitute H.R. 3948, attempts to address this extremely important issue by simply deferring to the discretion of the administration. And therein lies our concern. The EPA has placed so many restrictions on the use of intake credits, that the granting of such credits is extremely unlikely.

Fundamental fairness should dictate that dischargers not be held responsible for pollutants in their effluence that result from the presence of such pollutants in their intake waters. We therefore recommend that H.R. 3948 be revised to clarify the principle that dischargers are to be held responsible only for the pollutants that they themselves add to their discharges.

This concludes my testimony.

I would like to request the opportunity to submit more extensive written comments after the close of the hearing.

Thank you.

Mr. APPLEGATE. Thank you, Mr. West. We will look forward to additional testimony and comments.

Let's see, who did we say was next?

Oh, yes, Mr. Heydlauff, with the Edison Electric.

Mr. HEYDLAUFF. Thank you very much, Mr. Chairman, Members of the subcommittee.

My name is Dale Heydlauff, I am Vice President of Environmental Affairs, American Electric Power Service Corporation, in Columbus, Ohio. I am here today testifying on behalf of the Edison Electric Institute, the association of investor-owned electric utilities.

At the outset, Mr. Chairman and Members of the committee, I want you to know that we support the Clean Water Act's goals, to protect and improve water quality. We frankly believe that the current Clean Water Act is fundamentally sound. It is working well, and it does not require significant new programs.

And I have to tell you, I think it is somewhat disturbing that we have heard a lot of testimony today and not much of it has recognized the fact that industry and their partners in the State and Federal Government and local governments have done an enormous job in ensuring that there is a perpetual improvement in water quality. Many of the provisions of H.R. 3948 trample all over the duly-delegated authority to the State governments, to protect water quality. And I find that very disturbing. I think we will talk about some of those in the course of my testimony.

But the States have been enormously aggressive and very responsible in the discharge of their responsibilities under this act. It is extremely rare that an industrial discharger does not receive more stringent water quality standards as NPDES permits are renewed. I think that is important to be kept in mind.

With respect to H.R. 3948, we have five primary concerns: The first is intake credits. Section 704 of the bill would amend the Great Lakes Critical Programs Act of 1990 to allow the EPA and the States to consider pollutants found in intake water when setting effluent limitations for discharges. This language suggests that Federal and State permit writers can impose limits without giving proper credit for the levels of contaminants present in intake waters from other sources, including natural sources.

Setting effluent limits based on the "gross" concentrations of pollutants in a discharge instead of only the portion of the pollutant load added by a permittee, is inequitable and inconsistent with the existing act. Treating and removing such background pollutants is expensive and difficult and, in some cases, technically impossible, because EPA and the States are setting some permissible concentrations of pollutants at levels below analytical detection limits.

Mr. Chairman, in Ohio, we recently received a permit proposal for one of our coal-fired power plants for mercury in the parts per trillion, well below the ability of existing technology to analyze it. A 1993 study evaluated the cost implications of this issue for electric utilities, including AEP and others in the Great Lakes Basin. The study estimated that the financial impact of not providing intake credits for just one pollutant, copper, and just one type of waste stream, once through cooling water, which does not come into contact with any industrial process, would be a staggering $13 billion.

Section 303 of the bill gives States or requires States to adopt antidegradation policies that are more restrictive than the stringent antidegradation policies already required by the EPA and working quite effectively under the current Clean Water Act. States would have to designate certain classes of waters as outstanding national resource waters. Those waters would be given absolute protection against any degradation, no matter now minor.

Section 303 could stop industrial expansion by limiting existing facilities from increasing or changing industrial expansion, changing production, and preventing new facilities from locating on water bodies because of restrictions on changes in water quality. This proposed broad Federal mandate could even prevent industry from changing an existing process or chemical to a more environmentally friendly process or chemical.

Turning to mixing zones, Section 304 of the bill would authorize EPA to prohibit or restrict the use of mixing zones for many pollutants. Under current law, EPA has long recognized the concept of mixing zones and permitted the States to rely on them without jeopardizing public health or the environment. I believe Administrator Browner this morning verified this point.

Let me give an example of how this would work in the real world. AEP uses wet ash handling systems at many of its plants. These systems discharge process water that has been treated to achieve stringent water quality standards using a reasonable site-

specific mixing zone. Without these mixing zones, these systems would need to convert to dry systems or new treatment technology would need to be installed at a cost of between $14 and $32 million per system.

We are also concerned with the increasing trend to impose burdensome permitting requirements for the installation, maintenance and emergency repair of electric utility lines, corridors, and related access roads in wetland areas. Utility rights-of-way in related access roads are installed, maintained and repaired consistent with existing best management practices developed by the U.S. Army Corps of Engineers, and as a result, have little or no effect on the wetland which they cross.

We encourage Congress to amend the Clean Water Act to exempt such facilities from the administrative permit requirements of Section 404 of the act, providing they comply with these best management practices of the Corps.

Mr. Chairman, we appreciate this opportunity to present the views of the American Electric Power System and the Edison Electric Institute.

Thank you very much.

Mr. APPLEGATE. Thank you, Mr. Heydlauff, appreciate that.

From the Chemical Manufacturer's Association, Anita Dawson.

Ms. DAWSON. Thank you. Good afternoon.

My name is Anita Dawson. I am Manager of Environmental Affairs for the American Cyanamid Company. I am here today representing Chemical Manufacturer's Association.

In 1993, the U.S. chemical industry was the Nation's largest exporter, and today the industry provides 1.1 million high-wage, high-tech jobs for American workers. Through our Responsible Care Program, we are committed to improvements in environmental performance.

Based on data reported in EPA's toxic release inventory, the chemical industry has reduced discharges of toxic pollutants to surface waters by 81 percent during the five-year period between 1987 and 1992. These improvements have not come cheaply, however.

According to U.S. Census Bureau data, the chemical industry spends almost $2 billion annually to control water pollution. Today, less than 10 percent of remaining water quality problems can be attributed to industrial discharges, according to EPA and State data.

Without any additional amendments, ongoing Clean Water Act programs will continue to reduce industrial discharges to our Nation's surface waters.

Mr. Chairman, CMA believes Clean Water Act reauthorization should address significant remaining risks to ensure that the Nation receives the greatest amount of environmental improvement for its expenditures. Under this standard, H.R. 3948's attention to watershed management is right on target. H.R. 3948, however, would also apply new requirements on industry that will not produce any significant environmental benefits.

Let me give you some examples: First, the groundwater provisions of H.R. 3948 would impose costly and redundant regulatory requirements, since groundwater is already well regulated under existing Federal and State programs.

Similarly, the mixing zone restrictions would provide no significant reductions in risk, but the costs would be huge. Mixing zones are already designed to be protective of health and the environment, even for persistent and biocumulative toxics.

The toxics section of H.R. 3948, which would allow citizens to petition the Agency to limit or prohibit the discharge of classes of toxic pollutants, is also inappropriate. Within a class of compounds, some individual compounds may cause adverse effects while others may not. Regulatory actions should focus on specific compounds of concern. Treating all compounds within a class the same, ignores the benefits of a majority of compounds that don't pose adverse risks and would come at a high price to society.

In the area of pollution prevention, the chemical industry has a great deal of experience through both voluntary and State-driven activities in developing and implementing plans to prevent pollution. We have learned that prescriptive requirements will achieve little or no risk reduction.

Let me give you two examples where H.R. 3948's pollution prevention requirements go wrong: First, by focusing on releases to water only, H.R. 3948's pollution prevention provisions would drive facilities to plan activities aimed at what could be their least significant environmental releases.

A second example, H.R. 3948's prescriptive data gathering provision would force us to spend our limited time and resources on information gathering exercises, rather than on discovering opportunities for preventing pollution.

Finally, any planning requirements should include regulatory flexibility to allow facilities to actually implement their plans. Without this, the planning process will be little more than a paper exercise.

In conclusion, CMA urges the subcommittee to focus its Clean Water Act reauthorization efforts on significant remaining risk, and to promote pollution prevention through added flexibility instead of prescriptive command and control requirements. CMA believes that the bipartisan alternative preserves many of the workable elements of H.R. 3948, while eliminating costly provisions that would result in little environmental benefit or risk reduction. CMA recommends that the subcommittee give serious consideration to the principles contained in the bipartisan alternative.

I would like to request that CMA's full statement be submitted for the record. And I thank you for the opportunity to appear before you today.

Mr. RAHALL [presiding]. Thank you very much.

Ms. DAWSON. Thank you.

Mr. RAHALL. We will now hear from the Food Industry Environmental Council; Mr. Romer Wilsek, the Director of Environmental Compliance, Kraft General Foods.

Mr. WILSEK. Thank you, Mr. Chairman.

I am Romer Wilsek, Director of Environmental Affairs for Kraft General Foods, headquartered in Northfield, Illinois.

Kraft General Foods is the largest food company in North America, with 220 facilities and 63,000 employees. I am here today representing the Food Industry Environmental Council. The coalition includes virtually the entire food processing industry. Our members

together represent some 15,000 manufacturing facilities across the Nation, contributing over $121 billion in sales to the economy and employing 1.4 million people.

Clean water is an essential ingredient in many food products and is used throughout the manufacturing process, both to wash product and to clean and sanitize food preparation surfaces and other equipment. Food processing facilities are just big kitchens, using the same class of detergents and disinfectants as homes, but on a larger and more efficient scale.

We have a number of comments regarding H.R. 3948, but I will focus on issues related to risk and risk assessment.

We believe it is essential that the committee consider risk in several context, as it proceeds with the Clean Water Act reauthorization process. First, Congress should consider risk as it sets overall priorities for the revision of the Clean Water Act. H.R. 3948 is commendable in that it attempts to address significant remaining water quality problems, while not including unnecessary new restrictions on those who discharge conventional pollutants to publicly owned treatment works.

However, the bill also envisions programs that may not be true priorities for action, such as expansion of the permitting program to include discharges to ground and groundwater. Existing State and Federal programs already have the authority and ability needed to protect groundwater and we do not believe that such a program expansion is necessary.

Second, risk assessment should be applied to individual issues or provisions to maximize cost-benefit considerations. For example, within the nonpoint source title, it would be useful to target programs only to impaired waters. Society's efforts and limited resources will be diluted if we impose extensive requirements on all waters nationwide when problems only exist in certain watersheds or locations.

Third, Congress should ensure that a risk assessment is an integral consideration in the issuance of any standard, effluent limitation or other regulatory requirement, resulting from reauthorization of the act. Thus, social, environmental and economic benefits will be properly considered. Environmental risks, while important, are not the only risks. It would be shortsighted to craft laws and regulations that would elevate the weight of one risk to the exclusion of others.

Let me describe an example within the food industry that helps to illustrate the importance of how we deal with risk: The food industry uses detergents followed with disinfectants as a last step to prevent microbial contamination of the food supply. By necessity, these disinfectants are toxic to living organisms. We use them precisely because they do kill bacteria. Importantly, the disinfectants we use are limited to those approved by FDA and USDA, the Agencies that regulate all food manufacturing processes, including our uses of water.

After use, trace amounts of these disinfectants or their by-products may be present in our wastewater, but the alternative, not using the disinfectants, may compromise the safety of the foods we all eat. Thus, the benefits society derives from our careful use of disinfectants to help ensure food safety clearly outweigh the poten-

tial risks posed by possible trace amounts that may be found in the wastewater. Curtailing the use of disinfectants to eliminate their discharge could needlessly put the food supply at risk without significantly improving the environment.

Another example of where risk assessment would be beneficial is illustrated by the application of current law. Currently, the term "oil" and "grease" is too broadly defined in the original act. Food oils and greases and petroleum oils and greases are regulated similarly, in spite of significant differences between them. Food oils and greases are readily biodegradable and generally nontoxic to aquatic and animal life, unlike those that are petroleum based.

Risk assessment would allow agencies the flexibility to differentiate where appropriate. A provision to correct this deficiency is included in an alternative discussion draft. We urge its inclusion in any final measure.

In closing, you and your colleagues should consider several important steps to help ensure an effective reauthorization of an efficient and focused Clean Water Act.

Specifically, first, direct program improvement only to those significant remaining water quality concerns.

Second, maintain flexibility for the regulated community, allowing it to select the most efficient and cost-effective controls rather than dictating process or other changes.

Third, adopt risk-assessment language such as that contained in the alternative discussion draft.

And finally, require Federal agencies to coordinate and consult with one another when overlapping jurisdictions create possible conflict and regulatory action that might have adverse food safety and health consequences.

Thank you for listening to our concerns.

Mr. RAHALL. Our next witness will be the Natural Resources Defense Council, represented by Jessica Landman, Senior Attorney.

Ms. LANDMAN. Mr. Chairman, thank you very much for the opportunity to testify today about the Clean Water Act and the bills that are now being considered by this committee.

The Natural Resources Defense Council and the nearly 500 other environmental, fishing, labor and citizens groups in the Clean Water Network are all very concerned about the current state of the Nation's waters and about the fate of this legislation in this committee.

You heard earlier today from the citizens who are being harmed by water pollution and wetlands loss around the country. Those people represent just the tip of the iceberg. Many of the members of the groups in the Clean Water Network are experiencing similar problems all over the Nation. We feel very strongly that the purpose of this reauthorization must be to strengthen, not to weaken, the current law.

While we welcomed very much the introduction of H.R. 3948, a careful reading of this legislation revealed a number of gaps and loopholes. In the end, NRDC has concluded that we cannot support 3948, unless it is strengthened in a number of key areas.

Today this committee will receive a letter signed by over 200 organizations from around the country in the Clean Water Network

which will say that the committee must strengthen H.R. 3948 before Clean Water Network members can be asked to support it.

In my testimony today, I would like to focus first, though, on some even more significant problems we have identified with the so-called "bipartisan alternative," which I will call the Hayes-Shuster bill. Then I would like to respond to some of the issues that have been raised by other people on this panel this evening concerning industrial controls, some of which are addressed right now in 3948.

One highly problematic section of the so-called "bipartisan alternative" is the risk and cost-benefit analysis provision that we just heard about from one of my fellow panelists. Under this provision, each proposed and final rule and each guidance document issued by EPA would be subject to a highly subjective analysis of whether the, quote, "social, environmental and economic benefits," unquote, were reasonably related to the anticipated costs.

I must stress that EPA would be paralyzed by this provision. Quite frankly, I think that is what some people are hoping this provision would do: paralyze the Environmental Protection Agency.

Nobody can possibly address these types of subjective questions in a scientific fashion. The provision simply declares open season on the rulemaking process. In fact, I think it is ironic that the provision also declares open season on Congress' own considered judgments as to how risk ought to be evaluated with respect to a number of key Clean Water Act Programs.

All the sections of the Clean Water Act that have been discussed today as having been effective and having worked well, in fact, reflect careful and often hard-fought balancing decisions that are, in effect, risk assessment and risk-balancing decisions made by the Congress already. For example, the effluent guidelines program represents a very careful balancing between the availability of technology and the affordability of that technology, before those guidelines are put in place.

We heard today, as another example, of the significance of needing to target nonpoint source programs to those areas that are impaired and threatened. Those are cost-benefit judgments and risk judgments made by the Congress. This provision would override those judgments in a very broad-brush fashion.

We also reject as completely unworkable the deadly provision with the reasonable sounding name in the Hayes-Shuster bill. I refer to the "adequately funded mandates" provision. This provision would also require EPA to analyze for each proposed rule or guidance the indirect and direct costs of the rule, and then to subject them to a bizarre analysis I will explain in a moment.

The first task of identifying the so-called direct costs and indirect costs is an impossible one. Let me give you an example:

Is it the full cost of sewage treatment plants that would be charged against EPA's ledger under this analysis, or would it only be the incremental costs? In other words, how would we evaluate the community providing a greater degree of sewage treatment than it would have provided had it been free to provide a lesser degree of sewage treatment than is required by current law? I defy anybody to try and figure out what is required of the Agency in analyzing the, quote, "direct and indirect costs."

Under this bill, the next step would be that EPA would be required to estimate whether funds likely to be authorized and appropriated over a multiyear period are going to cover 90 percent of direct and indirect costs.

I challenge any Member of this committee to estimate accurately what will transpire in this year's appropriations process, much less five years hence. In effect, this provision, among other things, has the unintended consequence of handing over to the Appropriations Committee much of the substantive power of this committee, as well as the power of the purse that they already have, by putting in the hands of the appropriating committee the decision as to which provision is going to be implemented. That is the effect of the "adequately funded mandates" provision in that legislation.

I do believe that people are rightfully concerned about the costs of meeting environmental goals, but I think that Congressman Wise presented a very cogent case today about the costs of doing nothing: the cost of beach closures, bottled water, cancer, infertility treatments. These are the costs associated with not taking action. And it is important to note that certain provisions that are in 3948 actually would help hard-pressed cities and States to address the economic costs of complying with the Clean Water Act.

For example, there would be vast increases in the SRF funding levels. There would be greatly increased flexibility in how those dollars can be spent. There would be significant cutbacks in the current law's mandates to control storm water and sewer overflow problems.

But unfortunately, we are not going to able to support those provisions, which truly do provide economic relief to communities, unless they come as part of a package with provisions that are badly needed to improve control of polluted runoff and toxics, to strengthen citizen enforcement, and to protect critical wetlands. H.R. 3948 goes part of the way to do these things, but not nearly far enough, while the bipartisan alternative doesn't even get out of the starting gate.

If I may now take just a moment to address a number of issues that have been raised by other members of this panel: First of all, on the mixing zones provision that people have questioned. I frankly do not understand the objections being raised here today. This is an extremely modest provision. It calls on EPA to identify contaminants that are so pernicious—so toxic, persistent and biocumulative—that is inappropriate to allow them to be the subject of mixing zones.

I would like to ask Members of this committee: which persistent toxic bioaccumulative pollutants they feel it is appropriate to discharge at levels that should not be restricted by EPA?

Second, on the question of antidegradation, although people have said here today that this program is working, in fact, the antidegradation program as envisioned by the EPA regulations is not working. A tiny, tiny fraction, less than 1 percent of the Nation's surface waters, have currently been identified as outstanding national resource waters.

The provision that is in H.R. 3948 would call upon the States to identify such waters, particularly in areas like national parks and national wildlife refuges, areas which Americans expect to have

pristine and carefully protected waters. It would give the States an escape clause to make the case that those waters should not be so treated.

I frankly do not think that it is such an imposition on the States or on the Nation to identify those critical waters and then provide adequate protection to them.

Finally, to end on a conciliatory note, I agree with what was said by the representative from CMA, that the pollution prevention planning provision in this bill would benefit by a couple of changes. First of all, we share her position on the concept of single-medium pollution prevention. We agree that a multimedia approach is appropriate.

We also agree that the purpose of pollution prevention planning mandated by the Congress should not be to prescribe to industry how to plan for pollution prevention and what chemicals to focus on or what processes to focus on. We also agree that should be done by the plant. We should lead the horse to water, but we should not tell it what to drink. And so we would support the types of changes that we think would be able to accommodate their concerns about that provision.

Thank you for allowing me to run over my time. I would be happy to answer your questions.

The CHAIR [presiding]. Thank you very much, Ms. Landman.

Next we have the American Mining Congress with its Chairman, Phil Brick, of the Water Quality Committee.

And at this time I would like to yield to our colleague from West Virginia.

Mr. RAHALL. No, I will wait.

The CHAIR. Oh, okay, fine.

Let me then introduce or to recognize Mr. Brick.

Mr. BRICK. Thank you, Mr. Chairman, Members of the committee.

My name is Phil Brick. I am Director of Environmental Affairs for Cleveland Cliffs. Cleveland Cliffs is an iron-mining corporation. We own partial parts of various mines and manage iron mines. We are in the iron ore business, serving the integrated steel industry.

I am appearing today on behalf of the American Mining Congress where I serve as Chairman of the Water Quality Committee. AMC appreciates this opportunity to present the views of the domestic mining industry, and particularly its serious concerns with the two new sections that were added to single out the metals mining industry.

AMC has addressed other concerns with H.R. 3948 in an earlier letter to Chairman Mineta, that is attached to our testimony.

AMC represents companies from all sectors of the mining industry, including the producers of America's metals, coal, industrial and agricultural minerals, manufacturers of mining and mineral processing machinery, and engineering and consulting firms who serve the mining industry.

AMC and its member companies are deeply troubled by Sections 302 and 407 of the substitute. Section 302 would single out the mining industry, imposing burdensome and, in many instances, unattainable conditions on discharge permits.

Section 407 would require in addition a new Federal permit for all mining activities, which would be virtually unattainable. These sections would effectively ban any ongoing or future exploration, mining or beneficiation and processing of metallic minerals.

An important industry with annual gross revenues exceeding $11.5 billion would be destroyed. Tens of thousands of the Nation's highest-wage producing jobs will be lost, and the U.S. will become totally dependent upon imports for all of our metallic minerals, and little or no corresponding environmental benefit will be achieved.

Our concerns with these provisions are threefold: First, they are not necessary or appropriate to protect the environment; second, they discriminate against one industry without justification; and finally, they create a series of expansive new environmental requirements that are impossible to meet.

The metals mining industry is already subject to extensive and stringent regulations under the Clean Water Act. Like other industries, our discharges to surface waters are covered by NPDES permits.

Other potential discharges at mining operations such as storm water runoff are regulated separately. Thus, any potential impact that mining activities may have on water quality can be addressed through the existing regulatory structure.

This is not the appropriate vehicle to create an industry-specific regulatory regime. These issues have been debated fully in the context of the mining law reform. It is in that framework that the committees with jurisdiction specifically over mining operations already are considering all of the economic, social and environmental implications of such measures.

Perhaps what is most egregious about Sections 302 and 407 is the fact that they expressly discriminate against a single industry. Section 407, for example, would establish a new, largely duplicative, Federal permitting regime solely for the exploration, mining, beneficiation and processing of metallic minerals. No other industry is similarly targeted.

This type of permit is unprecedented in the Clean Water Act, because it would not regulate a discharge per se, but rather the activity itself. Virtually all States with mining operations already have stringent laws and regulations to protect water quality on the books governing mining activities. Moreover, mining is one area in particular where States have traditionally and effectively exercised a primacy role.

We are particularly concerned that the substitute would seek jurisdiction over groundwater through the mining permits and impose a zero tolerance standard that is not applied to any other industrial, agricultural or municipal discharge. Thus, under Section 407, a Federal mining permit could be denied if any contamination of groundwater, defined broadly as any increase, no matter how innocuous, in historic premining background levels, results from exploration, extraction or benefication.

This is an impossible standard. Virtually all metallic mineral mining will entail some localized and general temporary increase in the level of some contaminant or other naturally occurring element that might not otherwise be present in the groundwater at

a particular location. This increase typically poses no significant adverse effect on human health and the environment.

Significantly, although the substitute contains groundwater protection provisions that are applicable more broadly, there is no similar absolute prohibition against any contamination of groundwater applicable to other industrial or agricultural activities. Nor could other industries meet such a standard.

We strongly believe that the primary authority for groundwater management should remain with the States. Additional Federal permitting requirements for groundwater are not necessary or proper within the scope of the Clean Water Act.

Section 302 of the substitute would further target the metals mining industry by imposing a series of unique, unprecedented and overly stringent conditions on NPDES permits issued to mining operations. Here again, no other industry is subject to the same conditions. Only the mining industry is subject to a requirement as part of its NPDES discharge permanent that would prohibit the generation of acidic drainage.

This is not aimed at discharges to navigable waters; it is aimed at the generation of the acidic drainage. This standard again is impossible to meet, given the naturally high levels of federally regulated substances in soils and rock in mineralized areas.

Any mining operation will result in the generation of acidic or mineral discharges. Since mine sites often cover hundreds of thousands of acres that are exposed to storm water runoff, it would be impossible to prevent storm water from contacting mineral ores, which could possibly result in some drainage.

Under the substitute, again only the mining industry is targeted for a bonding requirement that would mandate that as a condition of receiving an NPDES permit a mine operator demonstrate financial responsibility to ensure long-term treatment and perpetual compliance. Again, only the mining industry is singled out for broad contingency planning requirements.

We would like to thank the subcommittee, Mr. Chairman, once again for this opportunity to raise our serious concerns with the Sections 302 and 407. The metals mining industry has been unfairly singled out for particularly onerous and in some instances, impossible requirements. We believe that it is critical that they be deleted from the bill.

We look forward to continuing to work with the subcommittee and full committee on this bill.

Thank you.

The CHAIR. Thank you very much, Mr. Brick.

Let me now call on the Mineral Policy Center, Mr. Phil Hocker.

Mr. HOCKER. Thank you, Mr. Chairman.

My name is Phil Hocker, I am President of Mineral Policy Center. We are a small public interest organization concerned with the establishment of sound mineral development practices in the United States, and the cleanup of the damage which mining has caused in the past.

I would like to commend you, Mr. Chairman, and also Mr. Rahall, for including the mining provisions in your proposal for Clean Water Act reauthorization.

These proposals grow out of Mr. Rahall's extensive experience with this industry, and with its problems. They are tempered by the experience of regulating mining impacts which Mr. Rahall has personally lived with in his district in West Virginia, and also with his extensive experience as Chairman of the Mining Subcommittee of what is now the Natural Resources Committee.

In listening to Mr. Brick, I have to—I have to say I feel somewhat like Alice in Wonderland on this issue, when she was told that she could have "jam yesterday and jam tomorrow, but never jam today." We have had jurisdiction yesterday, jurisdiction tomorrow, but never jurisdiction today, on the environmental problems for mining.

In fact, last week before last, in a staff discussion on the 1872 Mining Law, industry representatives were saying that the environmental issues raised in those legislative proposals were properly addressed in Clean Water Act authorization.

Today in the discussions on Clean Water Act, we are being told that they really should be deferred to 1872 Mining Law, even though that bill only has very limited scope compared to these provisions. We think there are real problems, I will try to demonstrate that to the committee, and they must be addressed in Clean Water Act reauthorization. We commend the provisions which are included.

The mining industry is a special industry. It generates each year more than twice as much solid waste according to EPA estimates as all other industries and municipalities in the United States combined. Much of that waste contains real problems for water quality, both surface and groundwater.

[Photograph 1 follows:]

Mr. HOCKER. Just to demonstrate a few examples, not far from Yellowstone National Park in Montana, this stream sat for many years because of the inability to clean up damage caused by relatively small-scale mining in the past.

What you are seeing here is as acid drainage and what is call "yellow boy," the coating of the streambed with ferric hydroxide, because of sulfuric acid being generated by mishandled mining wastes.

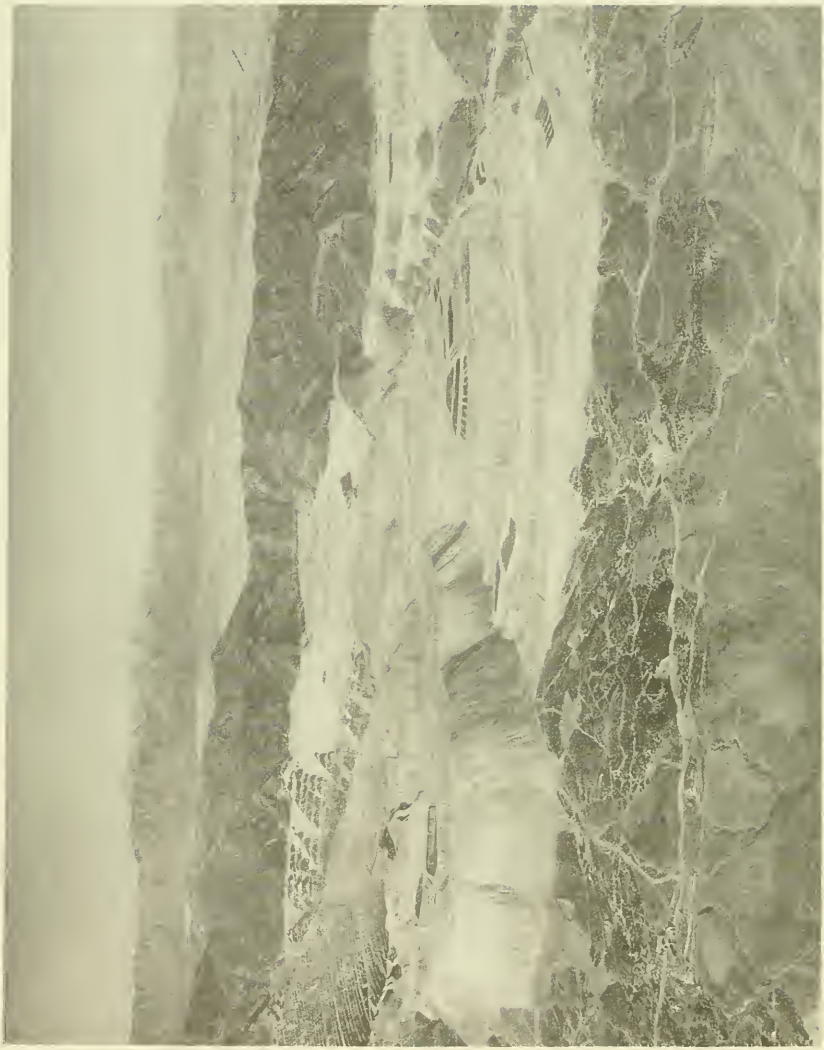
[Photograph 2 follows:]

Mr. HOCKER. In Colorado, the uranium mining industry gave me one of the very few chances I have ever had to take a photograph of polluted groundwater. It is not easy to photograph groundwater. In this site, which was left by the uranium mining industry, tailings leached uranium and other toxic salts into the groundwater. It was carried out on a perched aquifer in here, dribbles down into the San Miguel River.

This became a Superfund site, but Superfund is not the way to clean these problems up. The way to clean them up is through prevention. It is much more economical, and is fairer to the public and to the industry.

Finally, the question will be raised why should these problems not be left to the States?

[Photograph 3 follows:]



Mr. HOCKER. This is an example of why that isn't working. This is the Bingham Canyon Copper Mine just outside of Salt Lake City. These are what is called dump leaching operations here. Each of these little ponds and many more that don't show up in the photograph are used to contain sulfuric acid, which percolates down through these piles of rock.

There is no liner between these and the ground. They are dumps, literally. Much but not all of that material is collected and treated to extract copper metal from it. It is a perfectly legitimate, economical means of treating low-grade ore, but a substantial amount of it leaks into the groundwater table.

We have been involved in litigation together with people who drink that water, trying to get Kennecott to pay to clean it up. The State of Utah unfortunately sided with Kennecott to try and cut a sweetheart deal in which Kennecott would not be required to pay the full costs of cleanup.

At the District Court level, that might have been explained as simply a difference of legal opinion, but when the District Court ruled with us and with the people who drink that water, the State continued to join with Kennecott in an appeal to the 10th Circuit.

The 10th Circuit has now sided with us in our interpretation of what the law requires. The question remains whether the State will join with Kennecott going all the way to the Supreme Court.

We believe that Federal legislation setting the baseline standard for the protection of groundwater and surface waters from these impacts is required. We believe that the Clean Water Act reauthorization is an appropriate vehicle in which to do so. And that the need is urgent.

Thank you for including these provisions.

We would be happy to answer any questions.

The CHAIR. Thank you very much, Mr. Hocker.

Let me call on now the Director of the Snake River Alliance, Beatrice Brailsford.

Ms. BRAILSFORD. We are almost through. Thank you.

My name is Beatrice Brailsford. I am the Program Director of the Snake River Alliance, working for the end of nuclear production activities and responsible solutions to nuclear waste and contamination.

Since our founding in 1979, the alliance has served as the only broad-based citizens group focusing on activities at Idaho National Engineering Laboratory, a Department of Engine site in southeast Idaho.

We accomplish our work through research, education, and community advocacy. I have come here today from the intermountain West to talk about the nuclear Navy. But first, let me thank you for your efforts to meet one of the primary goals of the Clean Water Act Reauthorization act, to bring Federal facilities, including those of the DOE, under the influence of this legislation.

Back to the nuclear Navy. There is presently in the bill language that would exempt radioactive emissions from the nuclear Navy's vessels and land-based facilities, even though some of its facilities actually lie within DOE boundaries.

If this exemption remains, the nuclear Navy's radioactive pollution will be the only radioactive water pollution in the country not regulated by any outside party.

I am here today to support the DeFazio amendment, which would remove the exemption for land-based facilities and substitute for vessels a system of uniform national discharge standards for radioactive pollution.

Before I speak of the exemption, the nuclear Navy seeks more—let me just list the facilities that would be affected if radioactive emissions from land-based facilities are exempt.

The Bettis Atomic Power Laboratory in West Mifflin, Pennsylvania; the Kesselring site in West Milton, New York; the Knolls Atomic Power Lab's Windsor site in Connecticut; the Knolls Atomic Power near Albany, New York; the Newport News Naval Shipyard; Puget Sound Naval Shipyard; Portsmouth in Maine; Charleston in South Carolina; Norfolk in Virginia; Pearl Harbor in Hawaii; and, yes, the Naval Reactors Facility and the Expended Core Facility on the high desert plain in Idaho.

Let me tell you a little more about INEL so that you understand what is at stake here for us. INEL covers 890 square miles of high desert plain in southeastern Idaho, just southwest of the Tetons. It sits at the end of the Snake River aquifer, which supplies drinking water for a fifth of all Idahoans and supports our aquaculture, agriculture, and recreation industries.

INEL also stores more spent nuclear fuel by radioactivity than any other site in the DOE complex. Since 1957, the nuclear Navy has sent over 500 shipments to Idaho, first for reprocessing, now for examination and handling. All the waste in Idaho will remain in Idaho for a very long time. In a very real sense, Idaho is the nuclear Navy's final port of call.

It is the nuclear Navy's piles of waste that have led us to oppose any regulatory exemption for radioactive emissions at its land-based facilities.

More specifically, the nuclear Navy argues its record is exemplary and there is no need for regulation of its nuclear discharges. But even the top student at Annapolis is required to take exams.

Spent fuel is one of the most toxic substances on earth, and the hundreds of tons stored in Idaho will remain hazardous for hundreds of centuries.

Two, the reporting requirements of environmental law are themselves a deterrent. Nuclear Navy land-based facilities are spread all across our country, yet there is no public accounting of their activities. The nuclear Navy's neighbors, to say nothing of American taxpayers, deserve to know all the costs of its activities.

Three, exemptions are terrible public policy. No individual is exempt from the Clean Water Act, nor is any industry, from glass works to grocery stores. Thanks to your efforts to remove sovereign immunity exemptions through the current legislation, even the DOE's compliance with this law will be assured. The nuclear Navy must play by the same rules as everyone else.

Environmental protection, public confidence in government, and basic fairness will all be compromised if nuclear Navy activities are allowed to continue above the law.

Once again, I encourage you to include the DeFazio amendment in the Clean Water Act reauthorization so that radioactive discharges from nuclear Navy land-based facilities are reported and regulated.

Thank you.

The CHAIR. Thank you very, very much, Ms. Brailsford.

Mr. Bahl, I apologize for not having been here earlier when you were testifying, but in looking at your statement, I would like to ask about anti-degradation.

You characterize the anti-degradation provision in the bill in rather extreme terms, such as, quote, "a no growth policy," unquote, which would prevent facilities from altering their discharge levels, and prohibit plant exception, changes in product, production output, expansion of capacity.

I guess what I would like to have you do is explain why you conclude that the exceptions to the anti-degradation provision are inadequate to address your concerns, especially since so much of this allows for important—what I would think are social and economic development activities.

Mr. BAHL. I guess to answer that, I could give an example of a facility which, say, is manufacturing a product now, and has a certain waste that it must discharge in order to operate.

In order to stay competitive, that plant would have to increase its production just to remain in business so that productivity gains would be increased and the facility would be able to compete on a cost basis with other industries.

In that case, there would be no addition of jobs to the plant. There would be economic benefits, but not the kind of great social economic benefits that the anti-deg exemptions would require. So in that case, the anti-deg review of the increased discharge would be allowed to disallow that. In which case, the jobs for the facility could be lost.

The CHAIR. Do we have an indication as to whether or not it would go that far in terms of what might be characterized as being draconian in terms of what you are predicting?

Mr. BAHL. You know, sir, I guess there is—you know, there is no way to know right now how EPA and the States would respond to that provision. What we are concerned about is that the provision would allow them to do that. However EPA and the States would interpret that, they could be draconian with the provisions that are in 3948, and we would just like to have considerations written into it so that it can't get to that point.

The CHAIR. Ms. Landman, do you have some comment on this?

Ms. LANDMAN. Thank you very much for the opportunity to respond.

There are two different components to the anti-degradation requirements under existing law and regulations, and under the proposal of the bill, that are being mixed up, I think, in discussions here today.

First are the restrictions that would apply under the existing regulations that your bill proposes essentially to codify but not really to change. And those are the restrictions that would apply to the increase in the discharge to a so-called "tier-two water," that

is, a clean water but not a water in a so-called "outstanding national resource area."

Under existing regulations, which your provision would codify into law, a facility that wanted to increase its discharge to a tier-two water would not be able to make that increase in its pollution until and unless it demonstrated that that increase was necessary to accommodate important social and economic values in the area where those waters are located.

I don't think that that is an unreasonable requirement at all. In fact, I think that if we are looking at waters that ought to be protected, simply having to make that proof, and demonstrating that all available controls on point and nonpoint sources are in place before those increases are allowed to go forward, as well as demonstrating that that increase is necessary, is in fact highly appropriate.

Other people on the panel have testified that they think that that component of the anti-degradation program is in fact working well, in which case I can't really understand an objection to codifying those regulations.

The other component of anti-degradation, which I have testified earlier is not working well, is to identify those key outstanding national resource waters for which no degradation ought to be allowed. And that component of the program, which is spelled out in the regulations, the States simply have not effectively implemented.

This legislation would take a step towards encouraging State implementation. We think it still leaves too much up to the States because it doesn't even require that they actually make a designation of outstanding waters. It only requires that they consider protecting waters in national parks and refuges as outstanding.

So I feel the legislation by no means is draconian in the effect that it would have with respect to anti-degradation.

The CHAIR. Thank you. Mr. Boehlert.

Mr. BOEHLERT. Thank you, Mr. Chairman.

Mr. West, you pointed out something very important in this deliberation, and that is, if we don't do a good job addressing the unaddressed problem of nonpoint source pollution, all of you people are going to have even more pressure than you now have.

So I would assume you are about ready to stand up and cheer for the direction in which this bill goes in terms of addressing the critically unaddressed problem of nonpoint source pollution.

Mr. WEST. Mr. Boehlert, I think we are impacted today with that problem, because we are in effect competing for water quality rights for our discharges with other sources, including municipalities, combined sewer overflows, urban runoff and other things.

And what we find in a lot of cases is that we are being penalized today on water quality issues simply because some of the public issues have not been addressed. We would encourage that they be addressed, because I think currently we are being negatively impacted by those sources in the way we have to do business.

Mr. BOEHLERT. Thank you. I would assume our other industry representatives would share that view.

Mr. MARSHALL. I would only add that from our standpoint we believe that the States are best equipped in the identification and de-

velopment of best management practices plans in their jurisdictions within the forest products industry.

We believe that we have made great gains in what have been largely voluntary best management practices plans for cultural activities. To a large degree they are responsible for the relatively low profile silvicultural activities among nonpoint source pollutants.

There may be instances where there is a bad actor, we do recognize that, and in that case we would concur that enforcement mechanisms developed by and at the State level would be appropriate ways to deal with the situations rather than a broad Federal mandate and enforcement measure.

Mr. BOEHLERT. Mr. Bahl, I really was impressed with your opening statement when you referred to the Clean Water Act of 1972. You say it has evolved as one of our Nation's most effective and successful environmental programs. And I accept that.

I think it might be an interesting case study for you to go back and look at the chamber's testimony in 1974 when this legislation was being drafted. I think there were some applications of dire consequences. Yet 20 years later, a generation later, you are able to stand up or sit before this committee and applaud it as one of the most effective and successful environmental programs.

And I share that view. But I would also suggest to you that draconian and some of the other words that have been used with respect to the Mineta-Boehlert bill, and incidentally, thank you, Ms. Landman, for straightening out the vocabulary. The original is a bipartisan bill too, as Mr. Gilchrest and I will attest to. We have been working closely with the Chairman.

I told Mr. Heydlauff, we have listened to industry, and I have got a history of working with EEI. I heard what you fellows were saying about this one. We didn't get into 401 to make you nervous, because from my perspective, I think one of the things we should do as we draft legislation like this is go out into the community that is going to be impacted and listen to what you have to say.

And I would say the package that the Chairman and I have developed reflects that we have listened. You are not happy with everything, and I guarantee you some of my environmental friends aren't happy with everything. But in the final analysis I think we have developed a pretty good package that probably needs a little more fine-tuning, and I think as a result of the hearings today, once again, Mr. Chairman, you missed this one earlier, I said that you were being pressured to have these hearings by all the people who said there is so much more to hear and we want to hear it. All the people didn't show up to hear it. We are here. But I just want you to know that we have worked with all of the people at this table, we have listened to all the people at the table, and we think we have addressed the problem in a responsible way.

A little more fine-tuning and I think we will have something ready to go to markup. I would think in the final analysis that 20 years from now, your successor—you are young enough to still be here in 20 years—your successor will come to the chamber and say, back then in 1994 they did something that was quite good. Thank you.

The CHAIR. Thank you. Mr. Rahall.

Mr. RAHALL. Thank you, Mr. Chairman.

Let me begin with you, Phil. You mentioned that you feel like Alice in Wonderland in being here today and listening to what you heard from a previous witness. When I hear statements like this from the American Mining Congress, that "there is absolutely no evidence to suggest that mining activities pose a unique threat to water quality that could justify the imposition of such a burdensome regulatory regime, I don't feel like Alice in Wonderland. I feel like Alice in La-la-land. I don't know how such statements could be made."

I also say to you, Mr. Brick, that you are here testifying today that this is not an appropriate legislative vehicle for the issues that Chairman Mineta has so graciously allowed me to insert into his substitute amendment. That is a familiar sounding refrain I have heard over and over for the last several years.

When you came before the Natural Resources Committee and you testified that my legislation to reform the Mining Law of 1872 was not the appropriate vehicle for providing Federal reclamation standards, you were saying the same thing you are saying today.

And this comes from the same industry that says Superfund is not the appropriate vehicle to address the issues affecting hard rock mining; the same industry, I might remind you, that enjoys sweetheart deals on taxpayers' lands, as most recently evidenced by the great gold heist on American taxpayer lands by a Canadian-owned gold company called American Barricks.

Yet the American Mining Congress comes before us and says that every piece of legislation we consider is not the appropriate vehicle to address reclamation on hard rock mining lands.

You have testified that RCRA is not the appropriate vehicle to address hard rock mining issues. By golly, I would like to know what is the appropriate vehicle to ensure proper reclamation of our lands and to strike a proper environmental balance? What is the appropriate vehicle?

If the American Mining Congress had played ball with us on mining reform when we first started that effort, we wouldn't be here today discussing this issue.

So I say the issues I am advancing in this legislation are bona fide issues that should be addressed under the Clean Water Act. We are dealing with requirements relating to NPDES permits. This is certainly an appropriate Clean Water Act issue. We are dealing with acid and toxic discharges. Certainly, this is an appropriate Clean Water Act issue.

Secondly, Mr. Chairman, I want to assure you that the requirements that I am advancing here are almost the very same that our coal operators in the Appalachian region in the country have been complying with since 1977, my first year in the Congress. At that time, I heard the same gloom and doom from the coal industry that I have been hearing today from the hard rock mining industry. Yet we have a more viable coal industry today than we had in those days, a responsible industry too, I might add.

Indeed, the coal industry must comply with all of the stringent requirements, yet the hard rock industry comes to Congress and claims they are different, they should be exempt. And to those who bad mouth this particular section or this particular Member of

Congress for advancing these proposals, I say, yes, I do recognize the differences between the manner by which coal and gold is mined. But I also know that when we are talking about protecting the hydrological balance, if coal miners can do it, then I see no reason why gold miners cannot do the same.

So that is the statement I wish to make. If you wish to respond, I would be glad to hear your response, Mr. Brick.

Mr. BRICK. Mr. Chairman, Mr. Rahall, I appreciate your comments. I have not been a part of the dialogue on the Mining Law of 1872. I have concentrated my effort at the American Mining Congress on the water issues. I would appreciate the opportunity of answering your concerns in further comments, if we may. Thank you.

Mr. RAHALL. This is a simple question. What is the appropriate vehicle to address reclamation issues in the hard rock mining industry?

Mr. BRICK. Mr. Rahall, it is our position that there are effective State programs. Those programs are working.

Mr. RAHALL. They are not uniform.

Mr. BRICK. Because of the different geologic, climatologic areas in the United States, they should not be uniform.

Mr. RAHALL. We had a similar argument——

Mr. BRICK. It is my opinion that Arizona mining is much different than mining in northern Minnesota or northern Michigan, where we operate.

Mr. RAHALL. I think what we are talking about is bringing minimum Federal guidelines to ensure that some reclamation standards are on the books as opposed to those States that would like to get by without any reclamation standards on the books at all under the guise of how our State differs from a neighboring State.

Mr. BRICK. Again, our position is we feel the States are regulating mining properly. I know in the States that we operate, that is true. And from my experience in talking with other Members of our committee, that is all happening.

Mr. RAHALL. Mr. Hocker, are you interested in responding?

Mr. HOCKER. Mr. Rahall, in my testimony I give a number of examples of unfortunate cases which are occurring right now where the States are not adequately regulating the kinds of impacts your language in the bill would address. That is why we think a Federal baseline to bring some uniformity at a minimum to this impact area is necessary.

I have talked with a number of the States themselves about this over the years, and many of them agree. In fact, I have never heard one openly disagree with the concept that there needs to be a minimum standard established with a Federal program.

Many of the States want to have, and I think we all support their right to have, the ability to impose more stringent State-specific requirements beyond the Federal minimum baseline. But we need that Federal baseline, and there are too many examples on the books where States are not doing the job today.

If I could add another point, too, contrary to the testimony that was given earlier, the technology to solve these problems exists. I don't believe, and the word "draconian" was used on a different sec-

tion of the bill a minute ago, I don't believe these are draconian provisions.

I know the materials and the corporate organizations to clean up these problems, or preferably to prevent them in the first place, exists. We have companies that have invested a great deal in developing that expertise.

And I think that it should be our policy as a country to be encouraging and supporting the companies that are investing in the cures and not the companies that are producing the problems.

Thank you.

Mr. RAHALL. Thank you. Did you wish to comment, Mr. Brick?

Mr. BRICK. If I may briefly, Mr. Rahall, if these issues are important for clean water, I think they are important generically across all industry, all agricultural commodities. It is not the singling out of the mining industry—is not—well in my mind, of course, it is not fair, and there are——

Mr. RAHALL. We have separate regimes for a lot of those commodities, such as the coal industry, which I have demonstrated comes under its own separate regime under the act of 1977.

Mr. BRICK. That is true, it is a separate piece of legislation which was directed at the coal mining industry. I believe at that time the hard mineral industry was studied, and it was determined by that study that it would not be regulated the same as the coal industry.

The CHAIR. Mr. Zeliff.

Mr. ZELIFF. No questions, Mr. Chairman.

The CHAIR. Mr. Ewing.

Mr. EWING. Thank you, Mr. Chairman. I want to thank you for holding these hearings.

Mr. Boehlert has mentioned a couple of times about maybe our attendance wasn't as good as it should be. But I think there is another important reason for these hearings, and that is to allow all of you the opportunity to express yourselves on this bill.

This is a very far-reaching bill that we are talking about here. And while we can't cover all the points in your testimony or in our question and answer, I think it is very important for you to have the opportunity to submit that to us and to our staff.

And so there is very good reason for these hearings. And I congratulate you for doing that.

I wanted to ask a question of Mr. Wilsek of Kraft. I had some legislation introduced which dealt with the unlikely topic of animal fats. The Congresswoman from Indiana, Jill Long, and myself introduced that. That has been included or basically included in the Chairman's bill here.

Would you want to comment on the importance of that legislation and how it would kind of counterbalance some activity at the EPA at this time?

Mr. WILSEK. Yes, thank you, Congressman Ewing. The animal and vegetable oils and greases are significantly different from petroleum oils and greases. There is no differentiation out there from the standpoint of how the regulations are being applied. So I think it is important that that issue be addressed.

Animal and vegetable oils and greases are biodegradable, nontoxic materials, and they are really not toxic to aquatic life. Therefore, looking at the mechanisms to handle those particular

types of oils and greases, they are biologically treatable, we have them in our food chain, we all eat animal, vegetable type oils and greases. Therefore, it is very compatible to not only our systems but to treatment and municipal wastewater treatment plants, those kinds of systems, very compatible with the domestic waste streams in the country today.

Mr. EWING. And that is included, the bill that I introduced has been encompassed with H.R. 3948.

Mr. WILSEK. Very good.

Mr. EWING. Thank you. No other questions, Mr. Chairman.

The CHAIR. The gentleman from Michigan, Mr. Barcia.

Mr. BARCIA. Thank you, Mr. Chairman. I would like to direct this perhaps to Mr. Bahl from the U.S. Chamber, simply in the interest of time, I know there is a vote occurring on the Floor of the House.

I have received conflicting information on the citizens' suit provisions of the bill. Environmental groups have asserted that citizen suit provisions in the bill would allow them to catch polluters trying to sneak through violations because there is not enough time to properly review and evaluate reports.

I would also like to say in addition, could you comment on the assertion that there is no economic interest for a group to launch an action under House Resolution 3948, because the bill does not provide for any compensation, just for the ability of the Federal Government to collect any appropriate penalties that apply under the law. Could you comment on that?

Mr. BAHL. Your first part of the question, I believe, was I guess basically whether the citizen suits are going to be a further deterrent, whether industry feels they are getting away with something by having the citizen suit provisions as they are now, and it has to be an ongoing violation.

The chamber's response to the provisions in H.R. 3948 as far as citizen suits are concerned is that these new provisions will do nothing to enhance the environmental benefits that will be occurring from the Clean Water Act.

The provisions in H.R. 3948 will allow citizen suits for wholly past violations. That means the violation has already been stopped. Therefore, at that point filing a suit against the industry will result in absolutely no benefit to the environment. The violation has already stopped.

As far as the question as to whether the current provisions are enough of a deterrent already, I can tell you that every time I go to our plant managers and tell them we are reporting a violation, they all tell me to do whatever is necessary to keep them out of jail. They are all scared to death of environmental laws, more than anything else in the books.

More, you know, no more deterrent is needed at this point for those kinds of things. And in addition this covers increasing the fines from $25,000 a day. Industry already is very concerned and does everything possible to avoid the $25,000-a-day fine. Increasing them is not going to be a significant deterrent.

In addition, we question why any of these need to be questioned in the first place when compliance with the law is already above 90 percent and is greater than any other environmental statute on the books.

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Mr. BARCIA. Thank you, Mr. Chairman.

The CHAIR. Mr. Gilchrest, we have 8 minutes and 30 seconds left right now before the vote.

Mr. GILCHREST. I will be brief, if the people giving the answers can be brief.

Mr. Hocker, can you—I hate to pick on Mr. Brick here, but can you give a quick comment, Mr. Brick said section 407 of the bill would shut down the mining industry because it would not allow innocuous chemicals to be present in the groundwater. Can you just comment on his statement?

Mr. HOCKER. I don't agree. I think it will require diligence by the industry to meet this standard. But it can be met. And I think the consequences of not meeting it, unfortunately we have seen all too frequently.

Mr. GILCHREST. Thank you.

Ms. Landman, can you comment on Mr. Heydlauff's—this is what Mr. Heydlauff says about section 704.

Section 704 of the bill is inconsistent with present law and should be modified. Congress should add language supporting what is already explicit in the Clean Water Act, that the chargers are responsible only for their own additions of pollutants to a water body and are not responsible for pollutants in their intake waters.

Ms. LANDMAN. I, frankly, think the intake credits issue has become quite a red herring in this reauthorization.

Under the existing laws and regulations, as Administrator Browner attempted to explain this morning, EPA already has the legal authority to grant intake credits to allow a company that is discharging a pollutant that is in their intake water, a pollutant that is not there due to actions that they have taken, to have that fact be reflected in their permit limits.

This is an issue that has been raised in the context of the Great Lakes initiative, and there are a number of circumstances, some of which she attempted to talk about this morning, where it is not as simple as it is made out to be; that the discharge, for example, from that facility might be to a different water body—from a different water body than the one from which they took the water.

The EPA does under existing law have the authority to address those different circumstances where intake credits might or might not be appropriate. And in the context of the Great Lakes initiative EPA has made some proposals with respect to intake credits. Those proposals are pending. EPA has accepted comments on them and is evaluating them and is going to come out with final regulations.

I don't see any need to legislate in this area, but to the extent that section 704 of the bill simply spells out EPA's existing authorities and clarifies that they would not be changed and that EPA is still free to grant intake credits, we certainly have no problem with that provision.

I agree, it does clarify existing law. EPA already has the authority it needs to grant intake credits where they are appropriate.

Mr. GILCHREST. Thank you. Do we have time for another response?

Mr. BAHL. If I may, the reason that the comment was brought up, specifically she brought up the issue that throughout the context of the Great Lakes initiative, the intake credit issue has become a big issue.

Did I tell you about a month ago during the public hearing on the Great Lakes initiative, EPA personnel stated there had been no decision at the Agency whether they have the authority to grant this or not.

Now, whether that decision has been changed within the last month within the Agency, and, you know, Ms. Browner has come up with a position on that, I don't know. But what has been given to industry up until this point is that EPA, their lawyers, have not decided conclusively whether they have that authority yet, and what we are talking about is in the existing Clean Water Act, it talks about regulating the addition of pollutants to U.S. waters.

And we believe that that indicates they can only regulate the addition of pollutants to waters. And the fact that in 704, by inference it indicates that EPA may have the ability to regulate what comes in, that is the part we are concerned about.

Ms. LANDMAN. If I may, Congressman, I will be happy to provide for the record a citation to the place in the code of Federal regulations where EPA spells out how it handles these situations.

Mr. GILCHREST. Thank you.

The CHAIR. Thank you.

[The information received follows:]

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June 2, 1994

Chairman Norman Mineta
House Committee on Public Works and Transportation
2165 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Thank you for the opportunity to testify last week concerning the Clean Water Act reauthorization. During the course of my testimony I requested and was granted an opportunity to submit for the hearing record some followup information on the subject of "intake credits."

EPA regulations allowing for the issuance of "intake credits" (i.e., authorization for dischargers to be relieved of the responsibility of removing from their wastewater pollutants that were present in their intake waters) can be found at 40 C.F.R. § 122.45(g). These regulations apply to "intake credits" as they relate to technology-based effluent limits.

The attached memorandum, prepared by the National Wildlife Federation's Great Lakes National Program Office, explains this issue in further detail. It also explains how dischargers can seek relief from otherwise applicable water quality-based effluent limits. Relevant pages of the Federal Register, in which EPA discusses the issue of intake credits, also are included for the record.

I reemphasize that the issue of "intake credits" is a red herring. During debate on reauthorization, some have proposed amendments that would in fact allow the discharger to increase the mass of pollutants discharged (i.e., add more of the same pollutant that was present in the intake water) while holding concentration constant, labelling this an "intake credit." Obviously, where the pollutant in question is persistent and/or bioaccumulative, the additional mass of toxic pollutants can be significant. More to the point, it is disingenuous to cast these proposals as "relief" from an unfair provision in current law. They are, instead, efforts to include a loophole where none exists today.

Sincerely,

Jessica C. Landman

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INTAKE CREDITS & THE GREAT LAKES INITIATIVE

What are "Intake Credits"?

"Intake credits" as a term is a misnomer that is frequently used to refer to U.S. Environmental Protection Agency (EPA) regulations that, in certain circumstances, relieve dischargers from the obligation to treat or remove pollutants that are present in a facility's intake water. The result of these regulations is that, with appropriate conditions, discharge permit limitations are adjusted to, in effect, "credit" the discharger for pollutants.

Subverting the Great Lakes Initiative Process

In 1993, the EPA published the proposed Great Lakes Water Quality Initiative (Initiative) for public review and comment. The deadline for comments was September 13, 1993. The EPA must now review and respond to those comments and will be doing so up until as early as March 13, 1995, the earliest date by which EPA is expected to publish the final Initiative. Any attempts to predetermine the outcome of any GLI component will make a mockery of the public's review and comment on the Initiative. Proposed statutory changes affecting the Initiative before the EPA completes its review sends a strong message to citizens that their comments during the rulemaking process just don't count.

EPA Authority to Issue "Intake Credits"

Contrary to some allegations, the EPA does have adequate authority to allow permit writers flexibility to relieve dischargers of the responsibility to treat or remove pollutants present in intake water; such relief has been granted in permits for many years. EPA has interpreted existing law to provide adequate authority to grant this relief in appropriate circumstances; the basis for this authority differs, however, depending on whether an intake credit is sought for a technology-based effluent limitation (TBEL) or water quality-based effluent limitation (WQBEL).

<u>"Intake Credits" for Technology-based Effluent Limitations Under Current Law</u>
EPA currently allows dischargers to escape responsibility from TBELs for pollutants in intake water under the following circumstances:

(1) If they are a member of the sector for which intake credits are specifically allowed in 40 C.F.R. Subchapter N <u>or</u> (2) the discharger shows that the presence of pollutants in intake waters prevents compliance with TBELs using contemplated treatment technologies and methods.

Other relevant considerations under current EPA regulations include:

▶ "Credit" shall be granted only if necessary to meet applicable limitations or standards, up to a value equal to the influent value. More monitoring may be necessary to determine eligibility for credits and permit limitation compliance.

▶ "Credit" shall be granted only if the discharger shows the intake water is drawn from the same waterbody into which the discharge is made. This requirement may be waived if it is found that no degradation will result.

Source: 40 C.F.R. § 122.45(g).

"Intake Credits" for Water Quality-based Effluent Limitations Under Current Law

Current EPA regulations provide dischargers four different means by which they can seek relief from WQBELs (those necessary to achieve water quality standards) for pollutants present in intake water: (1) if the intake water pollutant results partially from upstream sources, the discharge can participate in a "wasteload allocation" by which the responsibility for clean-up is allocated among the sources; (2) the discharger may apply for a variance from water quality standards for the intake water pollutant; (3) the discharge may propose a "downgrading" of the applicable standards; or (4) the discharge may request a modification of the water quality standard to set a site-specific standard for the intake pollutant.

Source: 58 Fed. Reg. 20802, 20953 (April 16, 1993).

The Difference Between "Intake Credits" for TBELs and WQBELs

"Intake credits" are addressed differently for TBELs because WQBELs only exist where a discharge causes or has reasonable potential to cause or contribute to violations of water quality standards. Consequently, the EPA has developed separate mechanisms to address these differing situations. However, in both instances, EPA has thoroughly considered the issue and has promulgated comprehensive, national regulations allowing dischargers to escape responsibility for pollutants in intake water in both situations, with appropriate conditions.

Source: 49 Federal Register 37998, 38027 (September 26, 1984).

The Role of the Great Lakes Initiative

The GLI does not significantly, if at all, impact current "intake credit" policy with respect to TBELs. For instances involving WQBELs, the GLI does not affect the four options currently available to dischargers *plus it presents one more option in addition to current law* by which dischargers can escape responsibility for intake water pollutants.

Source: 58 Fed. Reg. 20802, 20952 (April 16, 1993).

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122, 123, 131, and 132

[FRL 4205-6]

RIN 2040-AC08

Proposed Water Quality Guidance for the Great Lakes System

AGENCY: U.S. Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: This document provides opportunity for comment on the proposed Water Quality Guidance for the Great Lakes System ("Guidance") developed under section 118(c)(2) of the Clean Water Act (CWA), as amended by section 101 of the Great Lakes Critical Programs Act of 1990 (CPA). This Guidance, once finalized, will establish minimum water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System in the States of New York, Pennsylvania, Ohio, Indiana, Illinois, Minnesota, Wisconsin, and Michigan, including the waters within the jurisdiction of Indian tribes. Today's proposal also is intended to satisfy the requirements of section 118(c)(7)(C) of the Clean Water Act that EPA publish information concerning the public health and environmental consequences of contaminants in Great Lakes sediment and that the information include specific numerical limits to protect health, aquatic life, and wildlife from the bioaccumulation of toxins.

The proposed Guidance specifies numeric criteria for selected pollutants to protect aquatic life, wildlife and human health within the Great Lakes System and methodologies to derive numeric criteria for additional pollutants discharged to these waters. The proposed Guidance also contains specific implementation procedures to translate the proposed ambient water quality criteria into enforceable controls on discharges of pollutants, and a proposed antidegradation policy for the Great Lakes System.

The Great Lakes States and Tribes must adopt water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System which are consistent with the final Guidance. If a Great Lakes State or Tribe fails to adopt consistent provisions within two years of EPA's publication of the final Guidance, EPA will promulgate such provisions within the same two-year period.

DATES: EPA will accept public comments on the proposed Guidance until September 13, 1993. Comments postmarked after this date may not be considered.

A public hearing on the proposed Guidance will be held on August 4 and 5, 1993, in Chicago, Illinois, beginning at 9 a.m. on August 4, 1993. The hearing officer reserves the right to limit oral testimony to 10 minutes, if necessary.

In addition, EPA and the States plan to hold a series of public informational meetings across the Great Lakes Basin to provide a general overview of the various elements in the proposed Guidance. Members of the public should call the following numbers for information on the dates and locations of these meetings: (1) in Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin—800-621-8431; (2) in Pennsylvania—215-597-6911; (3) in New York—716-285-8842.

ADDRESSES: An original and 4 copies of all comments on the proposed Guidance should be addressed to Wendy Schumacher, Water Quality Branch (WQS-16J), U.S. EPA, Region V, 77 West Jackson Blvd., Chicago, Illinois, 60604 (telephone: 312-886-0142).

The public hearing on the proposed Guidance will be held in room 331, 77 W. Jackson Blvd., Chicago, Illinois.

Materials in the public docket will be available for inspection and copying at the U.S. EPA Region V Records Center, 77 W. Jackson Blvd., Chicago, Illinois, by appointment only. Appointments may be made by calling Wendy Schumacher (telephone 312-886-0142). A reasonable fee will be charged for photocopies.

Selected documents supporting the proposed Guidance will also be available for viewing by the public at the following locations:

Illinois: Lincoln Library, Lincoln Library Reference Center, 328 South 7th Street, Springfield, Illinois, 62701 (217-753-4945).

Indiana: Indiana Department of Environmental Management, Office of Water Management, 6th Floor, 105 Meridian Street, Indianapolis, Indiana, 46206 (317-232-8671).

Michigan: Library of Michigan, Government Documents Service, 717 West Allegan, Lansing, Michigan, 48909 (517-373-1300); Detroit Public Library, Sociology and Economics Department, 5201 Woodward Avenue, Detroit, Michigan, 48902 (313-833-1440).

Minnesota: Minnesota Pollution Control Agency, Library, 320 Lafayette, St. Paul, Minnesota (612-296-7719).

New York: U.S. EPA Region II Library, room 402, 26 Federal Plaza, New York, New York, 10278 (212-264-2881); U.S. EPA Public Information Office, Carborundum Center, Suite 530, 345 Third Street, Niagara Falls, New York, 14303 (716-285-8842); New York State Department of Environmental Conservation (NYSDEC), room 310, 50 Wolf Road, Albany, New York, 12233 (518-457-7463); NYSDEC, Region 6, 7th Floor, State Office Building, 317 Washington Street, Watertown, New York, 13602 (315-785-2513); NYSDEC, Region 7, 615 Erie Boulevard West, Syracuse, New York, 13204 (315-426-7400); NYSDEC, Region 8, 6274 East Avon-Lima Road, New York, 14414 (716-226-2466); NYSDEC, Region 9, 270 Michigan Avenue, Buffalo, New York, 14203 (716-851-7070).

Ohio: Ohio Environmental Protection Agency Library—Central District Office, 1800 Watermark Road, Columbus, Ohio, 43215 (614-644-3024); U.S. EPA Eastern District Office, 25809 Central Ridge Road, Westlake, Ohio, 44145 (216-522-7260).

Pennsylvania: Pennsylvania Department of Environmental Resources, 1012 Water Street, Meadville, Pennsylvania, 16335; U.S. EPA Region III Library, 8th Floor, 841 Chestnut Building, Philadelphia, Pennsylvania, 19107-4431 (215-597-7904).

Wisconsin: Water Resources Center, University of Wisconsin-Madison, 2nd Floor, 1975 Willow Drive, Madison, Wisconsin (608-2620-3069).

Selected documents supporting the proposed Guidance are also available by mail upon request for a fee (see section XIII of the preamble for additional information).

FOR FURTHER INFORMATION CONTACT: Kenneth A. Fenner, Water Quality Branch Chief (WQS-16J), U.S. EPA Region V, 77 W. Jackson Blvd., Chicago, Illinois, 60604 (Telephone: 312-353-2079).

SUPPLEMENTARY INFORMATION:

Preamble Outline

I. Background

A. Description of Resource

1. General Statistics
2. Physical Characteristics
3. History of Environmental Degradation
4. Environmental Problems in the Great Lakes System
   a. Nutrients
   b. Toxic Substances

B. Great Lakes Water Quality Agreement

1. History of the Great Lakes Water Quality Agreement
   a. The Boundary Waters Treaty of 1909
   b. The 1972 Great Lakes Water Quality Agreement
   c. The 1978 Great Lakes Water Quality Agreement
   d. The 1987 Amendments to the Great Lakes Water Quality Agreement
2. Major Provisions of the Great Lakes Water Quality Agreement
3. Implementation of the Great Lakes Water Quality Agreement
   a. The International Joint Commission
   b. Provisions for Consolidation and Review

F including the procedure for determining whether the permitting authorities must generate or have the permittee generate the data necessary to derive Tier II values for the protection of aquatic life, wildlife, and human health for all pollutants known or suspected to be present in discharges; identification of procedures to minimize the costs of this data generation on permitting authorities and discharging facilities; and identification of procedures to minimize or eliminate possible inequities between facilities due to application of the data generated by one facility to subsequent permitting decisions regarding other dischargers.

Procedure 5.D.3 of appendix F of the proposed Guidance states that, where there is insufficient information to develop a Tier II value, nothing in procedure 5.D of appendix F precludes or denies the right of a State or Tribe to determine in the absence of the data necessary to derive a Tier I criterion or a Tier II value, that the discharge of a pollutant will cause, have the reasonable potential to cause or contribute to an excursion above the State's narrative criterion for water quality or incorporate a WQBEL for that pollutant in a NPDES permit. This provision is consistent with section 510 of the Clean Water Act which expressly retains the State's authority to adopt and enforce standards, limitations or requirements more stringent than those in effect under the Clean Water Act. Finally, proposed procedure 5.D.4 of appendix F clarifies that if the permitting authority develops a WQBEL pursuant to procedure 5.D.3 of appendix F under other more stringent authority, it is not obligated to generate or require the permittee to generate the data necessary to derive a Tier II value for that pollutant. When a permitting authority develops a WQBEL, the WQBEL must achieve State water quality standards including both numeric and narrative water quality criteria as required by 40 CFR 122.44(d)(1)(vii). As previously discussed in the preamble, Tier II criteria are the permitting authority's interpretation of narrative water quality criteria. Therefore, if a permitting authority establishes a WQBEL under other more stringent authority when a WQBEL is not mandated by procedure 5 of appendix F, it is not also required to apply the Tier II methodologies to interpret that narrative water quality criterion.

e. *Consideration of Intake Water Pollutants When Determining Reasonable Potential*—1. *Introduction.* The proposed Guidance in appendix F, procedure 5.A. through D., provides procedures for permitting authorities to determine if a discharge causes, has the reasonable potential to cause or contributes to an excursion above a State or Tribal numeric or narrative water quality criterion. These proposed procedures require the permit authority to establish water quality-based effluent limitations upon determination that a pollutant is or may be discharged at sufficient levels to cause, have the reasonable potential to cause or contribute to an excursion above any Tier I criterion or Tier II value.

The proposed procedures for conducting reasonable potential determinations in 5.A. through 5.D. do not provide special considerations for pollutants contained in a facility's intake water. In some situations, the sole or primary origin of a pollutant in a discharge may be the intake water for a facility. For example, the origin of many pollutants in once through cooling water is the water body where the facility obtains the water rather than a facility wastestream.

Procedure 5.E. of appendix F of the proposed Guidance provides a separate mechanism for permitting authorities to consider the presence of intake water pollutants in a facility's discharge when determining the necessity for WQBELs. Procedure 5.E. of appendix F would allow the permitting authority to determine that the return of identified intake water pollutants to the same body of water under specified circumstances does not have the reasonable potential to cause or contribute to an exceedance of water quality standards without application of the reasonable potential procedures set forth in procedure 5.A. through 5.D of appendix F. Based on this determination, the permitting authority would not be required to establish WQBELs for the identified intake water pollutants. This procedure would apply to facilities that return unaltered intake water pollutants to the same body of water without increasing the mass loading rate or concentration of the pollutant at the edge of any available mixing zone, and that do not discharge the intake water pollutants at a time or location that would cause adverse water quality effects to occur that would not have occurred if the pollutants were left in place.

The proposed procedure would supplement existing mechanisms to modify technology-based effluent limitations to reflect intake water pollutants, and to derive appropriate WQBELs for discharges to water that exceed water quality criteria. These mechanisms include Total Maximum Daily Loads (TMDLs), temporary variances from water quality standards, modifications to designate uses, and site-specific modifications to criteria. Application of these existing mechanisms to address intake water pollutants is discussed below.

In addition to the proposed procedure 5.E of appendix F to part 132, EPA considered four alternative options for addressing intake water pollutants. Each of these options is discussed in more detail in subsection e.iv below.

Option 1. Option 1 reflects the current national approach. While EPA's existing regulations do not provide for a special credit for pollutants present in a facility's intake water in the calculation of WQBELs, several mechanisms are available that may result in an adjustment in a WQBEL to reflect the presence of intake water pollutants (e.g. TMDLs, temporary variances from water quality standards, and changes in the designated use of the water body or site-specific criteria modifications). Option 1 would limit the regulatory procedures to address intake water pollutants to these existing mechanisms.

Option 2. In addition to allowing the use of the procedures in Option 1, Option 2 would allow a permitting authority to modify WQBELs directly to provide a full or partial credit for intake water pollutants when the pollutants are discharged to the same water body as the intake water. A specified level of credit would be allowed under this approach even when the facility contributes an additional amount of the intake water pollutant from its process waste stream.

Option 3. This option is similar to Option 3, but it would also allow the permitting authority to modify WQBELs when the source of the intake water is different from the receiving water.

Option 4. This option is the initial procedure developed by the Great Lakes Technical Work Group. It is a combination of Options 2 and 3 and would provide a direct mechanism for reflecting a credit for pollutants in a facility's intake water under specified circumstances.

Although the Great Lakes Steering Committee did not adopt the procedure drafted by the Technical Work Group (Option 4), it believed that the draft Great Lakes Guidance should include a provision addressing the discharge of intake water pollutants to the Great Lakes System. Accordingly, EPA agreed to convene a separate workgroup to evaluate the extent to which permitting authorities may consider the presence of intake water pollutants during the development of WQBELs. Proposed procedure 5.E of appendix F reflects the efforts of this workgroup. EPA requests comment on all aspects of this subject.

including proposed procedure 5.E, all issues raised in the preamble discussion below, and any suggested alternative requirements or combinations of requirements to address the subject and issues in the final rule.

ii. *Current National Approach*—(A) *Net/Gross Credits for Technology-based Limits.* EPA's NPDES permitting regulation at 40 CFR 122.45(g) currently provides a mechanism for adjusting treatment technology-based effluent limitations to reflect credit for pollutants in a discharger's intake water. The regulation specifies the circumstances under which EPA will adjust a facility's technology-based effluent limitation to account for the presence of pollutants in a discharger's intake water. The regulation provides that technology-based limitations shall be adjusted where the applicable effluent limitations guidelines direct limitations be applied on a net basis or where the discharger demonstrates that the presence of intake water pollutants prevents compliance with the applicable technology-based limitations despite proper installation and operation of the treatment systems. The regulation also identifies four specific conditions restricting the use of net credits:

(1) The regulation precludes the use of net credits for generic or indicator pollutants unless the permittee demonstrates that the constituents of the generic measure in the effluent and influent are substantially similar or unless appropriate additional limits are placed on process water pollutants.

(2) Credit may be granted only to the extent necessary to meet the applicable technology-based limitation, up to a maximum value equal to the influent value.

(3) Credit is generally limited to discharges to the same body of water from which the intake water is drawn although the Director may waive this requirement if no environmental degradation will result.

(4) Credit is precluded for return of materials generated from the treatment of intake water (e.g., raw water clarifier sludge).

The provision granting credit only to the extent necessary to achieve a technology-based limitation assures that a discharger uses the appropriate technology-based level of treatment (e.g. BPT/BAT/BCT) in removing pollutants that originate from the discharger's facility. This provision in essence assures the proper operation of treatment technology.

In the promulgation of this 40 CFR 122.45(g), EPA declined to develop a similar mechanism to adjust water quality-based effluent limitations to reflect credit for intake water pollutants. EPA explained that "[t]he Clean Water Act's requirement to protect and enhance water quality is not conditioned on factors such as intake water quality and it would be inappropriate for EPA to impose such a condition. Eligibility for a net credit under these (technology-based) regulations does not imply any right to violate water quality standards." (49 FR 37998, 38027 (September 26, 1984)). EPA recognized the complexity of water quality-based permitting, however, and indicated that permit writers may take the presence of intake water pollutants into account, as appropriate, in individual permitting decisions. In all cases, EPA noted that permit limits "must be adequate to meet the water quality objectives of the Clean Water Act when considered along with control requirements for other discharges to the stream." (49 FR 38027 (September 26, 1984)). The existing mechanisms for simultaneously considering control requirements for all dischargers to a single body of water are total maximum daily loads (TMDLs) and NPDES permits written to implement these TMDLs. The use of TMDLs to address intake water pollutants is discussed further below.

(B) *Consideration of Intake Water Pollutants for Water Quality-based Limits.* Existing National regulations and guidance allow the permitting authority to utilize four mechanisms to determine appropriate WQBELs when the receiving water exceeds a water quality criterion. These mechanisms which are discussed below are total maximum daily loads, variances, removal of non-existing uses, and site-specific modifications to water quality criteria.

In addition to mechanisms, facilities with intake water that contain pollutants at concentrations above water quality criteria may be able to reduce the level of these pollutants through pollution prevention measures: Although pollution prevention is a voluntary action under the existing NPDES permit program, pollution prevention techniques can help reduce the amount of a pollutant in an intake water and therefore reduce the amount of a pollutant that a facility may need to discharge. For example, a facility using groundwater contaminated with DDT may be able to use an alternative intake water source, such as a municipal or surface water supply, that does not contain this pollutant. Substitution of an alternative source of intake water may remove the necessity for or decrease the stringency of any WQBEL and improve the quality of the receiving water body.

Another type of pollution prevention involves source reduction within the facility. One example of this approach is a waste paper facility that discharges PCBs (that are present in a process waste stream and the intake water source) to a receiving body of water that already exceeds the criterion for PCBs. By switching to a different source of waste paper, one with less PCBs in the ink, the facility may be able to meets its WQBEL without having to install additional treatment technology. This type of source reduction is also beneficial to the environment because the effluent would contain less PCBs, a toxic bioaccumulative pollutant of concern.

A second example of source reduction within a facility is a utility with an effluent containing copper due at least in part to corrosion from its copper pipes at a level that would have a reasonable potential to cause or contribute to an exceedance of the criterion for copper. The facility could increase the hardness of the water that passes through the copper pipes, thereby reducing the amount of copper in the effluent from corrosion. The utility may then be able to comply with any necessary WQBEL for copper through this source reduction measure.

In addition to pollution prevention efforts conducted by the facility, regulatory authorities may utilize four mechanisms to determine appropriate WQBELs when the receiving water exceeds a water quality criterion. Regulatory authorities may:

(1) Develop an appropriate waste load allocation for the discharger through a TMDL that is designed to lead to attainment of water quality standards, pursuant to State requirements consistent with 40 CFR Part 130;

(2) Grant a temporary variance from water quality standards to an individual discharger, pursuant to State requirements consistent with 40 CFR 131.10 and 131.13;

(3) Remove a non-existing designated use where unattainable and designate a less stringent use and corresponding criteria to protect existing and/or attainable uses pursuant to State requirements consistent with 40 CFR 131.10; or

(4) Develop a site-specific criterion for the water segment pursuant to State requirements consistent with 40 CFR 131.11(b).

If the permitting authority utilizes a TMDL, a WQBEL for the pollutant may be less stringent or unnecessary if the TMDL provides for the attainment of water quality standards through load

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122, 124, and 125

[OW-FRL-2532-8]

National Pollutant Discharge Elimination System Permit Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On May 19, 1980, the Environmental Protection Agency published final rules which consolidated the regulations and procedures for five EPA permit programs including the National Pollutant Discharge Elimination System (NPDES) permit program under section 402 of the Clean Water Act (CWA). Following promulgation of these Consolidated Permit Regulations, petitions for review of various aspects of these regulations were filed in several federal courts and were subsequently consolidated into a single action in the United States Court of Appeals for the District of Columbia Circuit (*NRDC* v. *EPA*, and consolidated cases, No. 80-1607 (D.C. Cir., filed June 2, 1980)). On June 7, 1982, EPA entered into a settlement agreement on Clean Water Act issues with numerous industry petitioners. Under the terms of that settlement, EPA agreed to propose changes to the May 19, 1980 regulations to reflect the resolution of issues in the settlement. EPA also agreed to take such action as may be necessary to suspend several sections of the regulations pending completion of final rulemaking. Accordingly, EPA proposed amendments to the NPDES sections of the Consolidated Permit Regulations on November 18, 1982. At the same time, EPA proposed to suspend portions of these regulations and related provisions of the NPDES application forms to correspond with proposed changes to the regulation agreed to in that settlement.

After considering numerous comments submitted on the proposed changes, EPA has developed the amended NPDES regulations which are promulgated in final form today. Today's action also represents the final rulemaking on the proposed suspensions. No final action had been taken previously since the most expeditious manner of resolving all outstanding issues was to complete rulemaking on the suspension issues as well as the others at the same time.

Today's rulemaking also contains final regulations for determining whether a facility is a new source. EPA suspended the existing new source criteria and proposed revisions to these regulations on September 9, 1980 (40 FR 59317).

DATES: The effective date of this regulation is October 26, 1984.

In accordance with 40 CFR 100.01 (45 FR 26096, April 17, 1980), these regulations shall be considered final agency action for purposes of judicial review at 1:00 p.m. eastern time on October 10, 1984. In order to assist EPA to correct any typographical errors, incorrect cross references, and similar technical errors, comments of a technical and nonsubstantive nature on the final regulations may be submitted on or before November 26, 1984. The effective date of these regulations will not be delayed by consideration of such comments.

The modified information requirements contained in §§ 122.29(c)(5), 122.41(l)(1), 122.42(a), 122.45(b), 122.62(a), and 124.5 have not been approved by the Office of Management and Budget (OMB) and they are not effective until OMB has approved them.

ADDRESS: Comments of a technical and nonsubstantive nature should be addressed to: William Diamond, Permit Division (EN-336), Office of Water Enforcement and Permits, U.S. Environmental Protection Agency, Washington, D.C. 20460.

FOR FURTHER INFORMATION CONTACT: William Diamond, Permits Division (EN-336), Office of Water Enforcement and Permits, U.S. Environmental Protection Agency, Washington, D.C. 20460. Telephone: (202) 426-4793.

SUPPLEMENTARY INFORMATION:

I. Background
II. Final Regulations
A. Toxic Control Strategy
1. Background
2. Quantitative Data Requirements
a. Mandatory Testing
b. Testing Potentially Required—Toxic Pollutants
c. Certain Conventional and Nonconventional Pollutants
3. Sampling
4. Potential Discharges
5. Used or Manufactured Pollutants
6. Toxics Notification
7. Toxicity Limits
B. Storm Water Runoff Discharges
C. Construction Prohibition
D. Anti-Backsliding
E. Disposal to Wells, POTW's, or by Land Application
F. Best Professional Judgment (BPJ) and Draft Development Document and Treatability Manual
G. Net/Gross Limits
H. Total Metals
I. Actual Production
J. Imposition of Water Quality Conditions Stayed by a Court
K. Incorporation of NEPA—Based Conditions in Permits
L. Compliance Schedule Prohibition
M. Notice of Physical Alterations or Additions
N. Signatories to Reports
O. Bypass
P. Upset Defense
Q. Proper Operation and Maintenance
R. Mistake and Failure of Technology to Meet Best Professional Judgment (BPJ) Limits as Grounds for Permit Modifications
S. Non-Adversary Panel Procedures
1. Applicability of Panel Hearing Procedures to Initial Licensing Permits and Variances
2. Role of Panel members in Panel Hearings
3. Scope of Cross-examination
T. Evidentiary Hearing Procedures
1. Obligation to Submit Evidence and Raise Issues
2. *Ex parte* Communications
U. Deferral of Hearing on New Source Determination
V. New Source Criteria
W. Modification of NPDES Permits
III. Effective Date
IV. Executive Order 12291
V. Paperwork Reduction Act
VI. Regulatory Flexibility Act

I. BACKGROUND

On June 7, 1979, EPA published final regulations establishing program requirements and procedures for the NPDES program. A week later, on June 14, 1979, a number of petitioners representing major industrial trade associations, several of their member companies, the Natural Resources Defense Council (NRDC), and Citizens for a Better Environment filed petitions for judicial review of the regulations. Also on June 14, 1979, EPA published proposed regulations consolidating the requirements and procedures for five EPA permit programs. These included the NPDES program under the Clean Water Act (CWA), the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA), State "dredge or fill" programs under Section 404 of the CWA, the Hazardous Waste Management (HWM) program under the Resource Conservation and Recovery Act (RCRA), and the Prevention of Significant Deterioration (PSD) program under the Clean Air Act.

Final Consolidated Permit Regulations (CPR) were published on May 19, 1980. These consolidated regulations were challenged in court. Petitions for review were filed in several U.S. Courts of Appeal and subsequently consolidated in the District of Columbia Circuit (*NRDC* v. *EPA*, and consolidated cases [No. 80-1607, filed June 2, 1980]). The petitions for review of the final NPDES regulations published June 7, 1979, were joined with this action. In response to these challenges, on September 9, 1980 EPA suspended the criteria for

sludge discharges, although on its face it only bans net credits for such discharges. The proposal was interpreted to allow these discharges without restriction, except for restrictions required to meet water quality standards.

After review of all of the comments on this issue, EPA has decided that both extreme positions are undesirable. Discharge requirements for discharges of raw water clarifier sludge and filter backwash are best determined at the local permitting level after consideration of the appropriate technology-based effluent limits and water quality standards. Since there are no national guidelines for these discharges, they must be limited on a case-by-case basis according to the permit writer's Best Professional Judgment (BPJ), with more stringent limits if necessary to meet water quality standards. The particular technology used to determine BPJ technology-based effluent limits depends on the application of the statutory criteria for different levels of control, for example, best practicable or best conventional technology. These regulations are intended neither to ban such discharges nor to prohibit permit authorities from imposing such a ban in specific cases where this is the appropriate standard for control.

An environmental group commented that the proposed tests for similarity of generic pollutants may not be adequate to fulfill the objectives of the Clean Water Act, especially with regard to water quality. Their concern was that generic pollutants in the influent which were composed of relatively non-toxic constituents would be credited against more harmful constituents in the effluent. On the other hand, an industrial commenter said that the proposed tests to show substantial similarity of generic pollutant parameters are much more reasonable than the existing rule. In general, EPA believes that the "substantial similarity" approach (as opposed to demonstration of identical chemical, physical and biological characteristics) appropriately provides greater flexibility to permit writers in considering requests for net credits, but nevertheless provides adequate protection against environmental harm. However, EPA agrees that strict application of only one of the three tests for demonstrating substantial similarity suggested in the proposal, in some cases, may not provide adequate protection. Therefore, the three tests of the proposal have been replaced in today's final regulation with a more flexible regulation which relies more heavily on the exercise of judgment by the permit writer. The tests specified in the proposal may still be considered by permit writers. However, other alternatives may be required where necessary for adequate protection.

An industrial commenter asked for more flexible specification of the definition of "control system" arguing that net credits should be available in cases where the control strategy intended to be employed to meet permits limits involves management practices, such as a chlorine minimization program, rather than physical treatment technology. As explained in the preamble to the proposal, control system means any control measures considered by permit writers in developing effluent limitations which are applied by the permittee to wastestreams in order to meet the technology-based limitations and standards established in the permit. This includes measures such as chlorine minimization programs. This regulation is not intended to require the installation of specific treatment technology in all cases (e.g., in many cases it may not be necessary, or even useful, to run noncontact cooling water or raw water clarifier sludge through the same treatment system designed for process waters). Nor would this regulation bar a permitting authority from requiring treatment technology, other controls, or zero discharge in a particular case. In considering net credit requests permit writers should examine the control measures that were intended to be employed to meet the applicable permit limits.

Another industrial commenter wanted net credits to be available for water quality-based standards. A State also raised water quality concerns. The proposed regulation included a section stating that the regulation did not preclude consideration of intake pollutants in setting water quality based limits. For the following reasons, EPA is deleting this section as unnecessary. This regulation deals only with technology-based standards. The Clean Water Act's requirement to protect and enhance water quality is not conditioned on factors such as intake water quality and it would be inappropriate for EPA to impose such a condition. Eligibility for a net credit under these regulations does not imply any right to violate water quality standards. However, EPA recognizes that implementation of water quality-based standards is a complex balancing and consideration of many facilities and many factors and that, in setting water quality based permit limitations, a permit writer may take into account the presence of intake water pollutants, as appropriate. Of course, in any case limits must be adequate to meet the water quality objectives of the Clean Water Act when considered along with control requirements for other dischargers to the stream.

An environmental group maintained that the provision that dischargers need not incur significant additional expense to remove intake pollutants amounts to an economic variance which is illegal under the Clean Water Act. EPA does not agree with this contention. EPA is not authorizing variances from the applicable effluent limitations based on the costs to a particular permittee to meet these. Rather, EPA is recognizing that in meeting these limitations the permittee should not be responsible for additional incidental removal of intake pollutants where this would result in significant additional costs. EPA believes this comports with the Fourth Circuit ruling in *Appalachian Power*. In addition, we note that net credits are only available to the extent needed to meet applicable limitations.

4. EPA action. The issue of net/gross credit presents difficult problems. While in certain circumstances credits may be appropriate, there are abundant possibilities for abuse. Attempts by EPA to deal with this situation in complicated and detailed regulations do not seem to have resolved these problems and may have unduly restricted the legitimate use of net credits. Therefore, EPA has decided to restructure the regulation, preserving the best of the existing rule and settlement proposal, but simplifying it and providing for more discretion by the local permitting authority. This should make the granting of net/gross credits on a reasoned basis more workable and less arbitrary.

Three particular situations merit specific comment. First, "proper" operation of the control system as required in § 122.45(g)(1)(ii) could arguably be interpreted to require the permittee to incur significant additional expense (such as additional chemical cost) to treat as much of the pollutant present in the effluent as the system is capable of removing. EPA intends that if the permittee would incur significant additional expense above those contemplated in the development of effluent limitations in achieving the incidental removal of intake pollutants the discharger should qualify for a credit to account for these. EPA cannot place a precise figure on what is a "significant" additional cost. This determination must be made on the basis of site-specific

The CHAIR. Mr. Geren.

Mr. GEREN. Thanks, Mr. Chairman. I just want to express my appreciation to you for bringing these hearings about. I think they have been very educational and have been helpful to all of us, both staff and Members alike. I know it was difficult to put this together on short notice. I just want to make sure that appreciation to you is duly noted. Thank you, Mr. Chairman.

The CHAIR. I appreciate that, Mr. Geren.

If there is no further business to come before the subcommittee, we stand adjourned, and we will reconvene on Thursday at 9:30 a.m.

[Whereupon, at 7:00 p.m., the subcommittee was adjourned.]

PREPARED STATEMENTS SUBMITTED BY WITNESSES

STATEMENT
on
H.R.3948
THE WATER QUALITY ACT OF 1994
for submission to the
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
of the
HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
for the
U.S. CHAMBER OF COMMERCE
by
ALAN BAHL*
May 24, 1994

The U.S. Chamber of Commerce Federation appreciates this opportunity to offer its perspective on H.R. 3948, the Water Quality Act of 1994. Our members believe these hearings will provide the Committee with the additional information necessary to undertake the critical issue of reauthorization.

Since enactment of the Clean Water Act in 1972, the statute has evolved as one of our nation's most effective and successful environmental programs. American industry has made significant progress toward improving the quality of our water resources over the past 20 years and the Chamber continues to support the goals and objectives of the Act.

With improved scientific measurements, such as the ability to detect parts-per-billion of contaminants in water, there is a misconception that water quality is deteriorating. Today, more than 60 percent of our lakes, rivers and streams meet strict water quality standards based on their intended use, according to the most recent Environmental Protection Agency (EPA) data. Approximately 90 percent of major industries are in significant compliance with permits issued to regulate discharges. Because of this progress — which continues under existing law — the Chamber believes extensive and substantive changes in the Act are not needed. Rather,

fine-tuning and flexibility should be the focus of reauthorization. We share your goals of improving the quality of our nation's waters in a fair, cost-effective and environmentally productive way. However, we have concerns about the ways these goals will be achieved. Philosophically, the Chamber is concerned that H.R. 3948 moves the basic structure and focus of the Clean Water Act in the wrong direction. The bill in its present form proposes many fundamental changes to the Act and our members have serious questions about whether these provisions will actually improve water quality or unnecessarily restrict economic development and impose new mandates on local communities.

Before commenting on our specific concerns with H.R.3948, we address these larger issues. First, the bill would "federalize" water pollution control with prescriptive "top-down" national requirements. This would significantly alter the basic state/federal relationship and erode state authority to implement water quality programs. Second, the bill intensifies EPA regulation by imposing new standards, timetables and additional layers of bureaucracy on the regulated community without clear demonstration that water quality improvements will be achieved. New standards should be based on good science and the need to balance environmental risk with affordable requirements. Third, H.R. 3948 relies on the threat of stronger penalties and sanctions to enforce compliance rather than building cooperative partnerships to solve problems. Fourth, it mandates binding management measures for nonpoint sources to include all watersheds and all landowners nationwide. We do not believe this is necessary or desirable because it limits site-specific solutions and flexible approaches to watershed management.

H.R. 3948 takes a program that has worked well with measurable success and replaces it with one that is more prescriptive. This bill would move to a micro-management,

command- and-control approach that has become an increasingly questionable method in the 1990's. Such an approach would hinder effective, ongoing efforts to improve water quality. We favor a flexible and incentive-based approach.

Additional regulatory requirements should be directed toward significant sources of water quality impairment, should be based on credible scientific data, risk assessment and cost/benefit analysis, and should be targeted to specific bodies of water where problems remain. Such efforts will increase flexibility and provide incentives — without imposing new unfunded mandates — to allow state and local governments to address their water quality problems in a cost-effective way.

These principles are especially important to issues affecting small business and their compliance efforts and should be used as a guide in developing further changes to the Act. A major concern of the Chamber is that many portions of the federal laws, EPA programs and regulations are nearly incomprehensible to the practicing professional, and even more so to the small businessperson or small manufacturer where the bulk of America's jobs — and job growth — reside. In addition, regulations under the different statutory authorities are not coordinated, creating conflict and duplication. Regulatory guidance should be clear and comprehensible so that the regulated community understands what is expected, why it is expected, and how it can be done in the real world context of a business operation.

SPECIFIC ISSUES IN H.R. 3948

Our members are concerned about the broad reach of expanded enforcement, restrictive antidegradation provisions, pollution prevention planning, new provisions on ground water, further implementation of water quality standards and reliance on command-and-control measures. We have serious questions about whether many of the provisions of H.R. 3948 will improve water quality or unnecessarily restrict economic development and impose new mandates on local communities. Some of our specific concerns are outlined below.

Antidegradation

H.R. 3948 would require states to adopt restrictive federal antidegradation policies subject to approval by EPA. States would be required to conduct an antidegradation review prior to issuing a permit for any new, expanded or increased discharge into a waterbody. This provision would prevent facilities from altering their discharge levels and would prohibit plant expansion, changes in production output and expansion of capacity. This is a "no-growth" policy that will restrict business development and economic expansion and stifle innovation. The Chamber does not believe antidegradation policies should be automatically prescribed nationwide. A "one-size-fits-all" approach will not work due to hydrological and climatic differences in various states.

Ground Water

Section 404 of the bill would drastically expand the scope of the Clean Water Act by adding a major new program specifying that discharges to the ground or ground water are subject to National Pollutant Discharge Elimination System (NPDES) permits in certain circumstances. This would impose significant new regulations and permitting requirements on business. Almost all states have ground water protection programs and have set ground water quality standards, bolstered by a number of federal statutes. The Chamber believes there is no demonstrated need for another federal ground water law, nor for a massive new regulatory program that would duplicate state and federal programs.

Enforcement

H.R. 3948 would overturn a key Supreme Court case (Gwaltney) and allow citizens to sue for past violations that have been corrected. Further, the bill would significantly expand enforcement to indirect dischargers, increase civil and criminal penalties and establish the minimum penalty to be "economic benefit of noncompliance." We question the need for stiffer penalties when, according to EPA, industry is in compliance with permits 90 percent of the time. There is no valid reason to overturn the Gwaltney decision. Citizen suits are to "supplement rather than supplant" government enforcement action. This will only encourage "bounty hunting" and nuisance lawsuits for dubious environmental benefit.

(6)

Summary

The federal government should not make it unnecessarily difficult for the regulated community to do what is desired. The Chamber believes the basic structure of the Clean Water Act is working well. Progress has been made in cleaning up and managing our water resources, but we do not dispute that more needs to be done to solve the remaining problems. To meet these challenges in a cost-effective and equitable way, Congress should consider the following criteria as part of its reauthorization effort:

- the use of sound science, risk assessment and cost/benefit analysis as the basis for establishing discharge limits and cleanup priorities;
- equitable and flexible regulations, where needed, for all sources;
- recognition of the need for economic growth within state and local water-quality standards determinations; and
- limitation of permit-application costs, monitoring requirements and paperwork burdens.

The Chamber looks forward to working with the Committee as Congress deliberates the reauthorization of the Clean Water Act. A consistent approach, while recognizing the economic realities of conducting business in the global marketplace, will greatly contribute to the nation's ability to make continued improvements in its water resources.

Snake River Alliance
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My name is Beatrice Brailsford. I am the Program Director for the Snake River Alliance, an Idaho-based citizens organization working for peace and justice, the end to nuclear weapons production activities, and responsible solutions to nuclear waste and contamination. Since our founding in 1979, the Alliance has served as the only broad-based citizens group focusing on activities at the Idaho National Engineering Laboratory, a Department of Energy site in southeast Idaho. We accomplish our work through research, education, and community advocacy.

First, let me thank you for your efforts to meet one of the primary goals of the Clean Water Act reauthorization: bringing federal facilities, including those of the DOE, under the influence of this legislation.

But there is presently language in the bill that would exempt radioactive emissions from the nuclear navy's vessels and land-based facilities, even though the nuclear navy is under the joint control of the departments of Energy and Defense and even though some of its facilities actually lie within DOE site boundaries. If this exemption remains, the nuclear navy's radioactive pollution would be the only radioactive water pollution in the nation not subject to regulation by any outside party.

On behalf of the Snake River Alliance's 1,200 members, I am here today to support the DeFazio amendment, which would remove the exemption for land-based facilities and substitute

for vessels a system of uniform national discharge standards for radioactive pollution.

Before I discuss the potential effects of the exemption the nuclear navy seeks and our opposition to it, I'll list the nuclear navy facilities whose radioactive water pollution will continue beyond the reach of law without the DeFazio amendment.

- The Bettis Atomic Power Laboratory in West Mifflin, Pennsylvania, a research and design laboratory for nuclear propulsion technologies;
- The Kenneth A. Kesselring Site in West Milton, New York, an experimental nuclear reactor test site that currently houses three operational nuclear reactors and a fourth that is being decommisssioned;
- The Knolls Atomic Power Laboratory near Albany, New York, a research and development laboratory for nuclear navy propulsion technologies and the PUREX chemical separation technology;
- The Knolls Atomic Power Laboratory's Windsor Site in Connecticut, which houses a naval reactor prototype that is undergoing decommissioning;
- The Naval Reactors Facility and the Expended Core Facility at the INEL.

I'll tell you a bit more about the last two--and about INEL--so that Idaho's stake in the nuclear navy and the DeFazio amendment becomes more apparent.

INEL covers 890 square miles of high desert plain in eastern Idaho, just southwest of the Tetons. It sits above the upstream end of the Snake River Plain aquifer, which supplies drinking water for one-fifth of all Idahoans and is the lifeblood of our agriculture, aquaculture, and recreation industries. The aquifer holds as much water as Lake Erie and feeds the Snake River, which then forges north to the Columbia and thence to the sea.

There have been fifty-three nuclear reactors at INEL--more than anywhere else on earth. Three of these are nuclear navy training reactors, including that for the USS Nautilus, and are located at INEL's Naval Reactors Facility. All will be shut down, through not decontaminated, by early next year.

INEL is a disposal site for significant quantities of low-level waste, much of it from nuclear navy fuel assemblies. It stores transuranic waste from Colorado's Rocky Flats weapons work; and liquid and calcined high-level waste from decades of reprocessing.

INEL also stores more spent nuclear fuel by radioactivity than any other site in the DOE complex. Much of it has come from the nuclear navy, which has sent all its spent fuel to Idaho--over 500 shipments since 1957--first for reprocessing, now for examination and handling at the Expended Core Facility and indefinite storage at the Idaho Chemical Processing Plant. Much more nuclear navy spent fuel may well come our way, though most waste shipments to Idaho are currently enjoined by federal court until their environmental impacts are assessed.

In a very real sense, Idaho was the birthplace of the nuclear navy, and in a very real sense, it is its final port-of-call.

It is the nuclear navy's piles of waste and, quite frankly, the nuclear navy's disdain for its neighbors' legitimate concerns that have led us to oppose any regulatory exemption for radioactive emissions at its land-based facilities.

More specifically:

1. The nuclear navy argues that its record is exemplary and there is therefore no need for external regulation of its radionuclide discharges. But protestations--even of perfection--are no substitute for outside regulation. Even the top student at Annapolis is required to take exams.

Spent fuel is one of the most toxic substances on earth, and the hundreds of tons of nuclear navy spent fuel stored in Idaho will remain hazardous for hundreds of centuries. Its continued generation, handling, and storage--to say nothing of the nuclear navy's decommissioning and research activities in Idaho and elsewhere--must be strictly controlled.

2. The reporting requirements of environmental law are themselves a deterrent.

Nuclear navy land-based facilities are spread from New England to the Intermountain West, yet there is no public accounting of the environmental effects of its activities. In fact, the DOE's own Spent Fuel Vulnerabilities Report, issued in December 1993, contains no information about nuclear navy

spent fuel handling and storage conditions, since the nuclear navy will not allow review even by one of its parent agencies.

The nuclear navy's neighbors--to say nothing of American taxpayers--deserve to know all the costs of its activities.

3. Exemptions are terrible public policy. No individual is exempt from the Clean Water Act, nor is any industry--from glassworks to grocery stores. Thanks to your efforts to remove sovereign immunity exemptions through the current legislation, even the DOE's compliance with this law will be assured. The nuclear navy must play by the same rules as everyone else.

Environmental protection, public confidence in government, and basic fairness will all be compromised if nuclear navy activities are allowed to continue above the law. Once again I encourage you to include the DeFazio amendment in the Clean Water Act reauthorization so that radioactive discharges from nuclear navy land-based facilities are reported and regulated.

Thank you.

TESTIMONY OF THE AMERICAN MINING CONGRESS

BEFORE THE

HOUSE SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

REGARDING THE

CLEAN WATER ACT REAUTHORIZATION – AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 3948

May 24, 1994

INTRODUCTION

Good Afternoon. My name is Phil Brick. I am the Director of Environmental Affairs for Cleveland-Cliffs, Inc. I am appearing today on behalf of the American Mining Congress ("AMC") where I serve as the Chairman of the Water Quality Committee. AMC appreciates this opportunity to present the views of the domestic mining industry on the Amendment in the Nature of a Substitute that was released by Congressman Mineta on April 20 and, particularly, its serious concerns with the two new sections that were added that single out the metals mining industry. My testimony will focus on those provisions and the devastating effect that they would have on the domestic mining industry and jobs. AMC has addressed other concerns with H.R. 3948 in an earlier letter to Chairman Mineta, which we have attached to our written testimony for the record.

AMC represents companies from all sectors of the mining industry, including: (1) the producers of most of America's metals, coal, industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment, and supplies; and (3) engineering and consulting firms and financial institutions that serve the mining industry. The metals mining industry sector is vital to the economic, social, and strategic well-being of the United States, supplying U.S. consumers and the government with gold, silver, zinc, copper, and iron, among other important metals and employs tens of thousands of people.

AMC and its member companies are deeply troubled by Sections 302 and 407 of the Substitute. Section 302 would single out the mining industry, imposing burdensome and, in many instances unattainable, conditions on discharge permits. Section 407 would require in addition a new federal permit for all mining activities. These sections would effectively ban any ongoing or future exploration, mining, or beneficiation and processing of metallic minerals. These provisions, if enacted, would result in widespread shutdowns of existing mining operations around the nation, including, for

example, copper mines in Arizona and Utah, gold mines in California and Nevada, silver mines in Idaho, iron mines in Michigan and Minnesota, and zinc mines in New York and Tennessee to name but a few. In addition, any new metallic mineral mines would be prohibited from opening. In fact, any mining or processing facility that has operations near any groundwater would be forced to shut down.

An important domestic industry with annual gross revenues exceeding $11.5 billion would be destroyed. Tens of thousands of the nation's highest wage-producing jobs will be lost, the U.S. will become totally dependent upon imports for all of our metallic minerals, and little or no corresponding environmental benefit will be achieved.

Our concerns with these provisions are threefold. First, they are not necessary or appropriate to protect the environment. Second, they discriminate against one industry without justification. And finally, they create a series of expansive new environmental requirements that are impossible to meet. Let me elaborate on these points.

THE CLEAN WATER ACT IS NOT THE APPROPRIATE LEGISLATIVE VEHICLE TO CREATE A SEPARATE AND DISCRIMINATORY REGULATORY REGIME FOR ANY SINGLE INDUSTRY.

We strongly believe that the mining-specific permitting requirements in section 302 and 407 are neither necessary nor appropriate in the Clean Water Act reauthorization. The Clean Water Act was intended to regulate discharges to navigable waters and not to establish specific and separate requirements for one industry. That fundamental non-discrimination principle should be retained.

The metals mining industry is already subject to extensive and stringent regulations under the Clean Water Act. Like other industries, our discharges to surface waters are covered by permits issued under the National Pollutant Discharge Elimination System. Point source discharges, that is those from any discernible conveyance, are subject to effluent limitations guidelines. Within that category of discharges, process waste water -- water that comes into contact with or that results from the production or use of any raw materials -- is frequently subject to a "zero discharge" requirement. In other words, no discharge of process water is permitted to a navigable water, regardless of the level of treatment. Mine drainage -- water pumped from an open pit or underground mine -- the second type of point source discharge, also is strictly regulated. This drainage may be discharged, but is subject to discharge limits that ensure the environment is protected.

Other potential discharges at mining operations, such as stormwater runoff are regulated separately.

Thus, any potential impact that mining activities may have on water quality can be addressed through the existing regulatory structure.

Nor is this the appropriate vehicle to create an industry specific regulatory regime. These provisions are nothing more than a backdoor attempt to push through measures appearing in the mining law reform bills and are inappropriate. These issues have been debated fully in the context of mining law reform. The mining law reform bills, H.R. 322 and S. 775, passed in both the House and Senate last year and are expected to go to Conference shortly. It is in that framework that the committees with jurisdiction specifically over mining operations already are considering all of the economic, social, and environmental implications of such measures.

SECTIONS 302 AND 407 WOULD UNFAIRLY SINGLE OUT THE METALS MINING INDUSTRY, IMPOSING EXTREMELY BURDENSOME AND DUPLICATIVE PERMITTING REQUIREMENTS NOT APPLICABLE TO ANY OTHER INDUSTRY

Perhaps what is most egregious about Sections 302 and 407 is the fact that they expressly discriminate against a single industry. No other industry is targeted in the Clear Water Act in the way the mining industry would be under the Substitute.

Federal Mining Program. Section 407, for example, would establish a new, largely duplicative, federal permitting regime solely for exploration, mining, and beneficiation and processing of metallic minerals. This new permit would be required in addition to the discharge permits that are already required of mining operations and to other requirements of comprehensive state permit programs.

Section 407 simply is not necessary. There is absolutely no evidence to suggest that mining activities pose a unique threat to water quality that can justify the imposition of such a burdensome regulatory regime. No other industry is similarly targeted anywhere in the Substitute for a separate permit requirement. Moreover, this type of permit is unprecedented in the Clean Water Act because it would not regulate a discharge per se, but rather the activity itself.

The notion of a federal clean water program specific to mining moreover unduly infringes upon the legitimate state role in regulating industrial activities. Virtually all states with mining operations already have stringent laws and regulations to protect water quality on the books governing mining activities. Moreover, mining is one area in particular where states have traditionally and effectively exercised a primacy role. States are uniquely qualified to regulate mining because of varying geologic and climatic conditions among and within the states. For example, Minnesota has adopted separate rules to regulate ferrous and non-ferrous mining.

"Zero Tolerance" for Groundwater Contamination. We are particularly concerned that the Substitute would seek jurisdiction over groundwater through the mining permits and impose a "zero tolerance" standard that is not applied to any other industrial, agricultural, or municipal discharge. Under Section 407, for example, a federal mining operations permit could be denied if any contamination of groundwater -- defined broadly as any increase, no matter how innocuous, in historic pre-mining background levels -- results from exploration, extraction, or beneficiation.

This is an impossible standard. Virtually all metallic mineral mining will entail some localized and generally temporary increase in the level of some "contaminant" or other naturally occurring element that might not otherwise be present in the groundwater at a particular location. This increase typically poses no significant adverse effect on human health or the environment. For example, in one common mining scenario, "contaminants" might enter the groundwater simply by virtue of the fact that a mine operator removes top soil or overburden from one location to another. Naturally occurring elements might leach from repositioned top soil or overburden through the infiltration of precipitation into groundwater. In that case, even though the only industrial activity involved removing soil, and even though the "contaminant" might be entirely benign and indeed already present in the soil and groundwater, the increased levels would be sufficient to block the issuance of a permit. This is a patently absurd result.

Significantly, although the Substitute contains groundwater protection provisions that are applicable more broadly, and which we also believe do not belong in the Clean Water Act, there is no similar absolute prohibition against any contamination of groundwater applicable to other industrial activities. Nor could other industries meet such a standard. Construction activity, oil refining, chemical manufacturing, steel production, and other heavy industry, agriculture, urban runoff, municipal and hazardous waste disposal, and even homeowners applying fertilizers, would cause increased levels of certain contaminants above background in groundwater. Those activities would not be denied permits, however, under existing law or the Substitute.

We strongly believe that primary authority for groundwater management should remain with the states, most of which have implemented stringent groundwater protection programs. Moreover, to the extent that it is necessary, the federal government already has adequate authority under the Safe Drinking Water Act to protect groundwater sources. Additional federal permitting requirements for groundwater are not necessary or proper within the scope of the Clean Water Act.

Additional Conditions Imposed on Discharge Permits. Section 302 of the Substitute would further target the metals mining industry by imposing a series of unique, unprecedented, and overly stringent conditions on NPDES permits issued to

mining operations. Here again, no other industry is subjected to the same conditions.

Pollution Prevention. Only the mining industry is subject to a requirement as part of its NPDES discharge permit that would prohibit the generation of acidic drainage. Certainly, numerous other activities regulated under the Act will generate acidic or mineral drainage, but they are not identified and therefore not subject to the same zero tolerance standard. And here again, the standard is virtually impossible to meet. Given the naturally high levels of federally regulated substances in soils and rock of mineralized areas, virtually any mining operation will result in the generation of acidic or mineral discharges. However, mineral activities can be and are conducted in a manner which reduces, and in many case prevents, acidic or mineral drainage to navigable waters. Here, however, the Section 302 would expand the scope of regulation far beyond discharges to navigable waters and even drainage beyond the property boundaries of a mine to cover the generation of such drainage. This expansion is inappropriate. A mining operation cannot ensure the elimination of all drainage. Nor is such a requirement justified by environmental considerations where the discharge does not extend beyond the boundaries of the mining operation or have any impact on navigable waters.

Moreover, to the extent that mine sites often cover hundreds of thousands of acres that are exposed to stormwater runoff, it would be impossible to prevent stormwater from contacting mineral ores and possibly resulting in some drainage. This is particularly significant in areas where historic mining activities have been conducted. Modern mining companies should not now be subject to zero tolerance standards for acidic drainage associated with activities that they themselves did not conduct.

Under current Clean Water Act requirements and other environmental laws, permitted exposure levels are estimated based on protection of health and the environment. These Sections of the Substitute would represent a marked departure from current procedures and would establish unattainable, impossible criteria.

Financial Responsibility. Similarly, under the Substitute only the mining industry is targeted for a bonding requirement that would mandate that, as a condition of receiving an NPDES permit, a mine operator demonstrate financial responsibility to ensure long-term treatment and perpetual compliance. Here again, there is no environmental or other basis to justify the disparate treatment of the mining industry. Any discharger must and should remain in compliance with the Clean Water Act for as long as the discharge continues. The mining industry is no different in that respect. Requiring a bond for perpetual

compliance is not necessary and, as a practical matter, would be impossible to obtain.

Contingency Planning. Finally, only the mining industry is singled out for broad contingency planning requirements to fully abate any contamination of groundwater, any degradation of water quality, and any damage to aquatic life. This requirement goes well beyond the scope of the Act's emphasis on permitted discharges. To the extent that these concerns are relevant at all, they should be applied across the board to all industrial, municipal, and other dischargers covered by the Act.

National Computerized Database. Among the most severe provisions of the Substitute is the creation of a computerized tracking system to facilitate permit blocks and denials that would once again be applied only in the context of permits issued to mining operations. The computerized database would contain detailed information regarding each permit applicant, entities owned or controlled by the applicant, and those entities with an ownership or control relationship over the applicant. Any violations, associated with those affiliates of the permit applicant would be stored in the database and, if not abated, would result in the denial of a permit to the applicant. No consideration would be given to the issue of whether the applicant has any actual ability to control the entity in violation or abate the violation. Even the most technical or minor violation could result in a permit denial. On its face, such a system raises fundamental questions of fairness and due process.

We strongly oppose the use of such a system in the Clean Water Act. First, there is simply no need for such a permit block program. The metals mining industry has long been subject to permitting and other environmental requirements under the Clean Water Act and other environmental statutes. Yet, there is no evidence to suggest that operators with violations have tried to manipulate the permitting system or circumvent enforcement by failing to abate violations and then obtaining new permits to mine other sites under different entities. EPA and states have a broad panoply of enforcement tools to ensure that violations of the Clean Water Act are corrected promptly and that irresponsible operators shut down.

Second, our experience with the database developed under the Surface Mining Control and Reclamation Act ("SMCRA") and that apparently served as the model for the provision here, is that the system was fraught with inaccuracies, overreached badly, threatened job losses for law-abiding citizens, and jeopardized legitimate and environmentally responsible businesses. High tech witch hunts put operators in the impossible position frequently of having to devote significant time and resources to prove a negative whenever the computer "found" a supposed ownership or control relationship and an alleged violation.

Finally, here again, there is no basis for singling out the mining industry. If computerized tracking of violations is appropriate for applicants for mining permits under Section 407, it should be equally appropriate for other industrial dischargers.

CONCLUSION

Mr Chairman, AMC would like to thank the subcommittee once again for this opportunity to raise our serious concerns with Section 302 and 407 of the Amendment in the Nature of a Substitute to H.R. 3948. The metals mining industry has been unfairly singled out for particularly onerous, and in some instances, impossible requirements. These new requirements present a real and significant threat to the continued viability of the metals mining industry in the United States, with little or no corresponding environmental benefit. We believe, therefore, that it is critical that they be deleted from the bill. We look forward to continuing to work with the subcommittee and full Committee on this bill.

AMC

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* Immediate Past Chairman
+ Honorary

April 11, 1994

The Honorable Norman Mineta
Chairman, Committee on Public
Works and Transportation
2165 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

The American Mining Congress welcomes the opportunity to submit our comments on the Clean Water Act reauthorization Bill (H.R. 3948) introduced by yourself and Congressman Boehlert.

AMC is an industry association that encompasses: (1) producers of most of America's metals, coal, and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment, and supplies; and (3) engineering and consulting firms and financial institutions that serve the mining industry. Our member companies are subject to extensive regulation under the Clean Water Act. We have therefore followed closely this Committee's efforts to enact legislation to reauthorize the Clean Water Act.

AMC and its member companies share the Committee's commitment to improving the quality of the nation's waterways, and we support reauthorization of the Clean Water Act at adequate funding levels. H.R. 3948 represents an important step in that direction insofar as it increases funding for implementation of important water programs. We are concerned, however, that H.R. 3948 goes beyond this in a number of respects, imposing significant new complex regulatory requirements, with little or no corresponding environmental benefit and without adequate consideration as to the potential social and economic impact of such requirements. Several of these would have a significant and disproportionate impact on the mining industry. At a minimum, the Bill raises a number of issues which should be explored more fully in hearings before the Committee proceeds to markup on H.R. 3948.

Issues of particular importance to the mining industry are summarized below. In addition, we plan to submit proposed legislative language to Committee staff for their consideration. We look forward to working with the Committee to enact a Clean Water Act that is good for the environment and good for the economy.

Substantial Revisions to the Clean Water Act Are Premature

We strongly believe that the Clean Water Act is an environmental statute that is "working" and that a number of the requirements in H.R. 3948 are premature at this time. EPA and the states are aggressively implementing numerous programs that were added by the 1987 amendments to the Act, which have only recently been fully funded. These programs include stringent new toxics and water quality standards provisions; new provisions regarding technology based effluent guidelines, a new nonpoint source management program, and significantly increased civil and criminal penalties. While much has been done to implement the 1987 amendments, it is evident that the full effect of those amendments have yet to be realized. Efforts now should be focused on fully implementing existing programs and "fine-tuning" them, before further comprehensive reform is undertaken. We urge the Committee, therefore, to focus this reauthorization effort on improving the implementation of the Clean Water Act and the 1987 Amendments.

Water Quality Standards for the Arid Areas

H.R. 3948 takes a first important step in addressing the critical issue of water quality standards for unique waterbodies by acknowledging the need for guidance on standards for arid areas. Section 304 of the Bill should be expanded, however, to ensure that states have greater flexibility, as well as accurate scientific data, to develop water quality standards for waterbodies in arid areas that protect the actual uses and wildlife present.

The development of appropriate water quality standards for waters in arid areas is of great importance to the mining industry. Many mining operations in arid areas, particularly in the West, are located along or near natural drainage channels sometimes called "ephemeral streams" or "dry washes" that flow primarily in response to storm events and are normally unable to support fish or other aquatic life. These natural drainage channels have historically been subject to inappropriate water quality standards based upon unachievable use designations and specific criteria premised on a series of assumptions tailored to perennial waters because there is insufficient information and guidance with respect to the development of appropriate standards for these unique ecosystems.

While we support the intent underlying Section 304 of H.R. 3948, we are concerned that the provision, as drafted, does not adequately address the root of the problem, i.e, the lack of accurate information regarding arid ecosystems. Furthermore, it provides no relief pending the development of appropriate criteria. A broader framework is needed to address the issue of water quality standards for arid areas on both a short term and a long term basis. We would urge the Committee to consider the language that was offered by Senator Reid in the Senate Environment and Public Works Committee and adopted by the Committee. That amendment established a comprehensive mechanism to promote and fund the development of accurate data relevant to arid ecosystems and, with the support of such data, the establishment of regional and site-specific water quality criteria tailored to meet the characteristics of ephemeral and effluent dependent streams, particularly in the Arid West.

On an interim basis, states would be authorized to adopt alternative use designations and water quality standards for these unique streams. Such an amendment will ensure that water quality in ephemeral and effluent dependent streams, particularly in arid areas, is protected consistent with the unique conditions present in those streams. For your convenience, we have attached a copy of the language on water quality standards for the Arid West that was adopted by the Environment and Public Works Committee.

Groundwater

AMC strongly opposes provisions of H.R. 3948, which would substantially expand the scope of the Act to cover discharges to groundwater. Of particular concern is the proposed new permit requirement for groundwater discharges. We strongly believe that the primary authority for groundwater management should remain with the states, most of which have implemented groundwater protection programs. Moreover, to the extent that it is necessary, the federal government already has sufficient authority under existing environmental statutes, including the Safe Drinking Water Act and the Resource Conservation and Recovery Act, to ensure the protection of human health and the environment. Any further regulation of groundwater under the guise of the Clean Water Act is unnecessary and inappropriate.

Management of Stormwater at Mining Sites

AMC urges the Committee to clarify the stormwater permit program as it is applied to the mining industry. EPA's implementation of the stormwater program has resulted in the creation of significant regulatory obstacles for both active and inactive mining operations. Unless these obstacles are addressed, the continued viability of the mining industry in the United States will be in significant jeopardy.

Definition of Stormwater. Of greatest concern is EPA's recent reversal of a long-held position regarding the scope of liability of a mine operator for stormwater discharges, including specifically the Agency's interpretation as to what constitutes "stormwater." EPA has, for the past two decades, distinguished between "process waste water" and "mine drainage," which are subject to technology-based effluent limitations established in NPDES permits under the Act, and stormwater discharges, which are covered by the stormwater permit program. The distinction is critical. Because of the substantial potential volume of stormwater that may be associated with a mining site and the size, remoteness, and topography of a mining operation, it is often virtually impossible to capture all stormwater at a site. EPA has acknowledged, moreover, that these stormwater discharges from mining sites present little threat to human health or the environment. For these reasons, and because of EPA's past position, it was generally expected that stormwater discharges (as opposed to process water or mine drainage) would be controlled through site-specific "best management practices."

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Now, however, after issuing regulations to cover these stormwater discharges, EPA is proposing to change its position and regulate virtually all stormwater at mining sites either as process waste water or mine drainage subject to the traditional effluent limitations permit program. This change will mean that existing mines will be immediately out of compliance retroactive to at least 1982. It will also mean that mine operators will be subject to extremely burdensome requirements inappropriate for the volume, nature, and limited frequency of stormwater discharges. Compliance with these requirements at many sites will be technically impracticable and prohibitively expensive.

AMC urges the Committee, therefore, to incorporate language in H.R. 3948 to clarify that precipitation runoff from mining operations not associated with manufacturing or process waste or mine drainage is properly within the scope of the Act's stormwater permit program. This would include runoff from waste rock and overburden areas, the outside of tailings piles and ancillary areas such as materials storage areas, maintenance areas, and haul roads. We believe that such a clarification is consistent with the underlying intent of the stormwater program and will not undermine environmental protection in any way.

Historical and Inactive Mine Sites. EPA has similarly revised its policy with respect to the management of stormwater discharges at inactive mine sites. There are numerous historical and inactive mining sites across the United States, which were mined, but subsequently closed for economic reasons. More than half of these sites are located on Federal lands. In many cases, these historic mining sites are now the most promising areas for future development. Environmental policy should encourage, not discourage, the exploration and remining of these sites.

EPA has adopted the position that even stormwater discharges from inactive and historical mine sites are subject to the stormwater permit program. Now, therefore, in the case of historical sites which are being explored for future development or are being remined, permits are required for any stormwater runoff emanating from anywhere on the entire site, whether or not the runoff is associated with the current exploration or mining operations. This broad interpretation makes it virtually impossible to undertake an exploration or remining operation.

AMC urges the Committee to clarify that in the case of an inactive mine, a mine operator's liability for stormwater discharges will be limited to stormwater runoff from the surface disturbances created by the new activity. Such a clarification would further the goals of this Act and significantly improve environmental conditions at historically mined sites.

Wetlands

H.R. 3948 does not address the wetlands program of the Clean Water Act. The issue of wetlands protection is of significant concern to the mining industry insofar as many mining operations take place on, or in the vicinity of, areas that, under some definitions qualify as wetlands. Because the mineral resources that the mining industry relies upon are

fixed in location and of limited quantity, the country as a whole as well as AMC member companies are seriously disadvantaged by wetlands protection regulations and policies that limit or deny access to, or the use of, these lands and mineral resources. However, AMC and its member companies recognize the ecological importance of wetlands and support reasonable protective measures. To this end, AMC has supported the Wetlands Conservation and Management Act, H.R. 1330, that was introduced by Congressman Hayes. We urge the Committee to consider incorporating the language of H.R. 1330 in this Bill.

Antidegradation

AMC supports the existing antidegradation policy as described at 40 C.F.R. §131.12, which was intended to protect existing uses of water at existing levels of water quality. In attempting to codify that policy, however, Section 302 significantly expands the scope of the policy. In particular, we are concerned that provisions requiring the identification and protection of water uses dating back to November 28, 1975, will expand the antidegradation policy to require enhancement of water quality without regard to actual existing uses or historical loadings. Requiring the restoration of waters to protect historical, but no longer current, uses of a waterbody could subject industrial and other users of the water to significant and in many cases unreasonable costs.

The antidegradation policy presents particular problems for a number of mining operations, many of which are located on public lands, particularly in the Western and Southern states. As drafted, H.R. 3948 would mandate that states develop and implement an antidegradation policy, including designating and then protecting as "outstanding national resource waters," all waters within the boundaries of a national park or national wilderness area, and any waters of exceptional recreational or ecological significance. This broad mandate could make it virtually impossible to conduct any further mining operation on or near any public lands. Moreover, a designation of an outstanding national resource water and the associated implications for antidegradation could have a significant adverse impact on proposed upstream development across state lines. The Committee should evaluate carefully these potential impacts.

Indeed, it could be argued that virtually every major water source in the Western United States falls within the scope of the definition of an outstanding national resource water. Thus, regardless of what designated use a state might otherwise have assigned a particular water body, if it can be characterized as an outstanding national resource water, industrial or other activities may be prohibited or curtailed in the future under the guise of significantly expanded and often inapplicable water quality considerations. We are concerned that the proposed definition of an outstanding national resource water is overly broad, and that the procedures for states to exclude waters are burdensome. Further, without clarification as to what constitutes degradation, EPA and state environmental agencies, often under political pressure from citizens, will be put in the position of becoming ultimate arbiters of economic growth. This is an issue of great importance to the mining industry, and we hope to work with the Committee to craft a policy that addresses the problem without threatening the economic viability of the industry.

Mixing Zones

AMC urges the Committee to reaffirm the validity of mixing zones, particularly in those areas where the use of mixing zones is most critical. Mixing zones are limited, defined areas within which the mixing of effluents and receiving waters occurs. Applicable water quality criteria must be met at the edge of the mixing zone, but do not apply within the zone. EPA has acknowledged that properly defined mixing zones do not interfere with the overall integrity of a water body or achievement of designated uses.

Without mixing zones, dischargers would be forced to meet extremely restrictive water quality standards at the point of discharge. In many cases, this would prove technically infeasible. Even where compliance is technically feasible, it would impose a crushing economic burden that many dischargers could not bear. If applying standards at the end of the pipe produces technically or economically infeasible limits, regulators face a choice between shutting down facilities or changing the standards. Using reasonably defined mixing zones avoids this result, while assuring protection of the water body as a whole.

Mixing zones are especially important to the mining industry. Because of the ephemeral and low flow nature of the receiving waters of many mine discharges, especially in the Western states, mixing zones serve a critical function for mining operations. Many mines discharge to low flow streams, dry washes and ephemeral streams that, for months of the year, may have little or no flow. In order for mining operations to comply with relevant federal and state discharge limitations, therefore, it is essential that H.R. 3948 continue to allow the use of mixing zones.

While we are pleased that H.R. 3948 implicitly acknowledges the validity of mixing zones, at least under some circumstances, we are concerned that, as drafted, Section 303 would unnecessarily limit or prohibit mixing zones for the discharge of pollutants that are deemed to be "persistent, toxic, or highly bioaccumulative" without regard to actual exposure or other relevant factors necessary to make a scientifically credible assessment of the environmental impact of a pollutant. Moreover, to date, EPA has not established properly validated scientific methodologies for measuring toxicity or bioaccumulation. Under these circumstances, then, it is possible that mixing zones might be prohibited when a discharge of metals is involved, even where there is little or no measurable adverse impact at that point where there is actual or potential exposure to aquatic or human life. In some cases, such a prohibition could effectively shut down a mining operation, which by its very nature, will result in the discharge of some metals.

Toxic Pollutants

Section 308 would require EPA to develop effluent limitations and standards for toxic pollutants based upon best available technology. Such standards (or prohibitions) would be required to take into consideration, among other factors, "the availability of, and risk posed by, substitute chemicals or processes or the availability of treatment processes or control technology."

We are pleased that the Bill does not arbitrarily mandate the phaseout of toxic chemicals. In particular, we strongly support the introduction of a risk-based analysis in the development of standards for toxic pollutants. We remain concerned, however, that by directing EPA to take into account substitute chemicals and processes, the Bill effectively give EPA direct and unprecedented control over the manufacturing process.

EPA simply does not have the expertise to dictate product development and manufacturing decisions. Moreover, such a radical departure from the current framework of the Clean Water Act is unnecessary. EPA already has substantial authority to control pollutants in point source discharges under Sections 301, 304, and 306 to protect public health and the environment. Pursuant to this authority, EPA has implemented numerous effluent limitations and new source performance standards that have substantially reduced discharges of toxic and other pollutants from industrial sources. At a minimum, we would urge that the reference to "substitute chemicals and processes" in Section 308 be deleted.

Conclusion

We appreciate the opportunity to bring to the Committee's attention some of the key concerns of the mining industry with respect to H.R. 3948 and look forward to continuing to work with the Committee and its staff towards the passage of an environmentally and economically responsible Clean Water Act reauthorization bill. If you have any questions regarding our views, please contact James Gilchrist, Vice President Environmental Affairs (202/861-2876). We look forward to an early opportunity to discuss with you and your staff in detail the comments and recommendations made here.

Sincerely,

John A. Knebel
President

TESTIMONY OF
CAROL M. BROWNER
ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
OF THE
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
U.S. HOUSE OF REPRESENTATIVES

May 24, 1994

Good morning, Mr. Chairman and Members of the Subcommittee. I am pleased to appear before you today to discuss the need for reauthorizing the Clean Water Act (CWA). I know that we share a strong desire and commitment to protect the Nation's water resources in the most effective, efficient manner possible. Today's hearing must begin our final push for this House's action to reauthorize a strengthened CWA this year.

A little over a year ago, I appeared before this Subcommittee to discuss the challenges that confronted us as we tried to achieve the goals of the CWA. I felt then, and I emphatically believe today, that we have a remarkable opportunity to create a second generation environmental law, one the develops new and innovative solutions that move beyond simple command and control approaches. I spoke of the challenges to address wet weather flows, to promote watershed protection and pollution prevention, to streamline the administration and enforcement of the Act, and to ensure that funding is available to States and municipalities. I also spoke of my intent to work with you, Mr. Chairman, the Subcommittee, other Members of Congress and their staff, other federal agencies, State and local governments, and industry and environmental groups to meet these challenges.

Since my appearance, we have released *President Clinton's Clean Water Initiative*, our set of comprehensive recommendations for reauthorization that was diligently crafted

among the federal agencies. EPA consulted with environmental groups, the regulated community, and our partner State and local governments; listened to their ideas; and incorporated those ideas into our thinking. EPA has also worked with your staff and that of others in Congress to help develop a renewed CWA that will sustain and reinforce America's commitment to our waters and aquatic resources. The Senate Environment and Public Works Committee has reported out its CWA proposal, which now awaits floor action.

I am pleased to note that many of the proposals the Administration recommends are included in H.R. 3948, and I look forward to working with you to improve the bill further. However, we must not lose sight of our goal -- a better, more flexible CWA that will result in increased protection for our water resources at a lower cost. I am concerned that certain proposals being discussed in the Congress may lead us away, rather than toward, an improved and enhanced CWA. While I recognize that legitimate issues of concern remain to be discussed and addressed, we must take advantage of the opportunity now to amend the CWA. We must not allow ourselves to become so distracted that the goal of cleaner, safer water slips away. I hope we will see a law enacted this session.

The need for a new law was vividly demonstrated to me this past Earth Day which I celebrated by spending time with some local students on a boat on the Anacostia River here in Washington, D.C. We caught some fish, along with a beer can or two, and spent time looking at the overall condition of the River. We did not like what we saw. One of the fish had a tumor, a marina along the River was no longer accessible because it had been filled in with silt, and old tires, broken bottles and trash were scattered along the banks. Everywhere we looked we saw evidence of society's impacts and the carelessness with which some in this

country treat our water resources. These students and I are not alone in the concerns about our waters. America cares. A recent poll indicated that 77% of the people in this country want government to do more to assure clean water.

And we need to do more. The same day I toured the Anacostia I released the latest National Water Quality Inventory, the biannual report based on State data which gives the most current assessment of the overall condition of the nation's waters. In spite of the progress we have made in meeting the goals of the CWA, States reported that approximately 40% of assessed waters are either impaired or degraded, mainly by polluted runoff from farms, storm sewers, and urban areas. In 1993, approximately 1,300 waterbodies were sufficiently contaminated by metals, organic chemicals, and pesticides that State authorities had to limit the public's consumption of the fish from these waters. Between 1990 and 1992, 18 States had to issue restrictions on the harvesting of shellfish in over 3,450 square miles of coastal and estuarine waters due to urban runoff, and discharges from storm sewers, municipal wastewater treatment facilities, industrial plants, and marinas.

The problems continue. Over 660 million pounds of toxic chemicals pour into the nation's waterways and municipal sewers annually. 1,100 cities serving 43 million people have sewer systems that during rains can discharge combined rainwater and raw sewage from as many as 15,000 overflow points. Between 60 - 80% of riparian corridors have been degraded. For many aquatic endangered species, poor water quality is an important factor. Based on information from the 1980's, about half the mainland's original 220 million acres of wetlands have been destroyed, and wetland losses continue at an estimated rate of nearly 300,000 acres annually. Current estimates for losses are lower, but still significant. State

and local governments, while seeking to improve the environment, are confronted with increasing resource demands.

We must act. Poor water quality and destruction of aquatic resources threaten public health, jobs, and recreation. The CWA has provided us with many successful programs and a solid framework for further action. Although we can point with pride to many examples of improvement, the impact of previously detected problems is becoming more evident, some persistent problems remain, and some previously undetected, more subtle problems are becoming apparent.

As we seek new ways to reduce pollution , we must also seek ways to reduce costs. The Administration has heard the unfunded mandates message. We have responded. *President Clinton's Clean Water Initiative* would result in annual cost savings of 27 billion dollars compared to a stringent interpretation of the current CWA requirements. Now we look to Congress to be our allies in amending the CWA so that we can realize these potential savings and meet our key policy objectives to:

- maintain and improve our water quality infrastructure;
- confront polluted runoff head on;
- promote adoption of a watershed approach;
- establish a more reasonable, balanced approach to controlling storm water and combined sewer overflows without sacrificing water quality goals;
- ensure fair, flexible and effective protection of wetlands;
- reduce the flow of the most persistent, bioaccumulative toxics into our nation's waters;
- improve compliance with the law; and

- encourage pollution prevention and the use of innovative technologies.

Water Quality Infrastructure

Since 1956, the federal government has provided nearly 70 billion dollars to local communities to help them construct wastewater treatment plants. In spite of the funding, and significant State and local contributions, EPA's most recent Needs Survey identified 137 billion dollars in wastewater treatment, combined sewer overflow, and nonpoint source infrastructure needs. The State Revolving Loan Fund, known as the SRF, has been tremendously successful as a flexible, self-perpetuating mechanism to meet infrastructure needs. In its relatively short life it has made available 11 billion dollars in federal and State funds for vital water quality projects. However, the SRF's authorization expires this year.

The Administration remains an active partner is helping to fund infrastructure needs. It is committed to working with State and local governments to create a long-term viable source of funding for water quality infrastructure. Our objective is for the SRFs to provide approximately two billion dollars in assistance annually, including funds available from repayments of SRF loans. Thus, we recommend that authorization for federal capitalization funding continue through FY 2004, providing approximately 13 billion additional dollars. By this time and with our recommended funding levels, we anticipate that the combination of federal capitalization grants, State matching contributions, leveraging and repayments will enable SRF loan activity of around 2 billion dollars annually.

Six years of experience with the SRF has demonstrated potential legislative improvements. We need to create a mechanism to help disadvantaged communities, to

expand potential loan assistance in a limited number of cases, and to expand State priority systems. Doing so would enable States to target resources more efficiently, flexibly and effectively at highest risk problems.

Although our primary goal in reauthorizing the SRF is to protect the environment, we cannot overlook how this program also is good for the economy. Each billion dollars spent in building environmental infrastructure supports as many as 22,400 jobs. The Administration is seeking 13 billion dollars for the SRF over the next ten years.

Polluted Runoff

The Nation has achieved considerable success since 1972 in substantially reducing the discharge of pollutants into our surface waters, primarily through the control of municipal and industrial point sources of pollution. While point source discharges continue to present an environmental threat in some areas, our nation's waters are endangered by many other activities that are associated with polluted runoff.

This is not a new problem, but one we need new tools to address. In the 1987 amendments to the CWA, Congress established a national approach of relying on State programs for managing nonpoint source pollution. As a result, all States have developed and are implementing management programs for controlling polluted runoff, supported, since 1990, by about 270 million dollars in EPA grants. Under the Clinton Administration, we have increased funding for nonpoint source grants from $50 million in 1993 to $80 million in 1994, and have requested $100 million in 1995. States are working with the Department of Agriculture, the Department of the Interior and NOAA to channel resources these agencies

have to improve polluted runoff management. In response to requirements of the 1990 Coastal Zone Act Reauthorization Amendments, twenty-nine coastal States and Territories are developing coastal nonpoint pollution programs which are to be submitted to NOAA and EPA for approval next year and which are to contain enforceable management measures conforming to the national guidance issued by EPA and NOAA in January 1993.

State efforts have led to increased public awareness of polluted runoff and of ways to manage these problem sources. State management programs under the CWA have demonstrated the effectiveness of a variety of innovative management practices and have established viable institutional arrangements. Efforts by many federal agencies have buttressed State efforts and have led to improvements.

Yet, despite the noticeable progress in some areas, polluted runoff related impairments are so widespread that our efforts must advance even further. Existing State programs under the CWA, while providing a good, basic framework, must be upgraded and strengthened. We encourage States to implement strong broad-based watershed management plans to address water quality problems. State programs should be built on management measures for existing sources causing or significantly contributing to water quality impairments or threatened impairments as well as measures for all new sources of runoff pollution. The management measures would be based on EPA guidance which, in turn, would consider costs, pollution, and risk reductions achieved and which would allow for appropriate local tailoring. States should be required to include authorities for enforceable State and local implementation mechanisms in their management programs, but should be provided flexibility to rely initially as much as possible on successful voluntary approaches.

State programs must include enforceable authorities from the outset as one means of stimulating voluntary action and of addressing those hopefully limited number of cases where implementation of necessary measures clearly does not occur voluntarily. State authorities must be backed by federal enforcement authority if progress is not made after sufficient time for implementation. In short, the CWA must be amended to authorize a flexible State program with a mix of voluntary and regulatory approaches that allows State and local governments to focus on the highest priority problems in a manner suited to local conditions.

I am pleased to note that H.R. 3948 adopts an approach similar to our recommendation. However, it may fall short in at least three areas. First, we believe that any exemptions to management measures should be risk-based, and limited to those sources which do not contribute substantially to water quality impairment. Second, we believe that best management practices and measures should be required for new nonpoint sources in unimpaired watersheds. Many practices can be incorporated into the design of new sources thereby preventing new pollution from impairing existing clean waters. Third, we believe that there must be provision for implementation of federally-established management programs where a State program has been disapproved. Without provision for implementation, a federally-established plan is meaningless.

The current CWA does not give us effective tools to reduce polluted runoff. Yet, some proposals under discussion would weaken it further. They would delay current requirements for implementation of management practices as "expeditiously as practicable" in favor a longer process during which States would only need show reasonable progress towards meeting water quality objectives. Minimum requirements for best management

practices and measures (considering costs, and pollution and risk reductions achieved), requirements to identify or target water quality impairments, minimum requirements for enforceable policies and mechanisms, including authority to obtain civil penalties or injunctive relief and workable alternatives if a State fails to develop or implement a program, are program elements essential to successful control of polluted runoff.

Watershed Approach

The potential causes of a particular waterbody's impairment are as varied as human activity itself. Aquatic ecosystems may be threatened by discharges from industrial or municipal sources; from urban, agricultural or other forms of polluted runoff; from habitat disturbances and hydromodifications; from contaminated ground water influencing surface water; from overharvesting of fish and other organisms; from the introduction of exotic species; or even from deposition of air pollutants. While many of these problems are addressed by CWA programs, there are many other federal laws and State and local programs that provide ways to protect, restore and enhance water resources. The federal laws have tended to focus on particular sources, pollutants, or water resource uses and have generally failed to protect ecosystems in a coordinated manner from the cumulative impacts of a multitude of activities.

Communities around the country have tried to address the complex problems affecting the quality of their waters and aquatic resources through an integrated, coordinated approach. Coos Bay in the Coquille River Watershed along Oregon's southern coast is a good example. The rivers and streams feeding into the Bay are highly valued as salmon and trout habitat,

and the estuaries provide highly productive shellfish beds. There are, however, numerous environmental threats to this very fertile watershed. Salmon need gravel to spawn, yet forestry activities have filled salmonid spawning gravels with sediment. Juvenile salmon need clean, clear, cold water to survive, yet cattle have overgrazed riparian areas, causing widespread bank erosion and severely elevated water temperatures. High bacteria loadings in the streams, also from cattle, have either resulted in or threatened the closure of commercial shellfish beds. Extensive diking and water management structures threaten the salmon stock by preventing young salmon from reaching important off-channel habitats in the winter months, resulting in high fish mortalities. No one is more directly affected than those who live near Coos Bay and in the watershed.

To address these problems, a wide spectrum of public and private partners has joined together to develop a multi-media, multi-discipline watershed program. These stakeholders include representatives from several Oregon State agencies, including its Departments of Agriculture, Forestry, Environmental Quality, and Fish and Wildlife, along with the Soil Conservation Service and EPA. All are working together to integrate numerous programs to restore and protect this valuable watershed. Thanks to these efforts, a new awareness now exists among those who live in the Coos Bay/Coquille River Watershed of the causes of the problems threatening their resource and of their responsibility to help solve those problems.

In addressing the complex problems facing the Coos Bay/Coquille River, and other watersheds across the country, stakeholders have shown the value of looking to the watershed as a whole rather than specific sources of pollution, evaluating the particular needs of the watershed based on risk, and then tailoring individual, workable solutions to meet those

needs. The National Estuary Program and scores of grass roots efforts vividly demonstrate that people are most likely to protect what they know -- the stream in their backyard, the lake where they grew up, the beach where they vacation -- or the local resources which provide their drinking water, recreation, and sustenance, or support their livelihood. Adoption of the watershed approach can promote more effective and economical clean up. It enables the coordination, integration, and leveraging of programs and resources, resulting in increased efficiency and long run cost savings. The CWA should be amended to provide States with a Federally supported framework for its development and implementation and to provide incentives sufficient to ensure its widespread adoption. I am pleased that H.R. 3948 recognizes the value of the watershed approach and proposes a program similar to our recommendation.

Combined Sewer Overflows and Storm Water

The reauthorization of the CWA provides us with the opportunity to protect the environment while significantly reducing potential costs. Combined sewers are a remnant of the country's earliest water infrastructure, many being built at the turn of the last century. Correcting the problems they create has a significant price tag, one that many of the affected cities would have difficulty paying. Because of the high cost and the need to control raw sewage, EPA and a diverse group of stakeholders, including representatives of environmental groups and municipalities, negotiated a workable, affordable, and environmentally protective solution. They reached consensus on a Combined Sewer Overflow Policy framework. The Policy was published in the Federal Register this past April 19. It is flexible and encourages

communities to look at a variety of control options and to consider cost in making final decisions. Compared to strict interpretation of existing requirements, the Policy would save cities 11 billion dollars annually.

As I think you will agree, this Policy should be adopted as the national framework for CSO management. Legislative endorsement is needed to clarify any uncertainty over options open to municipalities, and to eliminate the fear of litigation. H.R. 3948 should preserve the flexibility needed to control CSOs by expressly endorsing the Policy.

Urban stormwater runoff impairs 43 percent of estuary and 24 percent of lake waters assessed. States and EPA have begun a storm water permitting program which applies to larger cities and industry. However, given the enormous number of currently unregulated sites that generate storm water, we need a more targeted approach, one that enables us to focus on high-priority discharges in urban areas and which provides for adequate controls without causing unnecessary burdens for small businesses and local governments. We must be able to deal with all threats to our water resources and I would object to proposals that would permanently exempt from control dischargers in smaller urban areas which may be creating significant problems, including many dischargers already regulated by States.

The Administration would amend current CWA requirements by phasing in control requirements for targeted dischargers over an extended time period. By phasing in the requirements, States would have adequate time to develop appropriate water quality-based approaches for storm water, and EPA and cities would have time to determine the technical feasibility of establishing numeric effluent limits to meet water quality standards. The Administration also supports clarifying, in the manner described in the President's Initiative,

the authority under CWA §402(p)(3)(B) concerning "maximum extent practicable." Compared to existing legislation, the Administration's approach would save 16 billion dollars annually for cities and businesses. I am pleased that H.R. 3948 supports many of the recommendations we have made in the President's Initiative.

We also seek changes to the stormwater requirements as they relate to inactive and abandoned mines on federal lands. This is particularly important for the Departments of the Interior and Agriculture, since the House bill waives sovereign immunity. We estimate that there are 400.000 or more inactive and abandoned mine sites on federal lands, and that a significant number have point source discharges of pollutants, as defined under current statute, to waters of the U.S. subject to the NPDES permit program. Control of these discharges cannot be achieved in a short time frame within reasonable fiscal constraints. Legislative language has been submitted that would require federal land managers to set priorities to address abandoned mine discharges that cause environmental problems and target control measures at those sites to meet water quality standards in order to achieve the greatest environmental improvement for limited federal resources available.

Wetlands Protection

Wetlands are among our Nation's most productive natural resources, representing a vital link between land and water. They provide a multitude of services to society, are the basis of many thousands of jobs and contribute billions of dollars to the economy. They fulfill vital functions within the ecosystem, such as wildlife and aquatic life habitat and food chain support, water quality improvement and flood storage, and shoreline erosion control.

Despite this, we continue to experience an overall loss of our Nation's wetlands and our wetlands continue to be degraded. Further, wetlands regulation continues to be highly controversial.

In response, the Administration developed a Wetlands Plan last August which presented several legislative and administrative actions to better protect wetlands through a fair, flexible and effective approach. Among the most critical legislative actions identified in the Plan is the recommendation that the CWA be amended to adopt a national goal of no overall net loss of our Nation's wetlands in the short-term and a net increase in the quantity and quality of our wetlands in the long-run. In addition, the Administration believes Congressional action is needed to increase State and local roles in protecting wetlands, including authority for EPA to use its States Wetlands Grants Program to fund the implementation of State wetlands programs. Moreover, the Administration recommends legislative endorsement of the current wetlands regulatory definition, including the exclusion of prior converted croplands and the continued use of the 1987 Corps of Engineers Wetlands Delineation Manual, and the use of mitigation banking, as well as legislative clarification of the scope of regulated activities under Section 404 to include discharges of dredged material associated with excavation activities that degrade or destroy wetlands.

I am pleased that H.R. 3948 contains many of the provisions outlined in the Administration's Wetlands Plan. However, I would like to work with the Committee to address a number of areas. For example, we believe that revising the section 404(b)(1) Guidelines would result in delays and confusion, and is unnecessary because the Guidelines provide the flexibility necessary to tailor regulatory reviews to the function of the particular

wetlands at issue and to the anticipated environmental impacts associated with the discharges. To address concerns that this flexibility was not being consistently applied, in August 1993 EPA and Army issued guidance to the field on this matter. As for administrative appeals, the Administration believes that any administrative appeals process under the Section 404 program should, to address the most significant concerns of applicants without creating delays and excessive workload, be limited to appeals of the Corps' determination that it has regulatory jurisdiction over a particular parcel of property, permit denials, and administrative penalties. The Administration also believes that any statutory definition should clarify current law and requirements, not create confusions and uncertainty. Finally, the Administration believes that the concerns of cranberry growers can be addressed without creating new exemptions from permitting requirements, and in ways that not only meet the needs of the potential applicants, but also provide for appropriate State roles and adequate environmental protection.

I am concerned that other possible proposals under discussion would be detrimental to wetlands protection. For example, the Administration has concluded that nationwide, *a priori* categorization and ranking of wetlands would be unworkable given its technical, fiscal, and environmental implications. Moreover, there is no scientific basis for a nationwide ranking of functionally distinct and diverse wetlands types. Further, the suggestion that the federal government buy all "high value" wetlands would be unfeasible from a budgetary standpoint. The Congressional Budget Office estimates the acquisition costs alone for the lower 48 States at over $10 billion. The Administration's Wetlands Plan also rejected calls for changes in the criteria for wetlands delineation pending completion and evaluation of the

National Academy of Sciences study of wetlands delineation. The Administration also rejected major changes in the roles of the Federal agencies in the Section 404 permit program, but emphasized flexibility and improved administrative management in reviewing permits. Furthermore, the Administration believes that the mapping and compensation, as well as categorization, aspects of this proposal would be redundant or excessively costly. CWA reauthorization presents a real opportunity to move wetlands protection forward through the enactment of a balanced, common sense, workable set of improvements; I'm afraid that other proposals would do just the opposite.

Other Priorities

The discharge of certain toxic pollutants remains a serious problem in some cases. Amendments to the CWA are needed to improve the framework for addressing these pollutants. For example, we need to develop a better scientific understanding of their impact and, based on sound science and as necessary, we need the legal authority to restrict or prohibit the discharge of the most highly toxic and bioaccumulative pollutants, and the discharge requirements should be based upon a number of relevant factors which are listed in *President Clinton's Clean Water Initiative*. H.R. 3948 already includes the important toxic discharge reforms outlined in the Administration's initiative.

The current enforcement program would be more effective if improved in a number of areas. Those who have harmed our environment and deprived society of the benefits of a healthy, functioning ecosystem should not benefit economically from their actions, a premise which should be reflected in the CWA. EPA's ability to respond to emergency situations

should include our ability to protect the environment as well as public health. Federal facilities, while seeking compliance through pollution prevention, self auditing and other efforts, should also be subject to the same threat of enforcement and penalties for CWA violations for which a private person would be liable. Effective administrative enforcement measures are essential for aggressive and cost-efficient enforcement against polluters. EPA, Coast Guard, and Corps of Engineers experience has demonstrated the need to enhance certain existing administrative enforcement provisions and to provide additional authorities essential to effective implementation of a strong enforcement regime. We urge that the legislation include enhanced administrative and judicial enforcement options against oil and hazardous materials discharge violations by foreign and domestic vessels as well as by domestic facilities. Further, the Administration believes that citizens should be encouraged to take an active role in protecting their environment, and seeks legislative improvements to eliminate barriers to effective citizen enforcement.

Pollution prevention is a high EPA priority, but has been difficult to promote in existing programs because of the lack of specific pollution prevention authority. Twenty States have enacted legislation requiring various types of facility planning which typically requires plants to assess their production processes, identify opportunities for source reduction, set quantifiable goals, and establish a plan to meet these goals. They've demonstrated that such an approach can be done. Many municipal treatment plants are beginning to require source identification and pollution prevention assessment studies for industries discharging into their systems. I believe that the CWA must be amended to provide permitting authorities the discretionary authority to incorporate pollution prevention

planning into the NPDES permitting and the pretreatment programs. In exercising this discretionary authority, permitting authorities would consider the need for the information, the burden of developing and implementing a plan, and the environmental and public health risk of the pollutants being addressed. Before requiring implementation of any pollution prevention activity, the authority should evaluate the relative cost-effectiveness of alternative pollution control requirements. Authorizing permitting authorities to require facilities to implement pollution prevention plans would reduce pollution on a facility-wide, multi-media basis, and could do so at costs lower than those of controlling discharges. These plans should address prevention approaches for reducing releases into all environmental media, and be well coordinated with planning provisions under existing State and other Federal programs. H.R. 3948 needs to extend pollution prevention planning to smaller facilities and to multi-media tradeoffs. Otherwise, many excellent pollution prevention opportunities would be lost.

To promote pollution prevention further, the CWA must be amended to remove existing disincentives to technological innovations and to promote their wider application. In addition, pollutant trading should be encouraged and implemented to promote market incentives to reduce pollution. H.R. 3948 should include, as does the Administration's Initiative, a proposal to promote the use of innovative technologies and trading opportunities.

Another important reason to press for reauthorization of the CWA is to ensure that State programs are adequately funded. Current funding of the NPDES, pretreatment, and sludge management programs is insufficient to implement current responsibilities. Advancing science, more comprehensive controls, and future legislative changes place increasing

demands on already stretched resources. We therefore believe that the Act must be amended to require comprehensive fee systems which alone, or in conjunction with appropriated funds, grants or other revenue sources, would completely cover the costs of the NPDES, pretreatment, sludge management and other surface water programs such as water quality standard setting and monitoring. Such fees move us further towards a system where polluters, and not the public, pay the costs of those programs that are developed to enable polluters to discharge in an environmentally safe manner.

The last reason to reauthorize the CWA that I want to present in this testimony is the need to address environmental problems along the U.S. - Mexico border. The plight of the 300,000 U.S. residents who live along the border in unincorporated communities called colonias is overwhelming. Most residents have no clean running water in their homes or toilet facilities. Water-borne diseases such as hepatitis and dysentery are rampant and the threat of epidemic is always present. President Clinton has proposed spending 60 million dollars this fiscal year and 50 million dollars for each of fiscal years 1995 through 1998 to help colonias residents live in humane conditions. Our proposed amendments, which have been provided to this Committee, would authorize these funds. The proposal must become law before October 1, or we will not be able to use for this purpose the fiscal year 1994 money which has been reserved by the Appropriations Committee pending authorization.

Thanks to the passage of the North American Free Trade Agreement, EPA is now working with the Departments of State and Treasury on speeding the financing and construction of environmental infrastructure along the border where 9 million people live and work. The Border Environment Cooperation Commission and the North American

Development Bank will promote and fund wastewater pollution control projects to clean the shared water resources on the border. The Administration's proposed amendment to authorize 600 million dollars through the year 2001 will "prime the pump" and provide a pool of private and public sector financing larger than has ever been directed at the border. EPA and the 9 million people along the border will appreciate your support of our two amendments to improve conditions in this area.

Conclusion

I have tried today to highlight some of the many compelling reasons we must reauthorize the CWA this year. The Administration and Chairman Mineta have offered proposals that can lay a solid foundation for a CWA that will truly be that second-generation environmental law I spoke of earlier: stronger, more flexible, streamlined, reinvigorated, and less costly -- a law that emphasizes discretion over prescription and that truly views the States as co-regulators. We -- the EPA, the Congress, State and local governments, the people of this Nation -- must seize this opportunity to create such a new CWA today.

* * *

Testimony to the
U. S. House of Representatives
Public Works & Transportation Committee
May 24, 1994

Joy Towles Cummings
President of HOPE (Help Our Polluted Environment)
IN TAYLOR COUNTY, FLORIDA
P. O. Box 327
Salem, Florida 32356
904 584-4544

I'm Joy Towles Cummings, and I am a fifth generation farmer and rancher from Taylor County, Florida.

The reason I come before you today is to tell you about what I believe is the most important issue facing my community and many other communities: The pulp and paper industry has spread the most dangerous toxic substances ever created into every living thing on the earth. Now, you and your colleagues here in Washington have the perfect opportunity to remedy this terrible wrong.

I have seen very severe environmental degradation in my home county during my lifetime. I'm doing my best to farm carefully, considerately, and sustainably, but I have found that this an impossible task when the air, water, soil and the food chain have been contaminated by a not-so-good neighbor.

For forty years, the local pulp mill, which uses chlorine to produce cellulose for Procter & Gamble's bleached white disposable diapers and other such products, has badly polluted the Fenholloway River. State agencies have tested and found that the mill's effluent has contaminated the surface and groundwater, poisoning the water supply of the people, fish, and wildlife in Taylor County, with hundreds of organochlorines so complex that only a few can be chemically identified. In 1987, the EPA found that the few fish that still live in the dead Fenholloway River are very highly contaminated by dioxin.

The Fenholloway, where the mill dumps its toxic effluent, is Florida's only "industrial river". A 1947 state law classified the river as an industrial river, and the county as an industrial area. That law, still in effect, has allowed the only industry in the county to be one of the worst polluters in the entire nation. The lack of local, state, and federal action for so many years to remedy the situation should be very embarrassing to our local officials, the state of Florida, and the EPA.

You see, the situation where I live is very serious. We will soon be marking the third anniversary of the meeting in Taylor County, Florida between the Florida Departments of Environmental Regulation (DER) and Health & Rehabilitative Services (HRS), local officials, and citizens, during which the DER and HRS announced that our water wells have been contaminated by Procter & Gamble's organochlorine-poisoned pulp mill effluent.

Not much has changed where we live since that evening three years ago:

* The pulp mill continues to poison our groundwater, our wells, the Fenholloway River, the Floridan aquifer, fish, wildlife, the food chain, and the Gulf of Mexico every day with dangerous organochlorines.

* EPA allows the company to continue to operate under an expired, inadequate 1984 NPDES permit.

* EPA still does not regulate the mill's discharge for the entire 22 mile length of the Fenholloway River.

* Twenty-five square miles of seagrasses in the Gulf of Mexico are still dead, with more dying, from the mill's effluent. One of the most valuable estuaries is being continually contaminated by toxics, resulting in loss of habitat, and contaminated fish and shellfish.

* Still, the only warning signs against consuming any amount of fish from the Fenholloway and the Gulf due to the dioxin contamination have been posted by my friends in our local environmental group HOPE, but not by P&G, DER, HRS, or the EPA.

* P&G/Buckeye still uses the sludge and effluent settlement ponds with gaping sinkholes, pouring poisonous effluent into the aquifer every day. The company also dumps thousands of tons of toxic sludge into wetlands, which are the headwaters to all the creeks and rivers in the county. The EPA assures us that they will, sometime in the future, complete studies on the safety of this common, questionable practice.

* The DER, HRS, and EPA still do not take responsibility for the problem, resulting in our falling through the gaping holes in the loose weave of regulatory agencies.

* P&G/Buckeye still gives away bottled water to residents who live within a two mile area, north and south of the Fenholloway. The company, in collusion with our local industry-controlled government, has run city water lines for several miles out into the county to selected areas, instead of cleaning up the on-going source of contamination. Required chemical tests have never been completed to show whether or not the city water is safe for human consumption.

* P&G (which says it has sold the mill to a group of "investors" calling themselves "Buckeye", but still financially backed by P&G) is desperately attempting to avoid liability.

* In the Fenholloway River, female mosquito fish, the gambusia species, are exhibiting hormonal and sexual changes: the female fish have taken on male sexual characteristics. This is known to be happening in only two other places in the world, one of those being Eleven Mile Creek, downstream from a Champion Paper Co. mill in Escambia County, Florida, the other downstream from a pharmaceutical plant in Italy. Scientists tell me that if fish are exhibiting this type of hormonal change, we should heed the warning, because those fish are our "canary in the coal mine ".

* Taylor County, Florida has become a toxic, unsustainable tree farm, with all its wetlands drained by the pulp industry. It is now a monoculture of young hybrid pine trees, planted in rows, then clear-cut, and chemically treated to become cellulose for bleached white disposable diapers, one of the least environmentally-friendly consumer products known in our day and age.

*Independent health studies show that the leukemia and non-Hodgkins Lymphoma rates (diseases directly attributable to dioxin exposure) in Taylor County are twice the average rate in Florida. My friends and I know too many people with cancer, too many children with birth defects and learning disabilities. We know too many with hormonal and immune system problems. It's disgusting, but at the same time eye-opening, to learn that knowledgeable people in the EPA correctly refer to our children and the population of our county as having "diminished potential".

*The EPA estimates that our mill is the third worst in cancer risk of all the mills in the EPA's 104 mill study. The EPA estimates that the cancer risk from eating fish in our area is eight in one hundred.. If you eat fish often, or if you are a subsistence fisherman where I live, the risk is four in ten.

* The company still engages in a complete greenwash of the truth in the local newspaper, while the industry and the EPA still downplay the seriousness of the situation. Consequently, the majority of the local citizens still do not understand the severity of the problem – and many still drink from poisoned wells.

I ask you now to think of the anxiety we feel knowing that our tap water is poisoned with pulp mill effluent. Think of how you'd like to have to shower in stinking contaminated water. Think of how you would feel if you had to bathe your sweet little baby in toxic well water. Think how tired you'd be of always having to use bottled water for cooking and drinking. Think of the sick and elderly who are not able to carry heavy cases of bottled water, but must still do so because their well water tastes and smells so much like pulp mill effluent that they cannot drink it. Look at this Fenholloway effluent, taken six miles away from the discharge pipe, and think how angry we are because solutions are not being implemented.

We've already done everything at the state and federal level that I know to do. We've written all the letters, attended and testified at all the meetings, demonstrated, passed out literature, begged and pleaded for help. We've served contaminated fish dinners to Carol Browner and the Florida Environmental Regulation Commission, in an effort to help them understand. I've been here before to see Ms. Browner, trying to get some help for my community. I've even delivered live contaminated fish in an aquarium to Ms. Browner at the EPA here in Washington, all to no avail.

Carol Browner, before she came to Washington to be the Administrator of the EPA, was the Secretary of Florida's Department of Environmental Regulation. Ms. Browner stated in a public meeting in Taylor County three years ago that something must be done about the serious pollution in Taylor County. Ms. Browner made that statement just a few months before the pulp and paper industry executives convinced her, in an under-the-table deal, to agree to and push for lax dioxin standards for the entire pulp and paper industry in Florida. (Ms. Browner's proposal was defeated). Ms. Browner still has not been held accountable for that dirty deed.

Now, without question, Ms. Browner, the EPA, and you have the perfect opportunity to correct past wrongs, and can now do something to protect our health and environment.

As far as we know right now, ours is the only community in Florida, hopefully in the nation, where the aquifer and water supply for the people have been poisoned with organochlorines from a pulp or paper mill. When I realized how serious our situation was, and then learned that the same effluent that is causing such damage to the fish is also in our water supply, I knew that I must try to do all that I could to stop this from continuing to occur. It's very sad, but I believe that my home county will soon be proven to be one of the most toxic areas in our entire nation. That is, unless politics and greed continue to allow the toxic truth to again be swept under the scientific rug.

I realize that this is not only a grave and serious problem where I live, it is also an issue of great concern in many other places. Half of the 104 mills in the United States are located in the South. Many of those pulp and paper communities are typically African American. This environmental racism by the pulp and paper industry is simply unforgivable. This powerful industry has convinced our government to allow its pulp and paper mills to relentlessly poison the rivers and streams, fish and wildlife, in communities which are the least able to address and solve such overwhelming problems. I hope and pray that I am adequately sharing with you the concerns of people in pulp and paper communities all across our nation.

Just last week, some of the findings of the EPA's reassessment of dioxin were revealed. Polluted pulp and paper communities anxiously await the entire truth.

* In its dioxin reassessment, the EPA now says flatly that dioxin is "likely to present a cancer hazard to humans", and dioxin "probably increases cancer mortality of several types" in humans. The EPA says that there appears to be no safe dose below which health damage does not occur. Obviously, dioxin's cancer effects are worse than the EPA previously thought.

*Four years ago, the pulp and paper and chlorine industries campaigned to force the EPA to undertake a thorough review of dioxin. It is now very clear that the reassessment has not turned out the way the industries hoped it would.

*The American Public Health Association, a 30,000 member association of public health scientists and practitioners, voted that "chlorine-containing organic compounds are found to pose public health risks" and approved a resolution that these chemicals should be treated as a class and subject to a broad phase-out.

* The International Joint Commission on the Great Lakes called on both the U.S. and Canadian governments to eliminate chlorine and chlorine-containing compounds in all industrial processes.

* The Canadian provinces of Ontario and British Columbia have announced regulations which would phase-out chlorine use by 2002.

* In Europe, many governments have enacted chlorine phase-outs, and the industry is well on its way to total conversion.

* Though the American pulp and paper industry denies it, and the EPA doesn't seem to know it yet, European companies are currently making chlorine-free versions of the same products, using the same type of pulping processes - but without chlorine or chlorine dioxide.

* In Sweden, Stora Cell and Korsnas use oxygen and hydrogen peroxide to bleach totally chlorine-free diaper-grade pulp in kraft mills, while the Lenzig AG of Austria has purchased a rayon mill in Tennessee which will use totally chlorine-free rayon pulp from Brazil. Pulp mills such as Millar Western Pulp Ltd., MeadowLake Saskatchewan, Canada, and another which is now being built in Rauma, Finland, are totally effluent-free, using closed loop systems. They produce high quality pulp products without the use of chlorine or any other form of chlorine.

* Paper mills in New York, Wisconsin, Maine, and Michigan have successfully produced very high quality paper without the use of chlorine or chlorine dioxide, or any other form of chlorine.

We know what is happening in the rest of the world. All we have to do is look at the IJC and the Great Lakes, Canada, Ontario, British Columbia, Sweden, Finland, the rest of Europe - the world is passing us by. What happened to that good old American spirit of being first in technology, first in solutions, first to find the answers to difficult problems? The American pulp and paper industry is letting other countries get way ahead of us. What's wrong with trying to find new ways to solve old problems? Where's our can-do spirit?

This testimony is printed on chlorine-free paper. The technology is available, affordable, and workable. However, outside of Louisiana-Pacific, the American pulp producers have thus far simply refused to commit to convert to chlorine-free processes. It's obvious that a clear mandate is needed to ensure that the industry converts as soon as possible.

All of these factors add up to a recognition by governments, scientists, and the industry world-wide that chlorine should be phased-out. The pulp and paper industry can convert to chlorine-free processes without a loss of jobs, and with an increased demand for poison-free products, as the European industry has already demonstrated.

A few weeks ago, in a special editorial supplement to Pulp & Paper/Pulp & Paper International, there appeared an article called "Closing the Loop, Engineering the Effluent-Free Mill". In that article, the authors say that "Most pulp and paper industry experts agree that effluent closure is an attainable goal." Of course, effluent closure (or closing the loop), can only be accomplished by stopping the use of chlorine and chlorine dioxide.

All of the 104 chlorine-bleaching pulp mills in the U.S. need to commit to chlorine phase-out timelines. All of these mills continue to cause serious environmental damage every day. Every day that the industry is allowed to continue discharging poisons to air, water, and soil means that permanent damage is being done to the health of the surrounding community and environment. Now, the EPA is finally admitting that dioxin and the other organochlorines produced by the pulp and paper industry are more dangerous than previously thought.

Of all the mills in the U.S., there may be no other that more urgently needs to go chlorine-free than the P&G/Buckeye mill in Taylor County, Florida, because our drinking water is poisoned. Even after having proven that fact, neither the state nor the EPA have taken any action, except another study called a Use Attainability Analysis, which is behind schedule. Meanwhile, the pulp and paper industry claims to progress in solving its pollution problems, when in fact, it continues business as usual, spewing poisons into the environment every minute of every day.

Ms. Browner has been to Taylor County, Florida and has seen the pollution there. I believe that if you ask her, she will tell you that ours is one of the most egregious pollution situations in the nation. Yes, Ms. Browner was right three years ago: something must be done. P&G/Buckeye must make an investment in modernizing the Perry mill. This investment is necessary to end the poisoning of our community and the mill workers, and to ensure the competitiveness and viability of the mill. The company simply must stop poisoning our drinking water.

The Clinton Administration, the U.S. Congress, and Ms. Browner have stated that there should be a way to balance the needs of the people and the environment with the needs of the economy. We know that this balance is attainable.

There are two positive steps that can be enacted immediately:

1. All governmental agencies should use chlorine-free paper. The Clinton-Gore Administration and Congress can set a good example for all to follow. In fact, the Administration could and should require that all governmental agencies use chlorine-free paper and paper products. By helping to create demand, government can encourage the pulp and paper industry to implement much-needed technological advances. Then, when chlorine-free paper is recycled, there are no resulting dioxin problems.

2. HR 2898, the Chlorine Zero Discharge Act should be adopted now. It is imperative that the Act be passed for the sake of my community and the other 103 pulp and paper comunities which are being poisoned unnecessarily.

On behalf of all pulp mill communities I'm asking you to take those two steps.

If you don't adopt these measures, then please tell me what to do next. We have tried everything, but we are still being poisoned. Tell me now: Which regulatory agency am I supposed to go to next? What elected official is going to help us? How are we going to get these mills cleaned up? Who is going to stand up to the pulp and paper industry? How many people must die before you act?

The seriousness of the problems caused by the chlorine industry and chlorine-using pulp and paper mills demands your attention and action. I know how serious it is, because it affects my family and friends every day.

The provisions of the Clean Water Act must be strengthened to protect communities like mine. The provisions of the 1972 Act have not been enforced in many areas of our country. Lax enforcement can no longer be tolerated. We simply must remedy past mistakes. Now is the time to strengthen the Clean Water Act. Please take action now to stop the poisoning of my community and many more like mine.

Printed on chlorine-free paper, naturally.

85-427 95 – 14

CANCER RISK ESTIMATES FROM DIOXIN EXPOSURE NEAR FLORIDA PULP AND PAPER MILLS

Water Body Pulp and Paper Mill City	Recreational Fishermen (Four 8 oz servings per month)	Subsistence Fishermen (Nineteen 8 oz servings per month)
Amelia River ITT-Rayonier, Inc. Fernandina Beach	4 in 10,000	2 in 1,000
Fenholloway River Procter & Gamble Cellulose Co. Perry	8 in 100	4 in 10
Elevenmile Creek Champion International Cantonment	9 in 1,000	4 in 100
St. Andrew Bay Stone Container Corp. Panama City	1 in 10,000	5 in 10,000
Rice Creek Georgia-Pacific Corp. Palatka	3 in 100	1 in 10
Gulf Coast Canal St. Joe Paper Co. Port St. Joe	4 in 10,000	2 in 100

SOURCE: U.S. Environmental Protection Agency (1990) and Legal Environmental Assistance Foundation, Inc.

WARNING

Fish from the Fenholloway River are contaminated with dangerous levels of organochlorines & DIOXIN

a poison that can cause cancer, birth defects, & miscarriages. Consumption of fish & shellfish from this river should be avoided.

Posted by HOPE (Help Our Polluted Environment) In Taylor County 584-4544

COPIED ON "AGENT ORANGE" PAPER

CHEMICAL
MANUFACTURERS
ASSOCIATION

STATEMENT OF

ANITA DAWSON

MANAGER, ENVIRONMENTAL AFFAIRS

AMERICAN CYANAMID COMPANY

ON BEHALF OF THE

CHEMICAL MANUFACTURERS ASSOCIATION

BEFORE THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

U.S HOUSE OF REPRESENTATIVES

REGARDING H.R. 3948

"WATER QUALITY ACT OF 1994"

MAY 24, 1994

2501 M Street, NW 202-887-1100
Washington, D C 20037 Telex 89617 (CMA WSH)

Good afternoon. My name is Anita Dawson. I am Manager, Environmental Affairs, for the American Cyanamid Company. I am here today representing the Chemical Manufacturers Association. My comments will focus on two principles for Clean Water Act reauthorization: first, the need to focus on significant remaining risk and, second, the need for flexibility -- not command and control -- to promote pollution prevention.

CMA is a nonprofit trade association. Our member companies represent more than 90 percent of the productive capacity for basic industrial chemicals in the United States. In 1993, the U.S. chemical industry was the nation's largest exporter and today the industry provides 1.1 million high-wage, high-tech jobs for American workers.

The U.S. chemical industry is proud of its record of achievement in reducing the impact of its manufacturing operations on water quality in this country. Based on data reported in EPA's Toxic Release Inventory, the chemical industry has reduced discharges of toxic pollutants to surface waters by 81% during the 5 year period between 1987 and 1992. These improvements have not come cheaply, however.

According to U.S. Census Bureau data, the chemical industry spends almost $2 billion annually to control water pollution.

Industry broadly has been apending money to control its discharges and the results are nothing short of dramatic. Less than 10% of remaining water quality problems can be attributed to industrial discharges today, according to EPA and State data. Without any additional amendments, ongoing Clean Water Act programs will continue to reduce industrial discharges to our nation's surface waters.

Mr. Chairman, it's based on these facts that CMA believes Clean Water Act reauthorization should address significant remaining risk. This approach to Clean Water reauthorization would ensure that the nation receives the greatest amount of environmental improvement for its expenditures. Under this standard, for example, H.R. 3948's attention to watershed management is right on target. In contrast, however, extensive new controls on industry will not result in significant risk reduction. H.R. 3948, however, would apply new requirements on industry that will not produce any significant environmental benefits. Let me give you some examples.

First, the ground water provisions of H.R. 3948 will impose costly and redundant regulatory requirements in spite of the fact that ground water is already well regulated under existing Federal and state programs. Expansion of the Clean Water Act to address ground water will not achieve significant risk reduction. What it will produce,

however, is more litigation and unnecessary expense for industry and regulators, both federal and state.

Second, H.R. 3948's proposed restrictions on the use of mixing zones for specific compounds or classes of compounds are similarly misdirected. These restrictions would provide no environmental or health benefit. Mixing zones are already designed to be protective of health and the environment, even for persistent and bioaccumulative toxics. No significant reductions in risk will result from this provision, but the costs would be huge.

The toxics section of H.R. 3948 also contains provisions contrary to the objective of addressing significant remaining risk. For example, allowing citizens to petition the Agency to limit or prohibit the discharge of classes of toxic pollutants is inappropriate. Within a class of compounds, some individual compounds may cause adverse effects while others may not. Regulatory actions should focus on efforts to lower the risks of adverse effects related to specific compounds of concern. Treating all compounds within a class the same is tantamount to throwing the baby out with the bath water. This approach ignores the benefits of a majority of compounds that don't pose adverse risks and it would come at a high price to society.

Finally, I'd like to turn to the pollution prevention planning requirements of H.R.3948. The chemical industry has a great deal of experience in pollution prevention planning. We have found time and time again that flexibility -- not command and control -- is the best

way to promote pollution prevention. The pollution prevention provisions are prescriptive requirements that will achieve little or no risk reduction. Let me give you two examples.

By focusing on releases to water only, H.R. 3948's single environmental media approach to pollution prevention will mean facilities will be driven to plan pollution prevention activities aimed at what could be their least significant environmental releases. For example, at many facilities, releases to air and land may outweigh their releases to water. Pollution prevention planning should address releases to air, land and water if it is to achieve significant risk reduction.

A second example: H.R. 3948's planning provisions are designed to produce information for information's sake. This is inappropriate. Pollution prevention plans should help facilities discover opportunities for reducing pollutants. This bill will force us to spend our limited time and resources on information exercises, not pollution prevention.

Finally, any planning requirement should include adequate regulatory flexibility to enable facilities to actually implement their plans. This is necessary because in some cases, facilities will be unable to implement their plans because of regulatory barriers. Without regulatory flexibility, the planning process will be little more than a paper exercise.

In conclusion, CMA urges this subcommittee to focus its Clean Water Act reauthorization efforts on significant remaining risks and to promote pollution prevention through added flexibility instead of prescriptive command and control requirements. CMA believes that the bipartisan alternative preserves many of the workable elements of H.R. 3948 while eliminating costly provisions that would result in little environmental benefit or risk reduction. CMA recommends that the subcommittee give serious consideration to the principles contained in the bipartisan alternative.

Thank you for the opportunity to appear before you today.

COMMENTS BY
GORDON K. DURNIL
Attorney At Law
Indianapolis, Indiana
Before the
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
UNITED STATES HOUSE OF REPRESENTATIVES
May 24, 1994

THANK YOU, MR. CHAIRMAN.

I WILL BEGIN WITH JUST A VERY BRIEF EXPLANATION OF MY BACKGROUND. I AM AN ATTORNEY, AND I WAS APPOINTED BY PRESIDENT GEORGE BUSH AND CONFIRMED BY THE UNITED STATES SENATE IN 1989 AS THE UNITED STATES CHAIRMAN OF THE INTERNATIONAL JOINT COMMISSION. PRIOR TO THAT I SERVED EIGHT YEARS AS THE INDIANA REPUBLICAN STATE CHAIRMAN, AND IN CAMPAIGN MANAGEMENT POSITIONS FOR GOVERNORS, U.S. SENATORS, CONGRESSMAN, MAYORS AND OTHERS, INCLUDING THE NIXON, REAGAN AND BUSH PRESIDENTIAL CAMPAIGNS.

MY FOUR AND ONE-HALF YEARS WITH THE INTERNATIONAL JOINT COMMISSION BROUGHT ME FACE TO FACE WITH A NUMBER OF FACTS, AND SUSPECTED FACTS, THAT HAD NOT PREVIOUSLY CAUGHT MY ATTENTION. MANY OF THOSE, I AM SURE, YOU WILL HEAR OFTEN IN THESE HEARINGS.

I BECAME QUITE ACTIVE IN INTERNATIONAL ENVIRONMENTAL AFFAIRS AS WAS REQUIRED BY TREATY AND VARIOUS AGREEMENTS BETWEEN THE UNITED STATES AND CANADA.

I WAS A PRIME AUTHOR OF THREE BIENNIAL REPORTS TO THE GOVERNMENTS OF THE UNITED STATES AND CANADA, IN 1990, 1992 AND 1994. THOSE REPORTS CONTAINED RECOMMENDATIONS WHICH ATTRACTED WORLDWIDE ATTENTION, AND I AM QUITE PROUD OF MY PARTICIPATION IN THOSE WRITINGS. I AM HERE TODAY, HOWEVER, AS A PRIVATE CITIZEN. I AM NOT SPEAKING ON BEHALF OF ANYONE CURRENTLY CONNECTED WITH THE IJC.

THE FREEDOM TO SPEAK WITHOUT RESTRAINT IS REFRESHING FOR ME, AND, AS EVERYONE SEEMS TO DO, I HAVE WRITTEN A BOOK ABOUT MY EXPERIENCES. THE TITLE IS THE REFLECTIONS OF A CONSERVATIVE ENVIRONMENTALIST.

I DID LEAVE THE COMMISSION EARLIER THIS YEAR WITH SOME SERIOUS CONCERNS ABOUT WHETHER THE CONTEMPORARY PRACTICES OF SCIENCE AND GOVERNMENT ARE FACILITATORS FOR, OR BARRIERS AGAINST, REAL ENVIRONMENTAL PROTECTION. AND THAT IS WHAT I WOULD LIKE TO BRIEFLY ADDRESS.

I CAME TO THE COMMISSION AS A CONSERVATIVE REPUBLICAN VERY MUCH PREDISPOSED TO THE VIEWS OF INDUSTRY. I LEFT THE SAME WAY, BUT CONCERNED ABOUT SOME IN INDUSTRY WORKING AGAINST THEIR OWN LONG TERM BEST INTERESTS. ~~SOMEWHAT ANALOGOUS TO THE GOOSE AND THE GOLDEN EGGS.~~

I ALSO CAME ABOARD THINKING OF SCIENTISTS AS BROAD THINKERS. BUT MY REFLECTIONS PAINT A DIFFERENT PICTURE. ~~I FOUND MOST TO BE IN A NARROW THINKING PROCESS. LOCKED WITHIN THEIR NON-ECOSYSTEMIC DISCIPLINES.~~

SCIENTISTS ARE CAUTIOUS PEOPLE. THEY TEND TO SEE THEMSELVES IN THE MIDDLE OF A QUERY WITHOUT AN END. CERTAINTY AN ESOTERIC QUEST.

BECAUSE SCIENCE MUST BE A VALUE NEUTRAL DISCIPLINE, MANY SCIENTISTS THINK THEY MUST BE VALUE NEUTRAL IN THEIR CONCLUSIONS. AND EXPRESSIONS OF CERTAINTY SEEMINGLY VIOLATE SUCH NEUTRALITY.

BUT, WHEN SCIENTISTS FROM DIVERSE DISCIPLINES COME TOGETHER IN THEIR PERSONAL AND PROFESSIONAL CAPACITY ON A BOARD SUCH AS THE IJC SCIENCE ADVISORY BOARD, THEIR THINKING IS

UNLEASHED; -- UNRESTRAINED; -- AND NEW THOUGHTS EMERGE.

THE SEEDS FOR NEW SCIENCE ARE PLANTED. THE EXPRESSION OF SOCIETAL CONCERNS ARE LESS RESTRICTED. CONSENSUS WITHOUT CERTAINTY BECOMES POSSIBLE; -- EVEN DESIRABLE. AND THE EXERCISE OF CAUTION, IS NOT ALWAYS DEEMED TO BE PREMATURE.

BUT, LET'S TALK FOR A MINUTE OR SO ABOUT CERTAINTY.

GOVERNMENTS REGULATE SOME CHEMICAL SUBSTANCES. THEY DO THAT BY ISSUING PERMITS BASED UPON CERTAIN STANDARDS. THE REGULATORY STANDARDS TEND TO BE COMPROMISES BETWEEN GOVERNMENT AND SOME OF THE INTERESTS. SUCH REGULATION PRESUMES A TOLERABLE AMOUNT OF EXPOSURE, EVEN THOUGH THE IJC WATER QUALITY BOARD TELLS US THERE IS NO HUMAN ASSIMILATIVE CAPACITY FOR SOME OF THOSE SUBSTANCES.

AND, KEEP IN MIND, THAT THE WATER QUALITY BOARD IS MADE UP OF THE TOP FEDERAL, STATE AND PROVINCIAL REGULATORS AROUND THE GREAT LAKES.

AS A BRIEF ASIDE, IF YOU HAVE A CURIOUS MIND, THINK FOR A MOMENT ABOUT GOVERNMENTS FORMALLY DECIDING THAT SOME SUBSTANCES ARE SO ONEROUS THAT THEY SHOULD NEVER BE DISCHARGED INTO OUR ENVIRONMENT, BUT, FOR A FEE, GOVERNMENTS WILL GIVE YOU A PERMIT TO DO JUST THAT.

BUT, LOBBYISTS ARE GOOD AT DEBUNKING THE SCIENCE OF OTHERS; YOU KNOW, THE BAD SCIENCE ARGUMENT. WHENEVER A SUGGESTION IS MADE TO PROTECT HEALTH, ESPECIALLY HUMAN HEALTH, WE HEAR ABOUT BAD SCIENCE AND THE LACK OF ~~SCIENTIFIC~~ CERTAINTY. WE HEARD THOSE CLAIMS IN THE BREAST IMPLANT DISCUSSIONS, AND AGAIN LAST MONTH AS THE TOBACCO INDUSTRY TESTIFIED BEFORE CONGRESS.

BUT STILL GOVERNMENTS DEMAND SCIENTIFIC CERTAINTY OF THE CAUSE/HARM LINKAGE, BEFORE STRENGTHENING A ~~REGULATORY~~ STANDARD. AND INDUSTRY DENIES RESPONSIBILITY, BECAUSE ABSOLUTE CERTAINTY OF THE CAUSAL RELATIONSHIP TO THE HARM HAS NOT YET BEEN FOUND.

THINK ABOUT THAT. WHAT OTHER ASPECT OF OUR LIVES DEMAND SUCH CERTAINTY BEFORE EXERCISING CAUTION?

NOT THE LAW, ... WE CONVICT PEOPLE ON THE SUBJECTIVE JUDGMENT OF JUST TWELVE INDIVIDUALS.

NOT EDUCATION, ... WHERE 70% CAN BE A PASSING GRADE.

NOT RELIGION, ... THERE IS ALWAYS ROOM FOR FORGIVENESS AND ATONEMENT.

NOT HEALTH CARE, ... TAKE TWO ASPIRINS AND CALL ME TOMORROW.

CERTAINLY NOT THE MEDIA, ... WHO NEVER SEEM TO BE ACCOUNTABLE FOR WHAT THEY SAID YESTERDAY.

ACCOUNTING? ENGINEERING? ARCHITECTURE? ALL HAVE ROOM FOR ERROR, ... MISCELLANEOUS ACCOUNTS, .. SWAY FACTORS, ETC., ETC.

BUT IN THE GOVERNMENTAL REGULATION OF THE MANUFACTURE, USE AND DISPOSAL OF PERSISTENT TOXIC SUBSTANCES, WE DEMAND SCIENTIFIC CERTAINTY. WE DEMAND ABSOLUTE PROOF OF THE CAUSAL RELATIONSHIP TO HARM.

AND THE CERTAINTY WE DEMAND IS THAT THE SUBSTANCE CAUSES THE HARM; NOT THAT THE SUBSTANCE DOES NOT CAUSE THE HARM

SO THE ONUS IS ON YOU. AND ON ME. AND ON OUR UNSUSPECTING NEIGHBORS. IT IS OUR PERSONAL RESPONSIBILITY, AS PRIVATE CITIZENS, TO KNOW ALL THERE IS TO KNOW ABOUT ADVANCED CHEMISTRY. TO KNOW WHAT CHEMICALS ARE BEING USED, AND DISCHARGED, AND TO KNOW WHAT POTENTIAL EFFECTS ALL OF THAT MIGHT HAVE ON US AND OUR PROGENY.

THE GOVERNMENTS OF THE UNITED STATES AND CANADA HAVE ESTIMATED THAT SOMEWHERE BETWEEN 60,000 AND 200,000 CHEMICALS ARE BEING DISCHARGED INTO THE GREAT LAKES. YES, THAT IS A WIDE RANGE. WHAT IT TELLS US IS THAT WE DON'T EVEN KNOW FOR SURE WHAT IS BEING DISCHARGED. WE DO KNOW THAT MOST HAVE NOT BEEN TESTED, ~~AT LEAST FOR PUBLIC REVIEW.~~

SO AS YOU ENJOY THE GREAT LAKES, OR AS YOU GO ABOUT YOUR DAILY BUSINESS, WHAT IS BEING DISCHARGED INTO THE ENVIRONMENT MIGHT ADVERSELY EFFECT YOU, YOUR CHILD, OR YOUR GRANDCHILD. BUT NO REAL CAUTION CAN BE REQUIRED OF THE DISCHARGER, BECAUSE THERE IS NO ABSOLUTE CERTAIN PROOF THAT AN EXPOSURE BY A YOUNG GIRL MIGHT EFFECT THE REPRODUCTIVE ABILITY OF HER YET TO BE BORN CHILD.

YET LOBBYISTS WORK HARD TO KEEP SUCH SEARCHES FOR THAT KIND OF PROOF OUT OF PENDING LEGISLATION.

SO I WONDER, IS IT INTELLECTUALLY HONEST, IN THIS UNCERTAIN WORLD, TO DEMAND SUCH CERTAINTY ON ONE SIDE OF A PRESUMPTION, AND NOT THE OTHER? OR, IS THIS JUST ONE MORE SITUATION WHERE GOVERNMENT MAKES IT EASIER TO DO THE WRONG THING, RATHER THAN THE RIGHT? SURELY, WE NEED TO CHANGE OUR WAY OF THINKING.

MOST ALL DEFINITIONS OF RISK REFER TO THE POTENTIAL FOR HARM. AND ENOUGH EVIDENCE IS NOW ON THE TABLE TO INFER SUCH POTENTIAL ABOUT CHLORINATED ORGANICS. THAT BEING THE CASE, SHOULD WE NOT EXERCISE CAUTION AND FIND OUT MORE? WHY NOT A SERIOUS NATIONAL STUDY TO DETERMINE THE FACTS ABOUT CHLORINE AND IT'S EFFECTS ON HUMAN HEALTH?

AS A POLITICIAN, I CANNOT IMAGINE ANYONE WITH WHOM I AM IN MORE DISAGREEMENT, ON MORE ISSUES, THAN I AM WITH THE PRESIDENT. HIS PROPOSAL TO YOU FOR A STUDY AND STRATEGY OF "SUBSTITUTING, REDUCING, OR PROHIBITING THE USE OF CHLORINE AND CHLORINATED COMPOUNDS," HOWEVER, IS VERY CLOSE TO A RECOMMENDATION MADE BY MY COLLEAGUES AND ME IN 1992.

WE RECOMMENDED AN ORDERLY PROCESS TO PHASE OUT THE USE OF CHLORINE AS AN INDUSTRIAL FEED STOCK, HOWEVER LONG THAT MIGHT TAKE, ~~WHETHER TEN, TWENTY OR EVEN THIRTY YEARS.~~ A PROCESS THAT PLANS FOR AN ORDERLY TRANSITION WITHOUT UNDUE SOCIAL AND ECONOMIC DISRUPTION.

THAT RECOMMENDATION GREW FROM A VARIETY OF SOURCES, INCLUDING A SERIES OF SCIENTIFIC AND ECONOMIC ROUND TABLES FROM THUNDER BAY TO NEW HAMPSHIRE; FROM A THREE YEAR LONG VIRTUAL ELIMINATION TASK FORCE; FROM MEETINGS AND REPORTS OF A VARIETY OF NON-IJC SOURCES; BUT PRIMARILY, THE RECOMMENDATION CAME FROM THE IJC SCIENCE ADVISORY BOARD AND ITS 1991 REPORT.

EVEN SO, WE STILL HEARD THE LOBBYISTS USE PHRASES LIKE "BAD SCIENCE" AND "SCIENTIFIC UNCERTAINTY."

AS A CAMPAIGN MANAGER, I TEND TO THINK IN TERMS OF STRATEGY AND TACTICS.

IN THE DEBATE OVER PERSISTENT TOXIC SUBSTANCES, I SEE ONE SIDE APPLYING A STRATEGY OF GETTING GOOD SCIENCE ON THE TABLE AND THEN USING THE TACTIC OF EDUCATING THE PUBLIC ABOUT THAT SCIENCE. THE THEORY BEING THAT THE PEOPLE WILL ACT, IF THEY ARE SUBJECTED TO THE FACTS.

ON THE OTHER SIDE OF THE DEBATE, I SEE A STRATEGY OF KEEPING INFORMATION OFF THE TABLE; OUT OF PUBLIC VIEW. THE TACTIC IS TO SQUASH ANY LEGITIMATE ATTEMPT AT FACT FINDING, SUCH AS THAT PROPOSED BY THE PRESIDENT IN A STUDY TO DETERMINE WHETHER OR NOT THE FEARS ABOUT CHLORINE AS A CLASS ARE REAL.

SO I CLOSE BY ASKING AGAIN, -- WHY NOT A LEGITIMATE STUDY OF THE EFFECTS OF CHLORINATED SUBSTANCES ON HUMANS? I WONDER IF WHAT WE DON'T KNOW, WILL HURT US. AND I WONDER IF WE FEAR THE TRUTH.

IN SUCH A STUDY, HOWEVER, MY EARLIER REFLECTIONS ON THE SCIENTIFIC COMMUNITY CAUSE ME TO BELIEVE THAT A LEGITIMATE STUDY OF THE ALLEGED ADVERSE EFFECTS OF AN ONEROUS SUBSTANCE, CANNOT BE LEFT TO SCIENTISTS ALONE. ANY EXPERT SCIENTIFIC PANEL NEEDS A KNOWLEDGEABLE MEMBER OF THE AFFECTED PUBLIC TO BRING THEM BACK TO REALITY FROM TIME TO TIME.

WE CAN ALL HAVE DIFFERENT VIEWS ABOUT WHAT THE ROLE OF GOVERNMENT SHOULD BE RELATIVE TO ENVIRONMENTAL CONCERNS. BUT SURELY, FINDING THE FACTS AND INFORMING THE PUBLIC IS A RESPONSIBILITY OF GOVERNMENT THAT MOST ALL OF US CAN AGREE UPON.

FINALLY, I AM CONCERNED THAT MANY LAWS AND GOVERNMENTAL REGULATIONS HAVE BECOME BARRIERS TO BOTH ECONOMIC GROWTH AND ENVIRONMENTAL PROTECTION. QUITE OFTEN THEY GET IN THE WAY OF THE PROTECTION AND GROWTH THAT WE DESIRE. TOO OFTEN THEY DEAL WITH ERRORS OF THE PAST, WITHOUT ADVOCATING A SERIOUS MOVE TOWARD PREVENTING THE PROBLEMS IN THE FIRST PLACE.

THE CYNICAL AMONG US CAN IMAGINE THAT GOVERNMENT, BY PUTTING ITS EMPHASIS ON THE RESULTS OF POLLUTION, INSTEAD OF THE CAUSE, IS ONLY DOING THAT TO DECEIVE THE PUBLIC INTO THINKING THAT GOVERNMENT IS ON TOP OF THE PROBLEM.

SO MY PLEA TO YOU IS TO FIND A WAY TO PUT REAL SCIENCE REGARDING THE INDUSTRIAL USE OF CHLORINE ON THE TABLE FOR PUBLIC CONSUMPTION.

THANK YOU.

The only way to set [illegible] to set A DATE [illegible]

Statement of Albert F. Goetze, Easton, Maryland

on Wetlands and Clean Water Act Reauthorization

Before the Subcommittee on Water Resources and Environment

of the House Public Works and Transportation Committee

May 24, 1994

Mr. Chairman, I thank you and other members of the Committee for the opportunity to testify today on the Clean Water Act Reauthorization.

I am a fisherman (60 years), a food industry participant (50 years), and a tidewater property owner (35 years). During the last decade I represented the State of Maryland on the Atlantic States Marine Fisheries Commission (ASMFC) for 9 years and on the Mid-Atlantic Fishery Management Council for 6 years. With both of these essential fishery management organizations, I provided leadership in the development of a unified marine habitat agreement between all 15 East Coast states, the three councils, and the appropriate federal agencies.

There is a dimension to this debate (over modification of our determination to adhere to original objectives of CWA) that is not understood or mentioned.

What's missing is a strong overriding concern for a major segment of our economy. What's missing is a concern for the sale of seafood products, the income derived from recreational fishing, the tidewater industries, and most importantly, the fishermen and the tidewater property

owners.

The outcome of this debate to re-authorize CWA directly affects the economic interests of millions of these citizens more than any other group.

Without a healthy, viable fishery:

COMMERCIAL FISHERMEN face bankruptcy and vessel loss.

SUPPLIERS, COMMUNITY BUSINESS are suffering.

SEAFOOD DEALERS/PROCESSORS lose money, shift to imports, layoff workers.

RECREATIONAL FISHERMEN (crabbers, claimers) stop or seldom fish. Charterboats and community business cut back/close.

But economically more important than any of these:

HOMEOWNERS/RENTERS/TOURISTS who are the community that represents the population of the tidewater/fresh watershed areas are losing asset value and quality of life. The water quality that supports this healthy, viable fishery or denies it, makes property valuable or worthless !

Considering that our U.S. fishery could represent 30% of the world supply and further considering that 40% to 60% of the U.S. population by year 2020 will live in the Tidewater/fresh watershed areas, the socio-economic dimension of the fishery's importance would appear to be enormous !

The issue, then, is not just what the "environmentalist" wants done but rather what is at issue is the economy !

In 1993, I addressed a letter to the Editor of the Star Democrat (mid-shore paper) with the reference "For wetlands, too, its the economy". I stated that for the Chesapeake Bay ... "the economic issue, when put on the scale balance, far out weighs the exclusive private property development rights and is a very disturbing revelation. Although, the marine habitat, our Bay, is a publicly held resource, step by step we are losing it because of man's polluting activities. The leading marine scientists and fishery managers from state, federal, and private affiliations agree that the most important of a long list of significant polluting activities is wetlands (habitat) loss due to land development.

I further stated ... "As a tidewater citizen, I am outraged by the decline of stocks of striped bass, oysters, shad, weakfish, flounder, and many other food and recreational important species. Maryland's remaining wetlands are only 26% of the original acreage. Recent stock assessment again reveals a decline for the blue crab populations of the Bay. It's well understood that crabs are directly dependent for survival on the watershed wetlands of the Eastern Shore, particularly Dorchester and Somerset counties.

How disturbing are these revelations? Ask the seafood industry members, charter boat owners, seafood restaurants, merchants and tourist industry, etc., if they know what this economic loss is doing to their business. Also, most importantly, ask the existing private property owners who

live or work near the water, what this degradation and economic loss is doing to their real estate asset value.

The bottom line for the majority must reference the true economic dimension of our ownership of real property and its contribution to the tidewater economy. Our best interests are served by resisting any attempt to balance against it the speculative financial gain of a few who would prefer to see the protective regulations demanded now by law either repealed or ignored".

Therefore, I believe the Committee should focus on the real character of this struggle. My comments before the Wetlands Task Force in 1990 regarding the Administrations policy of "No net loss" referenced the following: "For the Bay watershed, the truth is that any further net loss of wetlands would violate the Chesapeake Bay Agreement in which the 3 Bay Governors and the EPA Administrator state that **only in rare instances will losses of wetland acreage or function be allowed or justified".**

However, attempting to address the problem on a broad-based national scale without federal law is futile. In the book "Bay Country", local Maryland author Tom Horton states the "publicly held trust" reality with great clarity as follows: "To the greater public interest, vested in state and federal government, has gone most of the rule over the water of the watershed; but land-use decisions remain the province of a thousand town and county governments, none of which wants its water to end up like Baltimore harbor, but most of which <u>will fight to the death</u> to retain the option to use its land just as intensively as the state's largest city should the opportunity arise".

The Committee should also recognize that federal legislation recently passed, PL 103/206 (Atlantic Coastal Fisheries Management Act) and concurrent re-authorization of MFMCA (Magnuson Act) have a direct relationship to these CWA proposals. Let me explain:

> The Secretary of Commerce will require habitat determination sections for each species approved Fishery Management Plans. With ASMFC and Council Plans most of what is proposed for changing CWA will require protest and elevation to the Army Corps of Engineers, and EPA review by the Councils, ASMFC, and the Secretary.

I believe the Committee should want to identify the economic realities of this struggle. I believe what we, in opposition, want to know is why the economic interest of the existing fisherman, seafood industry, and the existing property owners and business interests are to be subjugated, by this bill, to the demands of those developers and speculators who will reap financial gain by their disregard for the fishery management plan requirements.

Unless the CWA provisions are strengthened and effectively enforced, we the fishermen, industry, and developed real estate owners will lose significantly dollar-wise.

HOW WILL WE BE COMPENSATED FOR THIS TAKING!?

Obviously, we are already here on the scene in tidewater America. We own the vessels, the gear, the fish market docks, the processing plants, the town businesses, and for millions of us

the existing homes and the existing developed land on or near the waterfront.

We are not willing to lose jobs, lose asset value, lose our economic base, and even, God forbid, our very existence!

Ultimately, without conservation and restoration, our economic strength will be sacrificed and future generations, having deciphered it, will understand that crazy bumper sticker: "NO WETLANDS - NO SEAFOOD" (no swimming, no fishing, no crabbing, and no waterfront value).

Thank you, Mr. Chairman.

SIERRA CLUB

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Testimony of Totten P. Heffelfinger
Chair of the Sierra Club Wetlands Committee
Chair of the Steering Committee of Campaign to Save California Wetlands
before the
House Committee on Public Works and Transportation
May 24, 1994

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TESTIMONY OF TOTTEN P. HEFFELFINGER

Thank you for the opportunity to comment on the provisions of H.R.3984 pertaining to our Nation's wetlands which, as many of you must know, continue to be lost at a rate of some 800 acres per day.

Since I retired as a lawyer for what was one of the West Coast's largest industrial enterprises I have devoted much of my life to wetlands issues. Like many conservationists I learned to love marshes and the creatures they support as a young person duck hunting with my father. Since then I have learned that wildlife habitat is just one of the important things that wetlands provide for human beings.

Last week I testified before the Regional Water Quality Control Board responsible for the San Francisco Bay Area. At issue was a proposal for the Board to assume from the Corps of Engineers some of its permitting authority under section 404 of the Clean Water Act. One of the Board members commented that decisions on wetlands should be made at a local government level like any other land use decision.

WETLANDS ARE A NATIONAL RESOURCE & THEIR DESTRUCTION HAS A NATIONAL IMPACT

I am sure that most members of this Committee understand that flooding, wildlife, and water quality are more than local land use issues, more even than regional or state issues. Floods in the Mississippi have told us what we should have known before: that what an upstream owner does to his wetlands can be a disaster to those living downstream in different counties, in different states, even in different countries. Recent reports on decline of wetlands-dependent fish have told us that fishermen from Canada to Mexico can lose their livelihoods because the great San Francisco Estuary is in decline and Northwest rivers are full of silt. Hunters and birdwatchers up and down the West Coast have watched the decline of migratory birds throughout the Pacific Flyway as the wetlands of California's coast and Central Valley declined to 10% of the historic acreage. Wetlands loss is a national and international problem. If the current unacceptable rate of wetland loss is to be abated, the federal role in protecting and restoring wetlands must be strengthened and not weakened. Local government is not likely to have the vision, the incentive or the will to do the job.

The fact that regulatory decisions on wetlands have national and even global significance is a difficult concept for local or even state agencies to incorporate into their decision-making process. An example of this recently took place in San Francisco Bay. A wetland impacting project came before a branch of a state agency for Section 401 water quality certification as part of the 404 permitting process. Ignoring the fact that no environmental documentation, either under NEPA or the California Environmental Quality Act, had been performed on this project that would have impacted at least five acres of wetlands just across the road from the San Francisco Bay National Wildlife Refuge, and ignoring staff recommendation to deny the project pending such documentation, this agency's Board Members approved the project.

There is a happy ending to this story in that, responding to public outcry and appeal, this regional agency's overarching state agency later overruled the decision and denied the project. Responding to this public outcry, the developer evinced surprise and was quoted as saying that he didn't know what all the fuss was about, he didn't even know half of the agency's Board Members socially, implying that he did know the other half.

This is a clear example of how putting wetlands regulation solely in the hands of local, regional or even state agencies can open the door to letting political influence shape the decision-making process to the detriment of our wetlands and of our nation's environmental health.

H.R. 3948 DRASTICALLY WEAKENS EXISTING WETLANDS PROTECTION

Far from strengthening protection of wetlands, the wetlands provisions proposed for H.R. 3948 will drastically weaken the existing system of federal wetlands protection under section 404 of the Clean Water Act, and accelerate wetlands loss. Some of the proposed amendments will virtually eliminate wetlands protection at all levels of government. Declines of fish and wildlife populations will increase. Flood plains will increasingly disappear. Siltation and pollution of waterways, lakes and estuaries will increase as riparian vegetation is destroyed and wetlands are replaced by urbanization.

I need not discuss the more draconian proposals that have been lifted from H.R. 1330. The disastrous impact of these on our Nation's wetland systems has been much discussed and is well known to all of you.

THE SHUSTER SUBSTITUTE WILL ACCELERATE WETLANDS DESTRUCTION

Unfortunately, other proposed amendments contained in the document entitled "Amendment in the Nature of a Substitute to H.R. 3948" will also greatly increase the rate at which wetlands are being destroyed and will compel us to oppose the bill. I have summarized on Attachment "A" hereto the provisions that cause us most concern.

An issue that requires special mention because it is so fundamental to avoiding wetlands loss is the need to prioritize the protection of existing wetlands. Compensatory mitigation or other forms of wetland restoration will not achieve "no net loss" and will certainly not replace all functions lost from the destruction of existing wetlands. This has been documented by the National Research Council in its publication "Restoration of Aquatic Ecosystems".

The current 404(b)(1) guidelines have at their core the presumption that since wetlands are such an invaluable resource, no wetland should be filled if there is a practicable alternative upland site for the purpose of the project. Flexibility does exist in this process, as recently described in the August 23, 1993, Memorandum to the field from the Army Corps and the EPA, in that the extent of documentation and research needed for an alternatives analysis may vary with the degree of impact of the proposed fill, but the core presumption is maintained.

Under the proposed amendments to HR 3948 that presumption would be fatally weakened by the introduction of a ranking process to determine the value and function of the wetlands and in particular by introducing, under the concept of "wetland management plans", the use of compensatory mitigation as an element to considered when performing an alternatives analysis. The recent Memorandum specifically states that compensatory mitigation should not be a part of the 404(b)(1) process. I have already expressed our belief, and that of the National Research Council, that compensatory mitigation should not be used to justify wetlands destruction. If there is no alternative upland site for a project then mitigation must follow wetlands destruction. In a balanced wetlands protection program, mitigation should not be used to excuse wetlands destruction.

SEASONAL AND DEGRADED WETLANDS PLAY A CRITICAL ROLE

The seasonal wetlands around San Francisco Bay provide critical habitat for over one million shorebirds and hundreds of thousands of ducks and other waterbirds. They are home to at least six endangered and threatened species and play an important role in the food web of the Bay. They are invaluable to society for flood control and air and water quality improvements. They enhance the quality of life by providing recreational and economic values. They are a buffer that protects the quality of the water, the mudflats and the tidal marshes of the Bay. In recent years losses of these seasonal wetlands have been stemmed by the wise application of federal laws and regulations. But under the proposed wetland amendments many of these wetlands would be lost to projects such as shopping centers and housing that are not water dependent and should be located on less environmentally sensitive upland sites. These are the very wetlands which through restoration could provide mitigation from destructive projects elsewhere that cannot be avoided. Many of these seasonal wetlands look dry for much of most years. Many are farmed wetlands kept dry by draining and are planted with hay.

Although they continue to provide important wetland functions, they would not be protected as "pristine " wetlands and would be sacrificed in exchange for payments to mitigation banks, or, in the case of farmed wetlands, would be considered "prior converted cropland" and left totally unprotected.

The reduction of protection for "degraded" wetlands and elimination of protection for many agricultural lands will be devastating also for California's Central Valley which is under intense pressure by proposals for new towns and other urban developments. These kinds of wetlands provide our only prospect for restoration and enhancement and thus increasing the State's wetlands base [a key part of Governor Wilson's wetlands program]. Farmed wetlands are not lost wetlands. Wetlands paved with concrete are not likely to be regained.

We have advocated and continue to advocate that this Committee adopt the modest improvements to section 404 of the Clean Water Act that are contained in H.R. 350, which would reduce the rate of loss of our Nation's wetlands and at the same time provide additional exemptions for ongoing farming and a fast track for processing minor permits.

ATTACHMENT A
to testimony of Totton P. Heffelfinger

The National goals and policies with respect to wetlands are seriously deficient. [pages 4-5].

The fate of wetlands within watershed management plans may be left to regional or local governments or even to private entities designated to develop and implement such plans. [page 79].

The fate of wetlands under wetlands management plans may be left to any kind of public entity chosen by a state governor. [page 92].

Permit review deadlines are likely to be interpreted to mean that a permit is deemed granted if the Corps fails to meet the deadline. [pages 95 and 121].

Mitigation banks would be encouraged by federal agencies as a means to facilitate projects in wetlands and to achieve the goal of "no overall net loss". [pages 96 and 125-128].

Requires revision of the EPA 404(b)(1) guidelines to weaken or even eliminate the protection of existing wetlands. [page 112].

Authorizes general permits for "categories of waters" which could mean, for example, a general permit for filling all vernal pools in California's Central Valley. [page 114].

Authorizes the delegation of section 404 permitting decisions to state or local agencies that are not committed to protection of wetlands and are likely to have conflicting mandates. [pages 96 and 115-117].

Authorizes fill of wetlands for cranberry production with no protection against or compensation for lost functions or values. [page 120].

Gives a broad range of appeals to landowners but none to other persons who may be affected by or who oppose destruction of the wetland. [page 123-125].

Requires delineation of wetland boundaries within 90 days of a request, even during dry season or drought. [page 130].

Implies that regulation under section 404 may be a taking for which compensation must be paid. [page 131].

Requires that wetlands on all agricultural lands, broadly defined, be delineated by the Soil Conservation Service without regard for the fact that SCS has insufficient trained personnel to accomplish this duty. [page 134].

Codifies and expands the administrative exemption for "prior converted cropland" to include all agricultural lands that produced at least one crop between 12/23/85 and 12/31/93. [page 143].

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TESTIMONY OF DALE E. HEYDLAUFF

Vice President, Environmental Affairs

American Electric Power Service Corporation

on behalf of the

EDISON ELECTRIC INSTITUTE

before the

UNITED STATES HOUSE OF REPRESENTATIVES

Public Works and Transportation Committee

Subcommittee on Water Resources and Environment

Hearing on Clean Water Act Reauthorization

May 24, 1994

TESTIMONY OF AMERICAN ELECTRIC POWER
AND THE EDISON ELECTRIC INSTITUTE
BEFORE THE HOUSE PUBLIC WORKS AND TRANSPORTATION COMMITTEE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

May 24, 1994

Introduction

Mr. Chairman and members of the Subcommittee, my name is Dale Heydlauff. I am Vice President of Environmental Affairs at American Electric Power Service Corporation (AEP), and I am here today on behalf of AEP and the Edison Electric Institute (EEI). AEP, headquartered in Columbus, Ohio, provides power to seven million people across seven states in the Midwest and east central regions. EEI is the association of the nation's investor-owned electric utilities. EEI's members generate approximately 79 percent of all electricity in the country and serve 76 percent of ultimate consumers of electricity. We appreciate this opportunity to provide our views on H.R. 3948.

We support the Clean Water Act's goal of protecting and improving water quality. We believe the current Clean Water Act is fundamentally sound, works well, and does not require significant new programs. Rather than making sweeping changes to the Act, Congress should focus on selective improvements aimed at correcting documented problems in the implementation of the current law.

With respect to H.R. 3948, the bill contains several provisions that significantly concern us, particularly those affecting intake credits, antidegradation, mixing zones, groundwater and hydropower projects. We also seek improved legislative text on utility rights-of-way in wetlands. Mr. Chairman, we also have significant and continuing concerns regarding the bill's sweeping enforcement provisions. We will address these and other concerns in detail in our written testimony for the record. All of these provisions will likely have substantial economic impacts without any commensurate environmental benefit.

As to the first issue, intake credits, section 704 of the bill would amend the Great Lakes Critical Programs Act of 1990 to **allow** the EPA and the states to consider pollutants found in intake water when setting effluent limitations for discharges. This language suggests that federal and state permit writers can impose limits without giving proper credit for the levels of contaminants present in intake waters from other sources, including natural sources

Setting effluent limits based on the "gross" concentrations of pollutants in a discharge, instead of only the portion of the pollutant load added by a permittee is inequitable and inconsistent with the existing Act. Treating and removing such background pollutants is expensive and difficult, and in some cases technically impossible, because EPA and states are setting some permissible concentrations of pollutants at levels below analytical detection limits. A 1993 study evaluated the cost implications of this issue for electric utilities, including AEP, in the Great Lakes Basin alone. The study estimated that the financial impact of not providing intake credits for just one pollutant -- copper -- in just one type of waste stream -- once through cooling water (which does not come into contact with any industrial process) -- would be a staggering $13 billion.

Section 704 of the bill is inconsistent with present law and should be modified. Congress should add language supporting what is already explicit in the Clean Water Act -- that dischargers are responsible only for their own additions of pollutants to a waterbody, and are not responsible for pollutants in their intake waters.

Section 303 of the bill requires states to adopt antidegradation policies that are more restrictive than the stringent antidegradation policies **already** required by the EPA and working effectively under the current Clean Water Act. For example, states would have to designate certain classes of waters as "Outstanding National Resource Waters." Those waters would be given absolute protection against any "degradation," no matter

how minor, ignoring the fact that such an inflexible requirement is unnecessary to protect uses of the waters. The bill also dictates how states are to implement their antidegradation policies, require states to submit their policies to EPA for approval, and authorizes the EPA to mandate policies for states that fail to enact their own.

Section 303 could stop industrial expansion by limiting existing facilities from increasing or changing production and preventing new facilities from locating on waterbodies because of restrictions on changes in water quality. This proposed broad federal mandate could even prevent industry from changing an existing process or chemical to a more environmentally-friendly process or chemical. Congress should modify the proposed language to direct the EPA to make its existing antidegradation rules more fair and flexible.

Turning to mixing zones, section 304 of the bill would authorize EPA to prohibit or restrict the use of mixing zones for many pollutants. This section should also be deleted. Under current law, EPA has long recognized the concept of mixing zones, and permitted the states to rely on them, without jeopardizing human health or the environment. Mixing zones are a cost-effective, practical approach for protecting water uses and the environment.

AEP uses wet ash handling systems at some of its plants. These systems discharge process water that has been treated to achieve stringent water quality standards, using a reasonable mixing zone. Such mixing zones are consistent with maintaining the overall uses of the waterbody as designated by the states. Without mixing zones, many of these systems would need to be converted to dry or low volume wet systems, because there is no demonstrated technology capable of reliably treating that waste stream to meet stringent water quality criteria at the point of discharge. To convert a high volume wet ash system to a dry one would cost approximately $32 million. A low volume wet ash system would cost about $14 million to install. These expenditures would provide no demonstrable environmental benefits.

We are also concerned with the increasing trend to overregulate low-risk, low--impact utility activities, by imposing burdensome permitting requirements for the installation, maintenance, and emergency repair of electric utility lines, corridors, and related access roads, in wetland areas. Utility rights-of-way and related access roads are installed, maintained and repaired consistent with existing best management practices developed by the U.S. Army Corps of Engineers, and as a result, have little or no effect on the wetlands which they cross. For example, utility towers are typically set on small concrete footings separated by hundreds or thousands of feet, and have a negligible impact on the wetland hydrology. We encourage Congress to amend the Clean Water Act to exempt such facilities from the administrative permit requirements of section 404 of the Act providing they comply with the best management practices specified by the U.S. Army Corps of Engineers.

Section 404 of H.R. 3948 would expand the federal NPDES permit program to require permits for a substantial number of discharges to the ground or groundwater that currently are subject to regulation under state law. This proposed expansion of the Act's key permit program should be deleted because it is unnecessary and inconsistent with current state authority to manage and protect groundwater. As EEI studies have well documented, states are actively and effectively managing their local and regional groundwater resources, with guidance from EPA and targeted federal programs such as the wellhead protection program in the Safe Drinking Water Act.

We believe the potential effect of the bill on hydropower projects will add new layers of regulations that would duplicate the Federal Energy Regulatory Commission's existing regulatory program and jeopardize the nation's ability to rely on this preeminent clean renewable energy source. If applied to hydropower projects, the bill's provisions on antidegradation, nonpoint source pollution, and watershed management would duplicate the comprehensive existing regulatory requirements applying to such projects. In particular, hydropower projects within the jurisdiction of FERC are subject to numerous

requirements aimed at protecting environmental quality. The projects undergo careful water quality review under section 401 of the current Clean Water Act.

We understand that a bipartisan alternative to H.R. 3948 is being discussed. This alternative addresses many of these and other problems we have identified. For example, under the bipartisan alternative :

- Dischargers would be responsible for controlling only pollutant loads originating from their operations, and not from intake waters;
- States would retain authority over development and implementation of outstanding national resource waters and antidegradation;
- Mixing zone regulation would be fully addressed by existing state authority;
- States would prioritize water pollution control goals;
- The costs and benefits of pollution control would be factored into state policies and;
- Discharges to ground and to groundwater would continue to be regulated under existing state laws and regulations.

We urge the Committee to give serious consideration to the concepts embodied in the bipartisan discussion draft. We believe this approach to reauthorization achieves the goals of cost-effectively refining many areas that need improvement without adding unnecessary and costly mandates to existing programs.

We appreciate the opportunity to present the views of the AEP system and the Edison Electric Institute.

MINERAL POLICY CENTER

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Statement of
Mineral Policy Center

Presented by
Philip M. Hocker, President

to the
Subcommittee On Water Resources and Environment
Honorable Douglas Applegate, Chairman
of the
Committee on Public Works and Transportation

Regarding
H.R.3498, the Water Quality Act of 1994, and
Issues Related to Clean Water Act Reauthorization

24 May 1994
Washington, D.C.

Chairman Applegate, members of the Subcommittee:

My name is Philip M. Hocker; I am President of Mineral Policy Center. Mineral Policy Center is a small non-profit public-interest organization dedicated to the establishment of sound mineral-development practices which prevent environmental damage, and to the cleanup of the damage caused by mining's past. The Center has approximately 2,000 members from around the country; we work cooperatively with many other organizations in the United States and abroad who share our concerns. I thank you for the opportunity to testify before the Subcommittee today on issues related to Clean Water Act Reauthorization.

Metals mining is a major cause of contamination of both surface and underground waters in the United States. Nonetheless, much of this contamination is not adequately addressed by any current Federal or state prevention program. We have the technical ability to execute mining activities without spreading contamination, but that ability is not consistently applied.

The mining provisions in the 21 April 1994 "Amendment in the Nature of a Substitute to H.R. 3948" text would create a program to prevent pollution of both surface and underground waters from metals mining. These provisions are urgently needed, and should be enacted into law.

Metals Mining Causes Water Contamination

Mining for metals is a large-scale industrial activity in the United States. The total *economic* impact of metals mining is not large; the gross value of primary metals production in 1990 was $12.4 billion, or 0.2% of U.S. GDP.[Bureau of Mines] However, the *environmental* impact of metals mining in the U.S. is very large, and it is growing. Metals mining generates between two and three billion tons of solid waste per year -- more than twice as much as all other U.S. industries and municipalities combined.

Metals mines -- both old and new -- are an important hazard to public safety, public health, and environmental quality nationwide. Over fifty sites on the Superfund National Priorities List for cleanup have been caused by metals mining. The Environmental Protection Agency's *Report to Congress: Wastes from the Extraction of Metallic Ores...*, completed in December, 1985, reported that over 50 billion tons of untreated mining waste blotch America's landscape. The U.S. Bureau of Mines reports that 12,000 miles of U.S. rivers and

streams are degraded below EPA standards by mining pollution. Other Subcommittees of the House have held numerous hearings on hardrock mine impacts and reclamation which have confirmed the need for increased attention to this problem.

An extensive study commissioned by the California State Legislature reported:

> "... the environmental damage caused by mining wastes at several abandoned mine sites is massive. Water several miles downstream of these mines is almost completely devoid of animal and plant life. Fish and other aquatic life are adversely affected by this pollution for distances of tens to hundreds of miles below these mines. The large scale of many of these mining operations means that enormous volumes of polluted waters are generated." [*Mining Waste Study*, 1988, p.xxiii]

Water contamination is created and spread by several different mechanisms at mining sites. The industrial chemicals, such as cyanide and sulfuric acid, which are used to treat metal-bearing ores can leak from the processing system and contaminate surface and underground waters.

In addition, the massive amounts of waste and ore which are excavated and broken up by mining are themselves the source of greater and more pernicious contamination than that from process chemicals. Many metal ores contain large amounts of sulfide minerals such as iron pyrite. These react with air and rainwater to form sulfuric acid. This natural reaction is greatly magnified when pyritic rock is excavated and large reaction surfaces are exposed to the elements where there had been a solid impermeable mass. To make matters worse, a ubiquitous bacterium, *thiobacillus ferrooxidans*, accelerates the acid-forming reaction.

Acid Mine Drainage, or "AMD," can develop slowly over time at a mine site. Laboratory tests are used to attempt to predict whether the waste from a particular mine will be acid-forming, but these tests are subject to misapplication and the incentive to predict no acid formation is strong. I have personally visited large mines now operating in South Carolina and California where acid was being generated by wastes which had been predicted to be benign. These were early problems, but AMD is an even greater concern for long-term site management. At many sites...

> "In all likelihood, AMD would not form until after the mine is worked out and abandoned, because while it continues to operate the mine can control the acidity of its waste piles by adding neutralizing materials. Provided that the pH within a waste facility is maintained about 4, the rate of acid formation is extremely slow. However, below this pH

value bacterial action leads to a dramatic acceleration of the oxidation rates. Once this happens it is virtually impossible to reverse. In other words, **a [mining] waste facility that may seem to be benign for years while the level of acidity is being controlled may, quite suddenly, begin to produce AMD and result in a problem that could persist for years."** [*Mining Waste Study*, 1988, p.xx]

Mining damage can be extremely extensive, and once established it can be difficult or impossible to correct. For example, the Clark Fork/Silver Bow complex of polluted sites caused by copper extraction and smelting in and near Butte, Montana, is the largest Superfund cleanup project in the nation. The contamination sites in the area cover over 50,000 acres along 140 miles of the Clark Fork River and its tributaries.

These problems are not simply the result of mining done in the past. They are being repeated and enlarged by mining going on today.

Furthermore, new technological trends in the mining industry increase the potential for water contamination. These include the increasing use of open-pit mining methods instead of underground (waste-to-product ratios are higher with open-pit mines), and the growth in "solution mining" processes in which large volumes of extractive chemicals are used to treat masses of low-grade ore (instead of more costly grinding and processing).

U.S. gold mining has been revolutionized since the 1970's by the spread of "cyanide heap-leaching," in which gold is removed from large piles of ore through soaking with dilute cyanide solution. Cyanide is extremely toxic, and over 100 million tons are used annually in the U.S. gold mining industry. Many of the heap-leaching sites in operation are known to have leaked; at many others, proper monitoring data are not available.

Another solution mining sector, that of copper ores by heap and dump leaching with dilute sulfuric acid, has rapidly expanded in recent years. Solution extraction - electrowinning ("SX-EW") production in the U.S. grew from 37,000 tons in 1974 to 405,000 tons in 1990 -- one-quarter of all production in a year when the U.S. led the world in copper mine output (Chile and the US produce comparable copper output). In solution mining, acid is applied to piles of low-grade ore, some on liners and some unlined.

"Leach dumps typically cover hundreds of hectares, rise to heights of over 60 meters or more, and contain several million tons of uncrushed, low-grade ore. The copper content of material deposited in leach dumps averages about 0.3 percent." [*Copper Dump Leaching...*, p.25]

"In-situ mining" techniques are still largely experimental, but this form of chemical mining is expected to grow substantially in the future. "In-situ" means "in place," and in this form of mining the ore is treated with extractive chemicals while still in place in the ground. Process solutions are injected at wells, allowed to flow laterally through the ore body, and recovered from separate well locations. Clearly, groundwater quality is threatened by in-situ mining and protective measures are necessary.

These examples demonstrate that progressive developments in the mining industry make concerns over protection of surface and underground waters even more urgent for the future than for the past.

Current Legislation is Inadequate

Federal law does not prevent contamination of America's waters by the paths most common in metals mining. Some, but not all, states have addressed this problem. However, where it exists, state regulation varies widely in effectiveness and enforcement. Federal legislation is needed to establish a baseline, and to protect the better states from being undercut by others which are willing to risk water quality in order to encourage mining development.

The Office of Technology Assessment, in its report *Managing Industrial Solid Wastes from Manufacturing, Mining...*, February, 1992, reviewed the state of Federal law regulating mining wastes and contamination, with a particular emphasis on RCRA. OTA concluded:

> "In comments to OTA, many industry representatives contend that the combined coverage of these statutes [SDWA, CWA, CAA, TSCA, CERCLA], along with programs of other Federal agencies such as BLM and of the States, is sufficient to address issues not strictly covered under RCRA. This appears to be true in terms of general statutory coverage, but with some **major exceptions such as protection of groundwater, control of nonpoint source pollution, regulation of heap and dump leaching operations, and regulation of inactive and abandoned mine sites.** Of course, the question of adequate Federal and State enforcement of existing regulations under these statutes always looms." [p.48]

> "The SDWA requires EPA to set drinking water regulations.... However, **EPA lacks authority under Subtitle D to prevent groundwater contamination from production facilities** (unless a demonstrable hydrologic link exists between surface water, which EPA can regulate, and groundwater) and may lack authority to regulate impoundments

used for storage of Subtitle D Wastes at injection sites. [p.49] [emphasis added]

The Federal Resource Conservation and Recovery Act of 1976 initially provided a potential framework for regulation of environmental impacts caused by mining wastes. However, the adoption of the Bevill Amendment in 1980, and a subsequent administrative determination by the Reagan Administration on July 3, 1986, have excluded metals mining from RCRA's scope.

In the fall of 1991 and early in 1992, the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce studied mining issues at length for possible resolution in RCRA reauthorization. However, no legislative solution has been adopted. The mining industry has argued that the large masses of material it excavates and processes are not "wastes" until all metal extraction has ceased, and therefore they should not be regulated under RCRA. However, the pollution-spreading character of chemical-mining dumps and heaps is determined when they are constructed, not when the solution process is ended. If regulation is deferred, the cost of relocating dumps and heaps to prevent contamination will be greatly increased. The goal of *prevention* will be thwarted.

Mining contamination is subject to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, or "Superfund." There are two problems with relying on CERCLA to protect the environment from mining impacts, however. First, CERCLA is a *reactive*, not a *preventive* law. Because mining impacts are the result of the management of very large masses of material, it is much more cost-effective to prevent the generation and spread of contamination than to correct a polluting condition after it has been constructed. Secondly, CERCLA by its limited scope will only address a small fraction of the mining sites which are causing environmental problems.

While point-source discharges from mining sites are regulated by the NPDES program, non-point mining discharges and groundwater contamination are not regulated by any Federal program. State groundwater programs for mining, where they exist, are not subject to any Federal standards or oversight.

> "... unlike EPA's air and surface water programs,EPA does not require, approve or authorize state groundwater quality programs, and there is no comprehensive federal groundwater quality statute." [*Draft Report/State and Federal Mining Waste Programs...*, 1989, p.27]

State programs to regulate mining and protect groundwater are inadequate and often spottily executed. For example, in Colorado the Summitville mine was allowed to operate for six years after it was found to be in violation

of its original permit conditions. When its Canadian owner corporation declared bankruptcy, the mine became a $100 million cleanup liability for the American taxpayers.

Colorado also allowed Battle Mountain Gold company to operate its San Luis gold mine using a cyanide destruction system which Mineral Policy Center predicted would not work. Two years after startup, the mine's tailings pond was found to have cyanide levels fifty times greater than allowed by its permit, a condition which the State had consistently overlooked.

In a further example, Idaho has allowed the Stibnite mine to continue to operate even though leaks of cyanide into surface and groundwaters were discovered as early as 1988. Regulators are loath to force the mine to close, because they have no funds and no adequate bond to cover cleanup costs... so the problems are allowed to fester.

The story is repeated at location after location: the pressure to keep short-term mining jobs going overrides state regulators' long-term commitment to prevent costly damage to environmental resources. A Federal baseline program is necessary to ensure that standards are maintained, adequate financial assurance is obtained at project initiation, and prompt enforcement action is taken when necessary.

Mining Provisions in H.R. 3948

The mining provisions in H.R. 3948 (all references are to the 21 April 1994 "Amendment in the Nature of a Substitute") would provide a strong framework of Federal law to prevent contamination of surface and underground waters from metals mining.

This framework would focus on *prevention*, rather than on cleaning up contaminated waters and soils after contamination had occurred. It pays special attention to the difficult problem of acid mine drainage, both during and after mining activities.

The proposed language establishes as a baseline the "naturally occurring background levels of water quality in existence prior to the commencement of any metallic mineral activity" [§407(a), adding §406(c) to FWPCA]. Statutory definition of this baseline is necessary to prevent evasion of the intent of the groundwater protection provisions. The State of Montana, for example, recently proposed to define "natural condition" -- the baseline for measurement of contamination -- of waters in that state as the condition which existed in

1955, regardless of whether mining had destroyed water quality before that year.

The technology exists to fulfill the requirements of H.R. 3948. Impermeable liners can be constructed to prevent contamination of groundwater -- it just takes better management of materials and techniques already in use, and prompt enforcement and corrective action when problems do arise. Sites can be engineered to prevent failures of solution ponds and overflows of embankments. However, so long as there is no firm and enforced national standard for mining regulation, corner-cutting will continue.

Conclusion

The mining language proposed in H.R. 3948 fills an important gap in U.S. environmental protection. It establishes permit requirements and standards to prevent the further spread of wastes and pollutants from metals mining. This step is sorely needed; the provisions should be retained as this bill moves through the legislative process.

Thank you for this opportunity to testify. I would be pleased to answer any questions the Subcommittee may have.

Attachments:

"Judge Sinks Kennecott's Plan to Pay $11.7 Million for Polluting Water," *The Salt Lake Tribune*, 5Sept92
"Mine blamed in fish kill at Squaw Creek," *Rapid City Journal*, 17 July 1992.
"Mine Pollutes Oakland Creek," *San Francisco Chronicle*, 11 Nov 1992.
"Mine's toxic leaks render river lifeless, *Denver Post*, 11 Nov91.
"U.S. challenges state ruling on water quality," *Great Falls Tribune*, 21Apr94.

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The Salt Lake Tribune

SATURDAY September 5, 1992

Judge Sinks Kennecott's Plan to Pay $11.7 Million for Polluting Water

By Jim Woolf
THE SALT LAKE TRIBUNE

A proposed $11.7 million settlement between Kennecott and the state of Utah for groundwater pollution in Salt Lake County has been rejected by a federal judge.

The settlement is "not just and fair," Judge J. Thomas Greene of U.S. District Court for Utah wrote in a 47-page ruling Friday. He also said it is inconsistent with requirements of the federal Superfund law.

"The decision is great," said Douglas Parry, attorney representing the Salt Lake County Water Conservancy District. "This was a sweetheart-deal between Kennecott and the state that would have left the citizens of Salt Lake County with contaminated water."

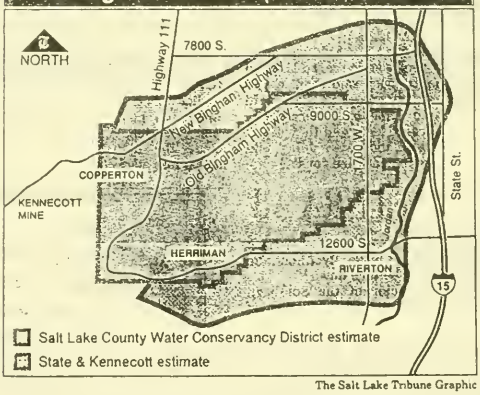
The water district intervened in the proposed settlement, saying compensation for the contaminated water should be far more than the $11.7 million Kennecott was going to pay. Experts who testified on behalf of the water district helped scuttle the deal.

"I'm disappointed, but not surprised," said Ken Alkema, director of the Utah Department of Environmental Quality. He helped negotiate the $11.7 million settlement and still believes it is a reasonable compromise.

"There is so much confusion over what the law provides for in this kind of case. I've been involved with it for 10 years and it

■ See A-2, Column 4

How Large Is the Polluted Area?



The Salt Lake Tribune Graphic

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Judge Tosses Out $11.7 Million Water Settlement

■ Continued from A-1

still is hard to understand all of this," said Mr. Alkema.

Heavy metals and acids have leached from the ore at Kennecott's Bingham Canyon mine and created a huge plume of contaminated groundwater in southwestern Salt Lake County. Many private wells have been polluted and several large, municipal drinking-water wells are threatened.

The agreement between Kennecott and the state assumed the groundwater in a 40-square-mile area is permanently contaminated by the mine waste. It also assumed this groundwater could have provided enough drinking water for about 52,000 people, and set the value of this water at $11.7 million.

Experts from the water district challenged these assumptions. They insist the plume of contaminated water already covers at least 54.5 square miles and is continuing to expand and move forward.

"There are a number of public agencies with major, municipal drinking-water wells in the path of that plume. If our consultants are right, they all are in jeopardy," said David Ovard, water-district director.

The judge cited three main "deficiencies" in the proposed agreement between Kennecott and the state: failure to adequately explain why the contaminated groundwater cannot be cleaned up; failure to ensure the source of the pollution has been stopped and the plume no longer is spreading; and failure to collect enough money from Kennecott for the contaminated groundwater.

Greg Boyce, spokesman for Kennecott, said the company is negotiating an agreement with the Environmental Protection Agency to answer the unanswered questions raised in the ruling.

"The judge has decided he wants to see all of this work completed before he looks at the issue of damage to the groundwater," said Mr. Boyce. "The factual basis for the settlement will be borne out."

July 17, 1992

Rapid City Journal

Mine blamed in fish kill at Squaw Creek

By Pat Dobbs
West River Editor

SPEARFISH — Acidic runoff from mining is killing fish in Squaw Creek above the popular Devils Bathtub swimming hole, according to an environmental researcher.

"There is no imminent human health danger ... I have no concern at all there. However, this is the beginning of a problem, not the end," said Deb Rogers Miller, executive director of Rapid City-based Technical Information Project.

Squaw Creek is a tributary of Spearfish Creek. The water from Spearfish Canyon is part of the water supply for the city of Spearfish.

Miller called on state regulators Thursday to require LAC Minerals Ltd., owners of Richmond Hill mine, to move its waste rock and pay fines for damaging the environment.

She said the state shared in the blame because it did not prohibit mine wastes in stream drainages. And she said the state Game, Fish & Parks Department had known about stream problems, including a complete fish kill on a portion of the creek last spring.

A state Department of Environment & Natural Resources (DENR) spokesman said the mine had complied with a July 2 order to stop dumping certain waste rock and was dousing the pile with a lime neutralizer as a short-term response.

Richmond Hill also filed a preliminary remedy plan on Wednesday as requested, said Tony Mangan.

"We know the lime is a temporary solution. ... The final report on Aug. 1 is going to hopefully include long-term solutions," he said.

Company officials could not be reached for comment Thursday.

The acid comes from water mixing with natural sulfide rock exposed in pit mining. There is 3½ million tons of sulfide and oxide rock in the waste pile, Mangan said.

Miller raised concerns of acidic runoff during the mine's permit hearing in 1988. But an official with St. Joe Gold Corp., then owner of the mine, said carbonate rocks would neutralize acids.

Now, Miller believes the only solution is "get that waste rock out of there."

Removal could be timed with reclamation, she said. Richmond Hill has announced it is exhausting gold ore reserves and expects to start shutting down in September.

But Miller's fear is that LAC's long-term proposal will be continued use of lime. She predicted that would cause other problems, including fluctuating pH levels in the stream.

GF&P records and a study by OEA Research Inc. for LAC indicate something already is awry in the Squaw Creek food chain, said Miller.

In 1985 there were 216 total fish counted in three separate test areas, 222 in 1988 and 11 in 1991. Just recently, no fish were found in one of the test areas, approximately a mile upstream of Devils Bathtub.

Mangan said DENR was notified of the runoff problems in May and that water samples were being collected weekly.

Angry that the state did not move sooner to protect a public resource and did not make the situation known until late June, Miller said:

"This fish kill was premeditated by lack of attention to preventing acid mine drainage."

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San Francisco Chronicle
11 November 1992

Mine Pollutes Oakland Creek

Tons of tailings must be cleaned up from old sulfur operation

By Elliot Diringer
Chronicle Staff Writer

In a barren ravine in the Oakland hills, a trickle of poisons seeps from the earth and meanders its way toward San Francisco Bay.

The acidic flow, which descends a small creek the neighbors grimly call the Yellow River, comes from an abandoned sulfur mine, where nearly 100 years ago men with pickaxes tunneled into the hillside to carve out its ore.

In dozens of other spots in the East Bay and throughout the Bay Area, heaps of ore tailings and long-forgotten mine shafts are ghostly reminders of an industrial era that is long past but continues to take its toll on streams, marshes and the bay.

No one knows for sure how many of the sites pose major environmental threats, but water pollution authorities are now trying to find out and get them cleaned up.

Some are well-known, such as the New Almaden Quicksilver mine in south Santa Clara County, once the world's second largest mercury mine. Others are small and hidden, making it difficult to gauge or control their damaging flows.

"You may be surprised to find it in the Oakland hills," said geologist Dyan Whyte of the Regional Water Quality Control Board, which traditionally regulates factories, sewage plants and other obvious pollution sources and is now targeting abandoned mines as well.

> ***'There are all these mine (openings) hidden through the hillsides up there'***
>
> — GEOLOGIST DYAN WHYTE

"But there are all these mine (openings) hidden through the hillsides up there," she said, "and the drainage from all of them potentially contains high concentrations of metals."

Tracking down the abandoned mines is just the first challenge. Then comes the job of figuring out how to render them harmless and who will pick up the tab.

"A lot of the mining companies are long since dissolved," said Whyte. "The current property owner inherits the (cleanup) responsibility, but that can be a problem if they don't have the funds to do the work."

One of the first slated for cleanup is the abandoned sulfur mine, on a winding one-lane road in the Leona Heights neighborhood below Merritt College.

The historical record is sketchy, but the mine apparently began operation around the turn of the century. Its original owner was Leona Chemicals, a partnership that included mining magnate F.TM. (Borax) Smith, who earned his nickname and a multimillion-dollar fortune hauling borax from Death Valley with 20-mule teams.

In Oakland, the quarry was pyrite, or iron sulfite, also known as fool's gold. The ore was crushed on the site to extract sulfur, which was used as pigment in paint and to produce sulfuric acid for industrial processes.

Two or more tunnels wound perhaps 1,000 feet into the hillside, and the ore was hauled out

MINE: *Page A18 Col. 1*

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Mine's toxic leaks render river lifeless

Despite fines, promises, cyanide flowing into Alamosa River and downstream

By Kit Miniclier
Denver Post Staff Writer

Deadly cyanide-laced water from a huge gold mine near Wolf Creek Pass has killed all aquatic life in 17 miles of the Alamosa River and the Terrace Reservoir, and it may have seeped downstream to the Rio Grande, say state and federal officials.

The leaks from Summitville Consolidated Mining Co. continue, despite a $100,000 fine levied against the company this year, agreements to take remedial actions, closure of the once-popular fishing reservoir after a massive fish kill and complaints from downstream users.

"We went up to the mine last month to investigate reports of an environmental disaster and we found an environmental disaster," said Mark Hughes, an attorney with the Sierra Club's Legal Defense Fund.

"I was appalled. There seemed to be substantial leaks and runoff, and the mine operators didn't seem to know where it came from or what might be in it."

The sprawling open-pit mine is 11,700 feet above sea level and about 16 air miles southeast of the summit of Wolf Creek Pass in southern Colorado.

A Colorado Department of Health video of the seepage showed brilliant blue sludge and water — ranging in color from orange to yellow to molasses — leaking into natural waterways from the mine site last summer.

"This ought to be on the 9 o'clock news," observed the filmmaker on the unedited video.

The company, a wholly owned subsidiary of Galactic Resources Inc. of Canada, is using 40 million to 50 million gallons of

Please see MINE on 7A

Gold mine's leaks deadly for aquatic life

MINE from Page 1A

cyanide-laced water in the 45-acre heap leaching process to extract gold from several million tons of ore, said mine general manager Bill Williams.

"We've got problems, there is no question about that," Williams readily admits, explaining that about 100 gallons of water a minute are leaking from the leach heap.

An elaborate system of ditches and ponds is designed to catch the leaks and either pump the fluids back to the leach pad, or treat them and then spray the treated water on the landscape.

However, under an agreement between the company, state health department and Mined Land Reclamation Board, the company ceased landscaping applications on Oct. 30.

"At this point, there isn't any acid runoff from the heap," Williams said. "We feel we are on the right track, and we are going to clean this place up."

The company expects to continue leaching operations at least another six months, though it finished mining operations this fall.

State game officials stopped stocking the Terrace Reservoir with 15,000 trout fingerlings annually after a massive cyanide leak rolled down Whiteman Creek into the Alamosa River in 1990, killing all life in 17 miles of the river and in the reservoir, which is south of Del Norte, said Jerry Apker of the division of wildlife.

The fish kill extended 7 or 8 miles below the reservoir, killing fish in at least one private farm pond, and may have reached the Rio Grande.

The first reported fish kill attributed to the mine occurred in 1986, shortly after the operation began. The most recent was six weeks ago, when 500 to 1,000 gallons of the cyanide-laced water spilled into Whiteman Creek.

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The Denver Post / Karl Gehring

DEADLY WATER: A sign warns of the danger at one of the Summitville Consolidated Mining Co.'s holding ponds.

Great Falls Tribune
21 April 1994

U.S. challenges state ruling on water quality

BILLINGS (AP) — The federal government is threatening to revoke Montana's right to enforce the federal Clean Water Act because of a state legal opinion that critics say would classify decades of mining pollution as the "natural" state of Montana's waters.

The threat by the Environmental Protection Agency also poses a new roadblock to mining permits for the proposed New World Mine, near Yellowstone National Park.

Under state law, wastewater must be treated to match the "natural condition" of streams where it is discharged.

But in a February legal opinion, a lawyer for the Montana Water Quality Bureau wrote that "natural condition" refers to the water condition in 1955, when the state passed its first water pollution laws, not to the original condition of the stream.

The EPA has told the state that federal regulators will not accept the definition because it effectively declares that pollution from old mines is "natural" and doesn't have to be cleaned up.

"The proposed definition is unacceptable, and by employing this definition, the state jeopardizes its ability to continue to administer the authorized Clean Water Act program in Montana," Max Dodson, director of EPA's water management division, wrote state water officials last month.

The EPA now delegates enforcement authority to the state, but it can revoke that authority if it feels the state is violating the intent of the federal law.

That could affect industries across the state, who then would have to obtain wastewater permits from the federal government rather than the state.

It could have particular significance at sites where mining has caused lasting contamination of rivers and streams. At the proposed Cooke City mine, for example, abandoned old mines still leach acid chemicals into streams. A central question is whether new mine operators must clean up the mess.

Environmentalists lambasted the legal opinion.

"There are mine tunnels discharging water that's about the same quality as battery acid — how can you define that as natural?" asked Peter Aengst of the Greater Yellowstone Coalition. "Is this the precedent we want to be setting across Montana?"

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TESTIMONY OF THE

NATURAL RESOURCES DEFENSE COUNCIL, INC.

BEFORE THE

HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

SUBCOMMITTEE ON WATER RESOURCES AND THE ENVIRONMENT

TOXIC POLLUTION PREVENTION AND CONTROL

AND OTHER CLEAN WATER ACT ISSUES

Prepared by
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May 24, 1994

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Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to testify concerning the reauthorization of the Clean Water Act. I am a Senior Attorney with the Natural Resources Defense Council[1], specializing in water issues.

Beginning with its 1990 hearings on coastal water pollution problems, this Committee has amassed an extensive hearing record on the effectiveness of current Clean Water Act programs in protecting water quality, human health and aquatic resources.[2] Based on this record, Chairman Mineta and Representative Boehlert have introduced H.R. 3948. Others on this Committee, led by Representatives Shuster and Hayes, have expressed support for a different legislative package, made public last week as a "Discussion Draft."

We welcomed introduction of H.R. 3948 because it signalled that this Committee recognized, based on the information in the record, that we need to strengthen the Clean Water Act and make

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[1] The Natural Resources Defense Council (NRDC) is a nonprofit environmental organization with approximately 170,000 members and supporters nationwide. NRDC has been involved in implementation of the Clean Water Act since it was first adopted in 1972, and in all major Clean Water Act reauthorization efforts since that time.

[2] Hearings before this Subcommittee on the status of the Clean Water Act are included in the following reports: Report No. 101-68, "Coastal Pollution" (May 9 and 10, 1990); Report No. 102-31, "Reauthorization of the Federal Water Pollution Control Act" (March 21; April 17, 18, 23, 24, 25; May 1, 2, 8, 14, 23; June 25 and 26, 1991); Report No. 102-43, "Reauthorization of the Federal Water Pollution Control Act (Protection of Wetlands)" (October 15, 16, 22, 23, 30, and 31, 1991); Report No. 103-17, "Reauthorization of the Federal Water Pollution Control Act" (February 23 and 24; March 31; April 1, 21, 22; May 5, 11, 12; June 30, 1993). Additional hearings on polluted runoff, not included in this Report, were held on July 14, 1993.

additional resources available to the EPA, the States and local communities to carry out clean water programs.

From the standpoint of the Natural Resources Defense Council, strengthening amendments are clearly needed. Despite more than twenty years of effort (and important progress, particularly in the control of municipal wastewater pollution and industrial discharges) we continue to be plagued by widespread water pollution, sediment contamination habitat loss and degradation and aquatic resource problems throughout the waters of the United States.

In preparation for the twentieth anniversary of the Clean Water Act, NRDC conducted a detailed review of the existing literature on the state of our nation's waters. We combed books, periodicals, reports and studies on water quality, habitat, and living resources, and on the government programs designed to protect them. The results were published in a book, entitled The Clean Water Act 20 Years Later,[3] and are summarized below. They show that we are far from "home free" when it comes to securing the future of our nation's waters:

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[3] Adler, R.W., Landman, J.C. and Cameron, D.M., The Clean water Act 20 Years Later (Island Press, 1993). Citations for facts presented in this summary can be found in the text and footnotes of the book.

SUMMARY OF FINDINGS

1. Traditional Measures of Progress are Incomplete and Inadequate, but Show Substantial Ongoing Impairment of Surface Waters

According to EPA's 1990 National Water Quality Inventory, we have a long way to go in meeting the goals of the Clean Water Act:

> At least a third of our rivers, half of our estuaries and more than half of our lakes are not meeting designated uses, that is, are not safe for swimming, fishing and other uses. Considerably fewer waters are reported as meeting these uses in 1988-89 than in 1980-81. (In part, this may reflect better monitoring and reporting.)

But these reports are incomplete. In 1990, only 53% of river miles, 69% of lake acres, and 75% of estuarine area were "assessed" for the report. And even these claims are misleading, since "assessed" does not mean "monitored" for toxic and other pollutants. The 1990 Report was based on actual chemical measurements for less than a fifth of our rivers, streams, and lakes, and about a quarter of our estuaries.

2. New Controls have Reduced Discharges of Pollution, but We Still have a Long Way to Go

The percent of the U.S. population served by wastewater treatment plants jumped from 42% in 1970 to 67% in 1975, 70% by 1980, and 74% by 1985. EPA estimates that annual releases of organic wastes have been reduced by about 46% as a result of this improved treatment, despite a large increase in the amount of wastes treated.

Industrial pollution controls have eliminated the release of almost a billion pounds of toxic pollutants each year into the Nation's rivers, lakes and coastal waters. Even higher amounts of conventional pollutants, like organic wastes and solids, have been controlled.

Still, we continue to release hundreds of millions of pounds of toxics into our surface waters each year from unregulated or poorly regulated industries, and discharges of raw or partially treated sewage continue unabated in many areas.

3. Long-term Water Quality Trends Show Inconclusive Results

Despite the existence of thousands of water quality monitoring stations around the country, very little information collected at these sites is suitable to tell us how much progress has been made in overall water quality.

The little information available to judge long-term progress shows no significant trends in overall water quality. Where improvements are evident, they are in pollutants such as phosphorus, reflecting investments in sewage treatment plants. Where deterioration is shown, it is from nitrogen, sediment, and other pollutants characteristic of polluted runoff from farms and other lands.

4. "Real-World" Measures Show Some Progress but Serious Problems Remain

a. Many Waters Remain Unsafe for Swimming

In 1991, U.S. ocean and bay beaches were closed or advisories issued against swimming on more than 2000 occasions in coastal states that monitor beach water quality. High bacteria levels were responsible for the overwhelming majority of closures. Over 5000 closures or advisories have occurred since 1988. This database must be seen as an incomplete record of beach contamination: many states do little or no beach water quality monitoring, and some fail to close beaches even when standards are violated.

State water quality reports confirm that a quarter of our assessed rivers and estuaries, a fifth of our lakes and ten percent of coastal waters remain unsafe for swimming.

b. Many Drinking Water Supplies Remain Jeopardized

The recent illnesses caused by Milwaukee's drinking water are not isolated. Reports from the Centers for Disease Control identify 102 disease outbreaks from 1986-1992 linked directly or indirectly to microscopic bacteria, viruses or parasites, striking 34,155 people in 35 States.[4] These numbers are conservative; some researchers believe that 25 times as many drinking water-related illnesses occur than are reported.

Between 27% and 30% of community drinking water systems reported violations of health-based standards from 1986-91.

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[4] The Natural Resources Defense Council and the Sierra Club recently released a report, "Danger On Tap: Protect America's Drinking Water," detailing the number of reported water borne disease outbreaks linked directly or indirectly to polluted runoff and making recommendations for strengthening both the Clean Water Act and the Safe Drinking Water Act to protect public health. A copy of this report is attached to this testimony and we ask that it be included in the hearing record.

c. Many Sources of Fish and Shellfish Remain Contaminated

In 1990, 31 states reported toxic contaminants in fish at levels exceeding action levels set by the Food and Drug Administration. Forty five states reported almost 1,000 fishing advisories in 1988-89, and another 50 complete fishing bans, due to pollutants such as PCBs, pesticides, dioxin, mercury, other metals, and other organic chemicals. These warnings affected over 7,000 river miles, almost 2.5 million lake acres, over 800 square miles of estuaries, and almost 5,000 miles of shoreline in the Great Lakes. EPA acknowledges that these reports are incomplete, and that state criteria for issuing advisories vary widely.

National data bases show some declines in chemical contamination of seafood, but increases and serious remaining problems for some chemicals, particularly in urban waters and other heavily-polluted areas. In a report released by EPA last year, almost half of the chemical forms of dioxins and furans, and a third of the other chemicals measured, were found at over half of the sampling locations. PCBs, biphenyl, mercury and DDE were found at more than 90% of the test sites. And every pollutant in the study was found in at least one location. EPA calculated that the levels of pollutants measured in fish around the country posed significant risks of cancer and other health effects for average fish consumers, and even higher risks to subsistence and recreational anglers who consume more fish from contaminated waters. Information is available, however, for only a handful of chemicals.

Sewage contamination of shellfish, however, is getting worse. The National Shellfish Register shows a 6% increase in estuarine waters closed to shellfish harvest from 1985 to 1990. By 1990, less than two thirds of our shellfish waters were unconditionally approved for shellfish harvest.

d. Aquatic Species are in Serious Jeopardy

Many more aquatic species are threatened and endangered than their terrestrial cousins: 73% of mussels, 65% of crayfishes, 34% of fishes, and 28% of amphibians are jeopardized compared to 13% of mammals, 11% of birds, and 14% of reptiles.

Between 1979 and 1989 the American Fisheries Society added 139 and removed 26 categories of fish from their list of threatened and endangered species, producing a total of 364 fishes that warrant protection due to rarity. Not a single species was removed from the list due to successful recovery efforts, while 10 were dropped because they became extinct.

e. Many aquatic and water-dependent populations are plummeting

Between 1970 and 1989, harvest of oysters dropped by 44% and landings of spiny lobster declined by 34%.

Commercial landings of striped bass have declined continuously since 1973, with a fall of 92% since 1982.

Between 1983-89 landings of bay scallops fell by 88%. Scallop landings also dropped by 50% from 1975-85, with catch per unit effort in 1985 reaching historic lows.

Duck breeding populations in North America dropped continually from 1955-1985. More recent data suggest that this trend has not been reversed. The ten species with over 97% of North America's breeding populations showed declines of 34% from 1970 to 1989.

According to data from the FWS Breeding Bird Survey, which has recorded flight records since 1966, a significant number of water-dependent species have declining population trends.

f. Pollution Continues to Cause Massive Fish Kills and Other Adverse Effects to Fish and Wildlife

From 1972-1989, EPA estimates that at least 429 million fish were killed in almost 10,000 incidents. (These data under-represent number of fish kills for several reasons.) The numbers of fish kills each year do not appear to be declining significantly.

From 1980 to 1989, NOAA reports over 3,650 fish-kill events in 533 coastal and near coastal counties in 22 states. These events involved over 407 million fish killed. In general, the total number of reported fish kills increased during the 1980s, but the average numbers of total fish killed per year declined.

Taken together, NRDC estimates that at least 1.35 billion fish have been killed in inland and coastal waters combined since the Clean Water Act was passed.

Pollutants continue to be released into our aquatic environments at levels that are toxic to aquatic species and to birds, mammals and other predators that consume contaminated fish. Studies in the Great Lakes indicate that toxic pollutants cause population declines and reproductive problems, birth defects, behavioral changes, sexual changes, and increased susceptibility to disease.

In sum, it is clear that the Clean Water Act has not thus far succeeded in achieving the goals we established in 1972 for fishable, swimmable waters and an end to the discharge of toxic pollutants in toxic amounts.

H.R. 3948 contains several provisions aimed at addressing the law's remaining deficiencies. We support some of them, but believe that significant changes would be needed to make H.R. 3948 highly effective. The Discussion Draft contains some provisions that parallel H.R. 3948. However, it also contains a number of extremely damaging provisions the adoption of which would greatly weaken rather than strengthen existing law. We urge this Committee to reject those amendments, some of which are discussed more fully below.

In testimony presented previously to this Committee, NRDC has urged that provisions in the Clean Water Act directed at toxic pollutants in surface water and sediments be tightened and that polluted runoff be prevented and controlled thorough amendments to Section 319.[5] While H.R. 3948 tackles these areas, it does not move us far enough in the direction of our national clean water goals.

This testimony will focus on certain areas not yet addressed in H.R. 3948, or in need of further strengthening, principally

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[5] Testimony of Robert W. Adler, NRDC Senior Attorney, April 22, 1993; Testimony of Diane M. Cameron, NRDC Senior Research associate, April 22, 1993; Testimony of Jessica C. Landman, Senior Attorney, May 14, 1991 and May 10, 1990.

relating to toxic pollutants.[6] It will also highlight our principal concerns about the Discussion Draft, based upon an initial reading; since this bill became available so recently, we have not yet been able to conduct a detailed review and assessment.

Effluent Guidelines and Pretreatment Standards

Although the effluent guidelines and pretreatment standards program under the Clean Water Act has made important strides in controlling the discharge of toxic pollutants to surface waters and sewage treatment plants, the program needs to be fine-tuned to ensure that future guidelines and standards focus on pollution prevention techniques and process changes as the Best Available Technology. Language changes are needed to make clear EPA's authority to prohibit technologies that result in significant cross-media transfers of pollution rather than prevention or actual treatment.

The Senate bill, S. 2093, make some small but significant changes to the law that we believe would be effective in addressing these concerns. We urge the Committee to consider following the approach in the Senate bill.

Other Discharges Which Affect Surface Water

H.R. 3948 contains an important provision aimed at improving the regulatory program for toxic pollutants discharged to surface

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[6] This testimony does not discuss all key provisions of H.R. 3948 or the Discussion Draft. In particular, wetlands and polluted runoff are omitted because other panels of witnesses will be covering these areas.

waters. Section 404 of the bill, "Other Discharges Which Affect Surface Waters," adds a provision to the permitting section of the Act making clear that discharges to the ground or ground waters should be covered by section 402 discharge permits where there is a "reasonably foreseeable and demonstrable direct hydrological connection between the ground waters and surface waters," and the pollutant being discharged to the ground or ground waters is actually present in the nearby surface waters. The provision is appropriately narrow: it applies only where this direct cause and effect connection can be shown, and applies only where no other program regulates the release. So it does not duplicate regulation, for example, under RCRA -- wastestreams already covered by RCRA would not fall within its scope. This is a positive effort to plug a regulatory loophole that can, in isolated instances, be significant. We urge its retention in the bill.

The Discussion Draft does not contain a parallel provision.

<u>President's Proposal for a Study and Task Force to Consider Chlorine and Chlorinated Compounds in Specific Industries</u>

The Administration's Green Book[7] contains a recommendation that the law be amended to call for a "national strategy" aimed at reducing exposure to toxic chlorinated organic compounds. The proposal calls for legislation to do the following:

* Within six months after enactment, the Administrator of EPA would convene a Task Force including key Federal agencies

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[7] "President Clinton's Proposal for the Clean Water Act," January 28, 1994 p. 22-24.

with expertise in health and living resource effects caused by chlorine and chlorinated compounds. The Task Force would evaluate the "use, environmental and health impacts... and availability and relative efficacy and safety of substitutes for these substances" in publicly owned treatment works (i.e., sewage effluent disinfection); drinking water systems, solvents, PVC and other plastics, and in pulp and paper manufacturing.

* Within 18 months the Task Force would collect and review this information, studying (among other things) the potential developmental impacts of these substances on aquatic life, wildlife and humans.

* Within 30 months, based on the results of the study, the Administrator would develop a plan for any appropriate actions to restrict or prohibit the use of chlorine or chlorinated compounds in these target industries and applications, in consideration of the environmental and health impacts as well as the availability and relative safety and efficacy of potential substitutes. The plan would be subject to notice and public comment; indeed, we believe that the entire process of setting up and managing the Task Force and study should be done in a fully open and public fashion much as the dioxin reassessment now coming to completion has been conducted.

* Finally, the Administrator would, within 30 months, release a national strategy for reducing, substituting or prohibiting the use of chlorine or chlorinated compounds in those instances where the results of the study supported such actions.

We recognize that this proposal has created a great deal of controversy in some quarters. However, it should be carefully considered and discussed on its merits; it makes a lot of sense.

First, the evidence is mounting that the release into the environment of toxic chlorinated compounds is having profound and potentially irreversible effects on the ecosystem and human health. Recent scientific findings indicate that persistent toxic chemicals may increase the incidence of breast, testicular and prostate cancer as well as endometriosis and lowered sperm counts.

One class of chemicals consistently linked with these health effects is dioxin and other organochlorines. They are discharged into our nation's waters directly or emitted into the air and subsequently re-deposited on the ground from various industrial processes, such as pulp and paper manufacturing, and the manufacture and use of some solvents and plastics like polyvinyl chloride. Once deposited on the soil they can either run off into our waters or be taken up into animals through foraging; human consumption of contaminated animals or dairy products is another potential route of exposure.

The use of chlorine as a disinfectant for treating sewage effluent discharged to surface waters and for treating drinking water supplies is a significant issue, as well. While no one would deny the importance of disinfection to protect human health from the spread of water borne diseases, chlorine usage is not an unalloyed and perfectly safe means for achieving this goal.

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EPA research has found that, while the ecological implications of wastewater chlorination are not fully understood, many studies indicate that chlorination causes significant acute (i.e., short term) toxicity to aquatic life and may also cause chronic toxicity. A recent EPA-State Task Force convened to study the EPA position on municipal wastewater disinfection found that, while wastewater disinfection is necessary to protect human health, as currently practiced it may present significant risks to aquatic life.[8] The Task Force noted that "alternative disinfection technologies such as ultraviolet radiation and ozone are often less hazardous to aquatic life than chlorination and are becoming viable both technologically and economically."[9] There are more than 40 wastewater treatment plants in the U.S. that already have ozonation disinfection facilities.[10]

Similarly, use of chlorine for drinking water disinfection poses significant risks along with its benefits. More than ten thousand bladder and rectal cancers per year in the United States are associated with the use of chlorine and the disinfection by-

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[8] "EPA Disinfection Policy and Guidance Update," (R. Bastian, EPA), 5/16/91. In 1986 EPA studied 6300 municipal wastewater treatment plants that chlorinate and discharge to freshwater streams. It found that up to two thirds of the plants were likely to discharge wastewater that exceeded EPA's water quality criteria for acute toxicity. U.S. EPA, "Municipal Wastewater Disinfection: Protecting Aquatic Life and Human Health from the Impacts of Chlorination" (February 1991).

[9] Id. at 2.

[10] Masten, S.J. and Davies, S.H.R., "Advances in Wastewater treatment Technologies: The Use of Ozonation to Degrade Organic Contaminants in Wastewaters," Environ. Sci. Tech., Vol 28, No. 4 1994, 181A (citing Rice, et al.).

products that result from chlorine disinfection.[11] As with wastewater, alternative disinfection techniques do exist; indeed, they are already widely in use in Europe.[12]

The use of chlorine and chlorine compounds in pulp and paper manufacturing is an important source of dioxin contamination of fish. Yet, today pulp and paper can be and is being manufactured in many plants without the use of any chlorine -- "Totally Chlorine Free," or TCF.[13] The availability of safer and effective alternatives is -- and should be -- a critical component of the President's proposal: if such alternatives do not yet exist, the Task Force's recommendations will reflect that fact.[14]

But the handwriting is on the wall: we need to act now to address the problem of persistent and bioaccumulative toxic

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[11] "Chlorination, Chlorination By-Products, and Cancer: A Meta-Analysis," Am. J. Public Health, Vol. 82, No. 7 (July 1992), 836-842.

[12] Cohen, B.A. and Olson, E.D., "Victorian Water Treatment Enters the 21st Century: Public Health Threats from Water Utilities' Ancient Treatment and Distribution Systems," Natural Resources Defense Council (March 1994) at 21.

[13] For a detailed analysis of the availability of alternatives to the use of chlorine and chlorinated compounds for pulp and paper manufacturing, see Albert, R.J., 1994, Worldwide Survey State-of-the-Art TCF Bleaching; Paper presented at the International Non-Chlorine Bleaching Conference, Amelia Island, Florida, March 6-10, 1994.

[14] We believe that the evidence of safe alternatives to chlorine for pulp and paper manufacturing is so overwhelming that the Congress should step in to direct that the switch-over occur. For this reason we urge inclusion of H.R. 2989, the "Chlorine Zero Discharge Act of 1993," introduced by Representatives Richardson and Waxman.

chemicals in the environment. The International Joint Commission on the Great Lakes has called for a phaseout of the use of these chemicals, as has the American Public Health Association. The U.S. Congress should assist EPA in handling this ecological threat in a sensible but ambitious fashion by mandating the Task Force requested in President Clinton's proposal. Neither H.R. 3948 nor the Discussion Draft contains a provision that would do so.

Developmental Toxics

Because of the growing body of evidence linking exposure to extremely low levels of certain chemicals to endocrine, immune and nervous system disruption, the Clean Water Act should be amended to address human exposures to these toxics. (Many but not all of the chemicals implicated in this research are organochlorines.)

The Senate bill, S. 2093, contains a provision calling for a NAS Study to identify the compounds of concern, and for an EPA strategy, based on the NAS Study, to reduce exposures to targeted substances by 85% over 7 years. We urge this Committee to adopt an analogous provision. Neither H.R. 3948 nor the Discussion Draft has one now.

Mixing Zones

NRDC and other environmental groups have called on the Congress to revise the Clean Water Act to more clearly state the oft-cited principle that "dilution is not a solution to pollution." We ask that the law prohibit the use of "mixing

zones" for highly toxic, persistent and bioaccumulative pollutants. Mixing zones, areas in which a discharge may violate water quality standards on the theory that the receiving waters can mix with and dilute the toxic effects of the pollutant, are absolutely indefensible when it comes to pollutants that never "go away" through biodegradation. Persistent or bioaccumulative toxics can build up in the sediments surrounding a discharge pipe and can bioaccumulate in the food chain -- even though they may be present in a discharge or in the water column only in tiny amounts below the level of detection.

H.R. 3948 does contain a provision calling on EPA to publish a list of "persistent, acutely toxic, and bioaccumulative chemicals or classes of compounds which pose a sufficient risk to human health and the environment that the use of mixing zones... should be restricted or prohibited." (Sec. 304). However, the bill falls short in that it authorizes -- rather than directs -- EPA to issue regulations that actually restrict or prohibit such mixing zones. We ask that the Committee go that extra step, and direct EPA to issue appropriate rules.

The Discussion Draft contains no provision concerning mixing zones.

Pollution prevention planning on a multi-media basis

Everyone from the Chemical Manufacturers Association to Greenpeace agrees that pollution prevention planning can be an important and cost effective means for reducing the use and release of toxic chemicals to all media. These diverse parties

also agree that pollution prevention planning must be done on a multi media basis, looking at air and land/groundwater releases as well as water releases simultaneously in order to identify the best opportunities for true use and exposure reductions. And all agree that pollution prevention goals, and decisions as to which processes or chemicals to target, should be left up to the facility and not managed by the government.

In addition, there is widespread agreement that pollution prevention plans should be protected under trade secrecy laws, with only the summaries of the plans and the facility's medium- and long-term goals made public. Both the environmental community and the industry recognize the need to allow the details of a plan to remain confidential.

From all of these areas of consensus, the Senate was able to forge a pollution prevention planning section for its bill, S. 2093, that has garnered widespread support from all sectors. It differs from the provision contained in H.R. 3948 in that it more specifically and accurately defines key terms, as well as more precisely defining how the process of planning is to go forward within a facility -- while still leaving the actual targeted chemicals and processes entirely up to the facility. The Senate bill covers all facilities reporting large Toxic Release Inventory (TRI) releases, and not strictly water releases. This approach will capture far more facilities, and it is far more consistent with the multi-media approach favored by all. We urge this Committee to modify its pollution prevention planning

provision -- an important addition to the Clean Water Act -- to more closely track the Senate bill.

The Discussion Draft also contains a planning provision, but this provision deviates still further than H.R. 3948 from the approach we favor. For example, unlike H.R. 3948 it limits reporting of pollutants released to those "for which the person determines reductions are feasible and likely to result in significant benefits to human health and the environment." This approach builds complicated and inappropriate analyses into a plant manager's review, and may result in pre-judging the outcome of a full pollution prevention options analysis, rendering it ineffectual. The Discussion Draft also calls for simply a "description of the sources of such pollutants" in such general terms that there is little likelihood that a meaningful pollution prevention analysis will result. (H.R. 3948, in contrast, calls for a "comprehensive review of the processes used... that result in the [release of the pollutants]."

Bans and Phaseouts of Particularly Pernicious Toxic Pollutants

Under current law, EPA has the authority to issue effluent limitations or prohibitions for particular priority pollutants. These limits or prohibitions can be even stricter than technology-based limits, and (unlike water quality-based permit limits which are site specific) can apply to a pollutant wherever it is discharged. This authority, under section 307(a) of the Act, has been rarely invoked. In part, this is because it was

intended to be reserved for special, extremely toxic cases.[15] But in part it is due to the cumbersomeness of the administrative procedures that current law imposes.

We support those changes in sec. 307(a) included in H.R. 3948 to eliminate unnecessarily complex hearing procedures; the Administrative Procedure Act's notice and comment rulemaking procedures will be adequate to protect all parties' right to be heard.

However, we strongly oppose other changes to section 307(a) that would alter the "factors" to consider in determining whether a pollutant warrants issuance of an effluent prohibition. Specifically, both H.R. 3948 and the Discussion Draft would direct the Administrator to take into account "the beneficial and adverse social and economic effects of the effluent standard, including the impact on energy resources."[16] This analysis would be virtually impossible to conduct in a meaningful and

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[15] Tom Jorling, a former EPA Assistant Administrator for Water, described the authority for section 307(a) as follows:

> [S]ection 307(a) of the Act [is] for special situations where the BAT provision, because of economic or technical constraints, cannot provide adequate protection to human health or welfare... [W]e believe there will be cases where BAT will lead to limitations that still leave an unacceptable threat to human health and welfare, and that the more stringent health based requirements under section 307(a) will be needed.

Testimony presented to the Senate Committee on Environment and Public Works, Subcommittee on Environmental Pollution, 95th Cong., 2d Sess., reprinted in A Legislative History of the Clean Water Act of 1977 (1978) at 1104.

[16] H.R. 3948, p. 28, lines 15-17; Discussion Draft, page 22, lines 20-22.

scientific fashion. What is an "adverse social impact" of banning the discharge of a highly toxic chemical? Such subjective criteria will lead to endless litigation and costly, unscientific EPA studies. Section 307(a) should instead be a model of scientific rigor in asking only about the human health and ecological risks.

If the Congress wishes EPA to consider factors such as the technological and economic feasibility of ending the discharge of a highly risky toxic pollutant, this factor should be considered in planning the timetable for the phaseout -- not in deciding whether to act at all. Section 307(a)(6) allows for a more attenuated timetable for phaseout where there are significant technological obstacles; this is the general approach that Congress should consider.

Pollutant "trading" schemes

There has been a great deal of interest expressed in identifying incentives for pollution prevention or control, particularly for point source dischargers. Economic incentives are appealing alternatives or add-ons to Federal permitting regulations.

One point commonly overlooked in trying to make the Clean Water Act more "incentive oriented" is that current law already provides for "pollutant trading" as a means for achieving additional pollution reductions needed to achieve compliance with water quality standards. Section 303(d) and (e) call on States to identify waters not meeting water quality standards, and to

develop "Total Maximum Daily Loads" (TMDLs) for these waters that identify, in effect, the remaining pollutant load that must be reduced in order to meet applicable standards. States can develop load allocations that assign needed further reductions to either point sources -- such as sewage treatment plants -- or nonpoint sources -- such as agricultural activities -- where the pollutant in question originates from both types of sources. The parties in interest can "make a deal" that additional reductions will be made by runoff rather than point sources. The POTW might choose to spend 50 cents on the dollar, compared to the cost of upgrading its facility to tertiary wastewater treatment, to acquire and take out of production agricultural land causing significant nutrient loadings to the water body or to pay for nutrient runoff-reducing on-farm practices.

Under existing law the State can develop an areawide wastewater management plan based on such a trading scheme, which is submitted to EPA for approval.

TMDL "trades" are acceptable, and worth trying, for conventional pollutants which tend to work their harms on a watershed basis. They are <u>not</u> suitable for toxic pollutants that tend to have severe and localized effects and which are not actually degraded through natural processes in the water body.

Since the law already allows for these trades to occur, why don't we see more of them today? In our view there are two principal reasons -- <u>neither of which is addressed through the</u>

questionable trading provisions included in H.R. 3948 or the Discussion Draft.

First, it isn't technically easy. It is very costly and time-consuming to model a watershed with enough detail to be able to say, for example, that one sewage treatment plant upgrade (with fairly predictable nutrient reduction outcomes) can be offset by a certain number of farming practice changes. Such models have been developed in isolated instances (such as the Chesapeake Bay and Long Island Sound) but it is not a universal, or universally affordable, concept.

Second, and more important, we cannot trade certain reductions, enforceable by permit, for highly uncertain reductions which may or may not be obtainable from nonpoint sources not subject to any performance standards or enforcement mechanisms in the event they do not comply.

If this Committee wishes to promote trading, the best thing it can do is to enact requirements for enforceable mechanisms for nonpoint source pollution prevention and control. Communities will be far more interested in pursuing point/nonpoint trades if they can count on implementation of the nonpoint source controls that are needed.

The Discussion Draft also contains a "pollution trading" provision that we strongly oppose.[17] The provision simply authorizes a State or EPA to allow a point source discharger to "offset the impact of its discharge" by entering into

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[17] Discussion Draft at p.74, lines 11-25 and p. 75 lines 1-13.

arrangements with other dischargers or nonpoint sources, "so long as appropriate safeguards are included" to ensure compliance with technology based controls. This extremely general authorization does not contain adequate safeguards or meaningful standards against which to measure compliance.

Additional Areas of Concern Raised by the Discussion Draft

There are several other subject areas covered in the recently-released Discussion Draft that are of grave concern to NRDC and to many of the nearly 500 organizations that, like NRDC are members of the Clean Water Network. These areas are addressed below in turn.

"Risk and Cost-Benefit Analysis"

Section 304 of the Discussion Draft, entitled "Risk and Cost-Benefit Analysis," would create a new, unwelcome and entirely unnecessary provision in the Clean Water Act. The provision would mandate that, in developing any rule or guidance under the Clean Water Act (except a permit), the Administrator of Secretary of the Army (for Section 404) would have to "perform a risk assessment" which will be subject to notice and comment. The bill further provides that "[n]o regulatory requirement or guidance ... shall be established or issued where the social, environmental, and economic benefits of such requirement are not reasonably related to the anticipated costs."

This provision would be a major setback for the Clean water Act and a terrible precedent for all environmental, health and safety laws. First, it means that Congress is second-guessing

itself: today, all of the major provisions of the Clean water Act contain their own careful balancing decisions weighing the degree to which economic or social costs should be factored into regulations. The standards are different, for example, for effluent guidelines (where economic achievability is the test) than they are for water quality criteria (where human health and aquatic life protection is the test). The "cost-benefit analysis" provision would wreak havoc with the integrity of the Clean Water Act as a whole.

Second, the provision would waste still more EPA resources performing redundant analyses. The recently proposed EPA rule governing pulp and paper effluent limits is a case in point. The proposed rule, under current law, already was accompanied by an "Economic Impact and Regulatory Flexibility Analysis;"[18] a "Regulatory Impact Assessment;"[19] a "Water Quality Assessment;" and a "Cost Effectiveness Analysis."[20] These documents are in addition to, not instead of, the actual technological analysis of the regulated industry (the "Development Document"), which itself contains a detailed economic analysis of the industry and the expected impact of the rule. Together, these extra and

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[18] The Regulatory Flexibility Analysis is required under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.

[19] The Regulatory Impact Assessment is required under Executive Order 12866, which requires that Federal agencies assess costs and benefits of each significant rule they propose or promulgate.

[20] The EPA's Cost Effectiveness Analysis evaluates the incremental annualized cost of a pollution control option per incremental pound-equivalent of pollutant removed by that option.

frequently duplicative analyses constitute a massive drain on EPA resources and a Full Employment Act for the Beltway Bandit consultants that we all would prefer find employment elsewhere.

Third, the proposal in the discussion draft lends credence to the false notion that the costs and benefits of a particular rule can be calculated and compared in a meaningful way.

Once again, the proposed pulp and paper rule offers a case in point. The costs of these proposed rules can be estimated, (although the industry's estimates differ by a factor of two or three from EPA's, presenting yet another area for dispute under this proposed provision).

But the benefits defy quantification and monetization. Out of desperation, in trying to assign a value to aquatic resources so that the rules' "benefits" could be "quantified," EPA resorted to using the annualized value of payments made to Native Americans for the loss of their fishing rights in treaty disputes, where the tribes had not voluntarily accepted these settlements.[21] This approach, apart from being an insult to Native Americans, grossly understates the value of the resource to humans and totally ignores its intrinsic natural value.

In sum, we urge this Committee in the strongest possible terms not to enact this so-called "Cost-Benefit Analysis" provision.

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[21] U.S. E.P.A., "Regulatory Impact Assessment of Proposed Effluent Limitations Guidelines and NESHAP for the Pulp, Paper, and Paperboard Industry," EPA-821-R-93-020 (November 1993) at 9-1 to 9-14.

Permit Term Extensions

The Discussion Draft contains provisions, subsumed in the watershed protection section, that would authorize the extension of permit terms from five to ten years for those holding clean water act discharge permits. (While H.R. 3948 contains permit term extension terms, as well, the provisions are far narrower.) Under the Discussion Draft, any discharger can get a 5-year extension of its permit term "if the discharge is located in a watershed management unit for which a watershed management plan will be developed"! This language allows five-year extensions on a whim and a promise of future action. It does not even pretend to link the term extension to the substance of any future management plan. For all intents and purposes, it guts the five-year permit term.

The bill also allows ten year permit terms for point source dischargers "unless receiving waters do not meet water quality standards due to the point source discharge." Violations of water quality standards frequently are attributable to multiple causes -- several point source dischargers and runoff or in-place contamination, or a combination of these factors. It is usually impossible in these circumstances to say that a violation is "due to" a particular discharger, who may be a contributing but not a sole cause of the violation. The effect of this provision would be to allow every discharger located in an area of multiple impacts/sources to have a ten year permit because the burden would be on the permit-issuer to show that the violation was "due

to" that source. Both of these provisions greatly weaken current law and must not be adopted.

"Consultation with States"

Section 501 of the Discussion Draft creates a new Section 501(g) in the CWA, calling for the EPA to "consult and substantially involve State government and... tribal and local governments, in the Agency's decisionmaking, priority setting, [etc.] under this Act..." The provision would "deem" these activities "consistent with the Federal Advisory Committee Act."

This provision sounds innocuous, even beneficial; all can agree that development of Clean Water Act programs should be done with full involvement of State, local, tribal and other government units, as well as citizens and the regulated community. But in fact, the provision that would "deem" these governmental consultations to be "consistent with the Federal Advisory Committee Act" (or FACA) is extremely damaging.

FACA says that, when a body is set up to advise a Federal agency and make policy recommendations, that body must contain a balance of viewpoints and must conduct its activities in an open and public fashion. This can be cumbersome and time-consuming, but it has a very salutary effect. It means that everyone has access to and representation on an advisory body that works with the federal decision makers.

The Discussion Draft provision effectively cuts the public -- and, for that matter, interested members of the regulated community, out of the process. It would leave all levels of

government alone in a room to decide the fate of the citizenry and the industry to be regulated. Clearly the cure for inadequate EPA consultation with State and local government is to increase consultation -- not close the door to others who wish to be heard!

A recent example of cooperative negotiations highlights the short-sightedness of this provision. For years EPA and the cities and states had been unable to agree on Federal policy regarding Combined Sewer Overflows. Only when a multi-party discussion and mediation, including members of environmental groups as well as various units of government, was convened to hammer out a solution, was a solution obtained. The lesson of the CSO negotiation is that all stakeholders have to be in the room to reach an agreement that has staying power.

We urge the Committee to reject an override of FACA as part of the Clean Water Act. Far less draconian solutions can be identified to increase State and local government access to the EPA's process.

"Adequately Funded Mandates"

Section 506 of the Discussion Draft would create a new Section 520 of the Clean Water Act under which, prior to issuing any proposed or final regulation or other requirement, the Administrator would be directed to conduct an analysis of the "direct and indirect costs" for state and local government; an estimate of what amounts will be authorized and appropriated to carry out the program; and a "certification that the amounts that

will be appropriated... exceed 90 percent of the costs for state and local government...". If the certification cannot be made, then the Administrator has to file a report with the Congressional committees of jurisdiction explaining why not.

This provision is completely unworkable. Here are a few of the highlights as to why:

* What is a "direct cost" and what is an "indirect cost"? Does a "direct cost" include the entire cost, for example, of installing a wastewater treatment plant? If so, it presupposes that, in the absence of a Federal standard, the State or city would pour raw sewage directly into the nearest river -- i.e., the city would do nothing to protect the environment.

Perhaps, alternatively, a "direct cost" is only the incremental difference between what the city would have done unbidden, and the additional protection it provides under a slightly tougher Federal standard. Who decides what that theoretical lower standard would have been? And what of the city that goes beyond Federal minimum standards -- is that a Federal "giveback" to be counted on the other side of the ledger?

* Do "indirect costs" include the costs of lost resources? For example, if the federal standard did not require secondary treatment of sewage, and beaches everywhere were closed to swimming as a consequence, how does the ledger book account for the money "saved" from no sewage treatment, and the tourism dollars lost due to closed beaches?

* How is the EPA Administrator supposed to estimate what Congress will authorize or appropriate for a given program? We question how the U.S. Congress, which itself cannot predict these answers, could consider directing one of the Executive Branch agencies to do so. EPA cannot even predict how it will fare in the internal Executive Branch budget battles, much less in the halls of Congress.

* How is anyone served by the filing of a report with this Committee certifying that EPA cannot predict that 90% of the costs of a Federal mandate will be covered by appropriations? This report might serve as a "make-weight" in the budget allocation battle, but is more likely to be just another diversion of EPA resources away from its true mission of environmental protection.

Because the Discussion Draft squarely raises the issue of unfunded mandates, we feel compelled to present a more detailed analysis of why the Clean Water Act should not be saddled with an "unfunded mandates" provision.

"Unfunded federal mandates" makes a brilliant sound bite. And behind the rhetoric lies one legitimate issue -- the adequacy of federal funding for important government programs that share widespread public support. But lurking behind this deceptively simple phrase are assaults on a panoply of statutes designed to assure all Americans equal access to safe and healthy homes, schools, workplaces and communities, and in some cases, basic civil rights. Among the programs being challenged using this

concept are environmental laws to ensure clean air and safe drinking water; children's health and welfare laws such as lead abatement, child immunization, and child support enforcement; worker protection requirements to guarantee fair wages and safe working conditions; civil rights laws to prevent discrimination against disabled people, voters and women; and crime and safety legislation such as handgun control, the Gun Free Schools Act and drunk driving programs.

Unfortunately, many officials have supported the wrong solutions to this problem. Provisions such as Section 506 of the Discussion Draft threaten decades of nationwide progress in programs designed to ensure all Americans equal access to safe and healthy homes, schools, workplaces and communities, and in some cases, basic civil rights.

The solution to unfunded federal mandates is not to weaken protection of health, environmental quality, and civil rights. It is to shift federal, state and local budget priorities to the needs and programs most important to the public, and to find new funding sources for programs supported by the American public.

Moreover, in their zeal to address state and local fiscal problems, some state and local officials have exaggerated the incremental costs of federal mandates, understated the need for those programs, and ignored the offsetting impact of significant unmandated federal funds -- federal funding for state and local programs without accompanying mandates. In fact, total federal contributions to state budgets, and total state and federal

contributions to local governments, exceed even the most inflated estimates of so-called unfunded federal mandates. For example, cities received three times as many dollars from higher levels of government as the U.S. Conference of Mayors estimated they were required to spend due to unfunded federal mandates. Viewed in this light, the federal government is still a cash cow for states and localities, not an unreasonable burden.

At a minimum, this issue requires careful consideration; not a broadside attack on a wide range of federal programs, all of which were passed by Congress due to widespread public support. The following issues should be evaluated before reaching any conclusions:

Unfunded Mandates or Unmandated Funds?

The argument against unfunded federal mandates goes like this: A large number of Federal laws and regulations result in costs on state and local governments. In some but not all cases, Congress provides funding to assist in the implementation of these requirements. States and cities claim, however, that while federal funds to state and local governments have declined, the costs associated with federal mandates continue to grow.

This case is misleading, however, because it ignores the open spigot of federal funds flowing to states and cities for which no mandates are attached, or for which the funding exceeds the mandates. In fact, total federal grants to states and cities are now at an all-time high. In 1993 the federal government gave states and localities over $214 billion in grants -- about 14

percent of the federal budget.[22] In inflation-adjusted (1987) dollars, federal grants to states and localities have grown steadily and significantly since 1960.

Despite this steady increase in federal grants, Mayors and Governors complain that federal mandates have grown as well, and therefore that federal funding has declined as a percentage of their total budgets. But even this claim is true only for recent years. Federal contributions to state budgets declined slightly from 21 percent in 1980 to 18 percent in 1990; while the combined federal and state share of city revenues fell from 30 percent in 1980, to 24 percent in 1985 and 22 percent in 1990. But even as a percentage of total state and local spending, in 1993 federal contributions were higher than in 1960 or 1970.[23]

When these figures are taken together, it becomes clear that, despite the effort in the 1980s to shift part of the overall tax burden back to the states and cities, states and cities remain net beneficiaries. The studies conducted for the U.S. Conference of Mayors and the National Association of Counties estimate that the ten most costly federal mandates

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[22] Bureau of the Census, U.S. Department of Commerce, Statistical Abstracts of the United States - 1992. The Federal share of total State and local spending and State and local capital spending was also about 22% in 1993, compared to 25% in 1960. Office of Management and Budget, Budget of the United States, Fiscal Year 1995 Analytical Perspective, Table 11-2.

[23] Federal grants constituted 15% of state and local expenditures in 1960 and 20% in 1970. The federal share rose dramatically in the 1970s, to a record of 28% in 1980, but was reduced again to 20% by 1990, and actually climbed to 22% in 1993. Id., Table 11-2.

consume an average of 12 percent of locally-generated revenues.[24] This figure uses a bit of sleight of hand. Since as shown above the cities only raise about 78% of their revenues,[25] the Mayors' estimated cost of unfunded mandates actually translates to about 8 percent of total local revenues. But the federal government still contributes nearly one fifth of all state revenues, and the federal and state governments combined contribute 22 percent of all local revenues -- roughly three times the asserted cost of unfunded federal mandates.[26] Thus, when all revenue transfers are considered, Uncle Sam is still a cash cow for states and localities, not an unreasonable burden.

These overall figures, of course, say little about the distribution of federal dollars among programs, and the flexibility with which states and cities can use available federal grants. Part of the problem is that the percentage of federal grants to states and localities earmarked for payments to individuals (Medicaid, food assistance, family support, housing subsidies) grew from 35 percent in 1960 to 64 percent in 1993

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[24] Impact of Federal Mandates on U.S. Cities -- A 314-City Survey, U.S. Conference of Mayors and Price Waterhouse (October 26, 1993); National Association of Counties, Executive Summary, NACo Unfunded Federal Mandates Survey (October 25, 1993).

[25] FY95 Budget, Analytical Perspectives, Table 11-2.

[26] Bureau of the Census, U.S. Department of Commerce, Statistical Abstracts of the United States -- 1992. The federal share of total state and local spending and state and local capital spending was also about 22% in 1993, compared to 25% in 1960. FY95 Budget, Analytical Perspectives, Table 11-2.

while the percentage of these grants devoted to physical capital declined from 47 percent in 1960 to 16 percent in 1993.[27] Notably, however, as a share of state and local capital spending the federal share was 22 percent in 1993 compared to 25 percent in 1960, showing that states and cities typically spend less overall on capital improvements absent federal dollars.[28] This highlights one of the real problems, which is the overall decline in government capital spending on important environmental and other infrastructure. Simply put, both Federal and state/local governments are letting infrastructure spending slide.

Nor do these figures address the possibility that the cost of some programs should be borne by neither the federal government nor by states and cities, but by the major causes of the problems being addressed. A prime example is the principle of "polluter pays." S. 2093, recently approved by the Senate Environment and Public Works Committee to reauthorize the Clean Water Act, provides for permit fees to ensure that the cost of implementing water pollution control programs is borne by the polluters, not by federal or state taxpayers who are the recipients, not the causes, of the pollution. Similarly, a recent EPA study found that over 100 communities nationwide have established stormwater utilities that require new developments and other major sources of stormwater pollution and flooding to pay their fair share of controlling those problems. Forty five

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[27] Id. Table 11-2.

[28] Id.

of these cities reported raising about $128 million per year to implement their stormwater programs (an average of almost $3 million per city per year).[29]

Given that total federal funds still exceed the total costs of federal mandates, the fact that federal funding of states and localities has returned to historical levels is hardly cause for a moratorium on programs supported by the public at large. Rather, Congress should consider efforts to:

(1) shift budget priorities to the programs and needs most important to the public, including capital spending for critical environmental infrastructure;

(2) find new sources of funding such as fees on polluters and others who are most responsible for the problems that face all levels of government; and

(3) increase the flexibility with which states and cities can use available federal dollars for the needs most urgent in those particular communities. (This is an effort that H.R. 3948 begins, through reforms of the State Revolving Fund.)

Unfunded Mandates or Basic Obligations?

States and localities describe unfunded federal mandates broadly as all federal laws and regulations that apply to state and local governments without full federal funding. This definition, however, fails to account for expenditures that would be made even absent federal mandates, and expenditures that

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[29] Apogee Research, Inc. for U.S. EPA, Storm Water Utilities: Innovative Financing for Storm Water Management (1992).

should be borne by the states and localities as a matter of sound policy. The fundamental question is whether a federal mandate unfairly requires a state or locality, without federal funding, to do a job that should be done by the federal government, or whether it is a legitimate federal requirement for a state or locality to do something that should be done by all states and localities? As Michael Fix wrote for the Urban Institute in 1990:

> While on the one hand, it is inappropriate for a fiscally strapped, deficit-plagued federal government to use its regulatory powers to accomplish objectives that should be achieved via the budget, on the other hand, the federal government should not be held hostage to the states whenever it attempts to accomplish goals of clear national importance.[30]

The following examples of targeted unfunded mandates, for example, either should not be considered unfunded mandates at all, or should be implemented at least in part with state and local dollars:

* Federal laws that apply to states and localities in the same way as they would to private parties. For example, cities cannot be allowed to pollute rivers and lakes any more than private industry. We require private parties to bear their own cost of pollution control; the same should be true for cities. Investor-owned utilities are required to clean up the drinking water they provide; and so should cities. While federal funding assistance for state and local pollution control is highly

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[30] Michael Fix, "Observations on Mandating," in Coping with Mandates: What are the Alternatives? (Urban Institute 1990).

desirable, it should not be a mandatory prerequisite to compliance with legitimate pollution control requirements.

* Federal programs that enforce civil rights guaranteed by the U.S. Constitution. For example, we require private buildings to provide equal physical access to all citizens, and prohibit job discrimination based on physical disabilities (as well as race, gender, and other characteristics). The federal government should not have to pay states and cities not to discriminate unfairly against any category of citizen.

* Federal requirements that implement other constitutional requirements, such as the property clause, or otherwise protect federal property and resources. For example, Congress has not just the right but the responsibility to pass laws adequate to protect the waters of the United States, and federally-protected fish and wildlife resources (including threatened and endangered species and migratory species protected by federal treaties), whether threats to those federal resources derive from the actions of private industry or from state and local governments.

* Conditions on federal grants or loans. When Congress funds state and local programs, it has the right to impose reasonable conditions to ensure that the funds are spent wisely, efficiently, and consistent with federal policy -- and not simply to balance state and local budgets at the expense of federal taxpayers.

* Basic state and local obligations, such as drinking water, or sewage and garbage disposal, just because federal laws establish minimum national standards in these areas. Most of these costs would be incurred even in the absence of federal programs, and are fundamental responsibilities of state and local governments. For example, in the National Conference of Mayors Report, over half of the Clean Water Act costs asserted by Phoenix were either expenses to accommodate growth (new sewers), or for wastewater recycling not required by federal law. Similarly, the fact that the Safe Drinking Water Act imposes minimum requirements for public drinking water does not make the full cost of providing water to city residents an unfunded federal mandate. Minimum national standards in these areas are essential to ensure all Americans equal access to city services and a safe and health environment.

* Federal programs, such as the Clean Air Act and Clean Water Act, which are either run by a federal agency or may be assumed at state discretion. These are not unfunded mandates because they are not mandatory -- a state can avoid these costs simply by not assuming delegated responsibility for the program. States often want to run these programs for policy reasons; in return, they are reasonably expected to pay for part of the cost of implementation (although some federal funding typically is provided, and H.R. 3948, for example, would increase Federal grants to states to operate their clean water programs).

Cost surveys such as those conducted for the U.S. Conference of Mayors fail to identify costs that would have been incurred absent any federal mandates. They also fail to evaluate which of the federal mandates in fact should be borne by state and local governments. Cities and counties were sent forms, with sparse instructions, asking them to judge for themselves which costs were attributed to unfunded federal mandates. The response rate to the survey was low (about 30 percent), leading to additional questions about the statistical validity of the data. These responses cannot be accepted uncritically; they must be checked for accuracy and consistency, and to evaluate from a policy perspective who should pay for each program. The national response to this issue should be based on objective data and policy analysis from a credible, independent source.

Unfunded Mandates or Sound National Policy?

Opponents of unfunded federal mandates often protest that they question only the lack of funding for federal programs, not the mandates themselves. And some officials are simply airing real fiscal concerns. Unfortunately, complaints about inadequate funding all too often are accompanied by claims that the programs themselves are unreasonable or unnecessary. But programs like protecting surface waters, drinking water supplies and clean air are among the most important roles of government -- federal,m State and local.

Some cities have taken their responsibilities seriously. But these are not the cities who will be let off the hook if we

weaken federal protections. It is the cities who have the worst record of protecting their public who will seize the opportunity to do even less. Minimum federal standards are needed because:

* It is not fair that some cities have worked hard, raised taxes, and issued bonds to comply with the law and protect their citizens -- and others will get off the hook.

* It is not fair that the public in some regions will be exposed to significantly higher risks from pollution than in others.

* It is especially not fair that it will be people in the poorest cities who will breathe the dirtiest air and drink the dirtiest water. We need to target federal dollars to the neediest cities; not tell them they deserve less protection.

* Pollution knows no geographic boundaries. Sewage from some states closes beaches in others. Air pollution from some cities threaten people in distant states. Urban pollution can pollute drinking water in downstream communities. Pollution isn't just a local problem, so it demands regional and national solutions.

As part of their effort to challenge unfunded federal mandates, some states and cities cite federal laws and regulations that impose allegedly unreasonable burdens. Many of these "horror stories" are exaggerated or simply inaccurate. The following examples show the danger of accepting at face value or basing policy decisions on anecdotal horror stories about federal regulations.

Example 1: Cities complain that under the Safe Drinking Water Act (SDWA), they are required to test, at considerable cost, for contaminants that may not be present in their water. The prime example is dibromochloropropane (DBCP), which cities claim is now only used on pineapples, and thus cannot be present in most city water supplies.

Response: DBCP was commonly used as a soil fumigant around the country until it was outlawed, and has been found in 16 of 25 states that have tested for this pesticide, and at

levels that exceed EPA's drinking water standard in 10 states. DBCP is considered a probable human carcinogen, and has been linked to sterility in production workers. Costs of testing contaminants in intake water under the SDWA have been wildly exaggerated. EPA estimates that, aside from testing for lead and copper from pipes, the total nationwide testing cost is only $60 million per year. EPA's rules under the SDWA specifically allow states to waive testing requirements on a statewide, regional or individual system basis if a contaminant has not been used in the area, or if the system is not vulnerable to contamination (for example, if it has a deep, protected well).

Example 2: Anchorage, Alaska complains that it was forced by Clean Water Act regulations to reduce the organic matter in its sewage by 30 percent. Because organic matter content was already so low, the city claims, this was impossible. In order to meet the standard, the city "invited" local fish processors to dump fish wastes into the waste stream, which were removed to meet the standards.

Response: According to EPA Region 10 and Anchorage's own comments to EPA, the story is not that the city asked the fish processors to dump their waste into the sewage stream, but that the processors routinely discharge their wastes into the sewers. The majority of communities around the country were required to build secondary sewage treatment plants. A small number of coastal cities, however, including Anchorage, were exempted from this requirement if they could show that no harm will occur to coastal waters. Having benefitted from this special treatment, Anchorage now complains about having to meet even the weaker standard for primary treatment. Anchorage admits that by using all of its existing equipment, it can meet all applicable standards, including the 30% removal standard now (without secondary treatment). Only with increased population will the City will have to add extra capacity. (Comments on EPA's Proposed 301(h) Rulemaking, Anchorage Water and Wastewater Utility, March 22, 1991, pp. 13-14.)

Example 3: Cities in the arid west complain that they are required to meet water quality standards designed for free-flowing streams even for intermittent streams that are dry most or all of the year. In short, they must make dry rivers fishable and swimmable.

Response: Many states have adopted, and EPA has approved, special exemptions for low-flow or intermittent streams. States could also modify water quality criteria to meet the special needs of arid ecosystems, so long as the standards are based on sound science. The Act and EPA regulations also allows states to eliminate any requirement to protect a

stream for fishing, swimming or other uses if it is shown that the use does not exist, and cannot be restored if it once existed. EPA has approved such downgraded uses when states provide adequate scientific support. However, some streams are dry for large portions of the year; but during the spring and early summer, they may provide critical fish and wildlife habitat, including important spawning, breeding and migration zones. Swimming, wading and other contact recreation can also occur during these times. Water levels can also vary dramatically from year to year. In some years, intermittent streams may be dry most of the time. But in wet years, these same streams can become vital oases for fish and wildlife.

Example 4: Cities complain about an EPA regulation requiring them to address the problem of lead in public drinking water. Cities claim that risks from lead are low, the problem is expensive to fix, and it is invasive to test and fix the problem in individual homes.

Response: EPA estimates that 130 million Americans are exposed to high levels of lead in their drinking water. (EPA Fact Sheet, National Primary Drinking Water Regulations For Lead and Copper, page 3, May 1991.) Lead in drinking water is responsible for over 670 deaths per year from heart attacks, and 680,000 cases of hypertension, and adversely affects the intelligence of millions of children. (Fact Sheet, p. 5.) EPA estimates that standards will result in 570,000 children having their blood lead levels reduced below federally defined levels for lead poisoning in blood. (Fact Sheet, p. 5.) Lead in drinking water has been estimated to account for 10% of lead exposure, and a significant number of infants exposed to lead are exposed due to lead in drinking water. (Shannon and Grant, "Hazards of Lead in Infant Formula", Pediatrics, v. 89,no. 1, January, 1992, p. 87-90.) The EPA rule requires that public drinking water systems not meeting lead standards must use inexpensive corrosion control techniques, and establish public education programs to inform people there is lead in the water. Treatment of source water is required only if corrosion control does not work, and if source water is identified as a potential problem. (Lead and Copper: A Working Explanation of the Lead and Copper Rule, American Water Works Association, 1991, p. 6.) Finally, if all of these efforts fail, systems must replace lead service lines. However, they are given 15 years to do so, and do not have to replace lines they do not own (i.e., pipes in houses). (AWWA, p. 11.)

Example 5: Cities claim that EPA standards to limit radon in drinking water to 300 picocuries per liter are ridiculously expensive, and that the health benefits from

the rule are minimal. Cities claim more could be done to reduce radon exposure by reducing levels of radon in living spaces of homes.

Response: About 47 million Americans have radon -- which is known to cause cancer in humans -- in their drinking water. EPA estimates over 200 cancer deaths each year due to this source of radon exposure. EPA estimates that compliance with the rule will cost only $180 million per year. For large drinking water systems, the cost is expected to be only one to two cents per person per day. While radon in soil is a major problem as well, EPA and Congress are proposing to do little about this source of exposure.

Of course, not all federal laws and regulations are perfect; and many can and should be improved. But Congress should be skeptical about accepting horror stories about unfunded mandates until it has all of the facts. Even where a complaint is legitimate, the proper response is to fix that problem, not to support a broadside attack on all federal programs.

Conclusion

Thank you for allowing NRDC to provide some initial observations about the Discussion Draft and some further thoughts on the Clean Water Act reauthorization. We look forward to working with the Committee in strengthening this essential Federal law.

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TESTIMONY OF DUANE MARSHALL,

UNION CAMP CORPORATION

ON BEHALF OF THE

AMERICAN FOREST AND PAPER ASSOCIATION

BEFORE THE

WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

U.S. HOUSE OF REPRESENTATIVES

MAY 24, 1994

TESTIMONY OF DUANE MARSHALL,

UNION CAMP CORPORATION

ON BEHALF OF THE

AMERICAN FOREST AND PAPER ASSOCIATION

May 24, 1994

Mr. Chairman and members of the Subcommittee, my name is Duane Marshall, I am Director of Environmental Affairs for the Union Camp Corporation. I am testifying today on behalf of the American Forest and Paper Association (AF&PA), the national trade association of the U.S. forest products, pulp and paper industry.

INTRODUCTION

Before addressing the Clean Water Act reauthorization issues, I would like to give you a brief snapshot of the important role that the U.S. forest and paper industry plays in sustaining the U.S. economy, and how much we have contributed to environmental protection.

Nationwide, our industry accounts for 7 percent of all U.S. manufacturing output. AFPA's member firms directly employ 1.6 million workers in the growing of trees, the manufacture of forest and paper products, and the recovery and recycling of paper products. Collectively, the industry injects $43.5 billion into local economies through wages and salaries, and ranks among the top ten employers in 46 of the 50

states.

FOREST MANAGEMENT: BALANCING RESPONSIBILITY AND REALITY

In the 1920's, there were dire predictions that the demand for lumber, paper and other wood products would fully deplete the country's supply of trees by 1945. Not only has that proved untrue, but today the United States has 20 percent more trees than it did on the first Earth Day celebration 20 years ago. Clearly, however, major differences of opinion continue to exist across the forest management spectrum. Our goal is to steadily diminish those differences, establish common ground, and work with all concerned to establish mutually acceptable policies and practices.

In addition, the relationship between a healthy and productive forest, and the forest and paper industry is elementary: no forest, no industry. Historical facts and figures--and science and reality--amply demonstrate there is room for sustainable coexistence between an efficient industry and a healthy forest.

Today, we are moving aggressively to underscore that point by living up--in practice and performance--to the principles of always putting more back into the land than we take out, preserving the ecological balance of a healthy forest, and protecting wildlife habitat. Our goal: to sustain and expand a renewable resource that will meet future consumer demand at competitive prices while, at the same time, respecting the diverse demands imposed by society, including the rational protection of sanctuary and habitat.

FOREST FACTS

1. America's forest and paper companies grow nearly a third more trees than they harvest.

2. The U. S. plants 2.5 billion seedlings each year. The vast majority of planting is done by private landowners and companies. Forest and paper companies plant 1 billion seedlings each year--about 270,000 trees a day.

3. An acre of young, healthy growing trees is capable of producing 4,000 pounds of wood in one year. These trees may consume 5,889 pounds of carbon dioxide and give off 4,280 pounds of oxygen, thus helping to maintain the delicate carbon balance in our atmosphere.

AIR AND WATER QUALITY: REAL COMMITMENT, REAL PROGRESS

Our franchise to operate our mills is built upon their success in performing against increasingly rigorous technical and community demands. It is the heart of how we do business. We also know that it lies in moving beyond the letter of regulation and toward the spirit of doing things earlier and voluntarily. Since 1980, we've committed over $9 billion in new plants and processes to improve our environmental performance, and that investment continues today at a rate exceeding $1 billion per year.

But we realize improvements--as important as they are--are not ultimately the point. In protecting the environment, the issue is not where you came from, it's where you are going. We know what we have to do. Today, we are aggressively exploring future technology to enable us to minimize the environmental impact of our mill operations and maximize their compatibility with surrounding communities.

MILL FACTS

1. Even though paper consumption has increased, significantly less paper is going to landfills--11 million fewer tons in 1993 than 1987.

2. Today's paper mills remove from the air more than 97% of all particles generated during the mill process.

3. U.S. pulp, paper, and paperboard companies are far ahead of schedul in meeting the 1995 reduction goals under the Environmental Protection Agency's 33/50 Voluntary Pollution Prevention Program. The EPA program is an initiative based on voluntary actions by the industry that set a 33% pollution-reduction goal for 1992, and 50% reduction by 1995. The forest and paper industry was one of the first industries to commit to the program and has the highest level of company participation.

4. Forest and paper companies use many raw materials more efficiently than they used to. They use 60% less fossil fuel to produce one ton of paper than 20 years ago.

5. In the period 1975-1988, the Industry's water use and effluent flows per unit of production were reduced by approximately 30 percent--by 1988, it required 70 percent less water to make a ton of paper than it had in 1959. This has been a significant achievement of the pulp and paper industry over the past two decades. As a result of a vigorous compliance and investment record, since 1975 the amount of the conventional pollutants discharged in final effluent per unit of production has been reduced by as much as 75 percent.

6. With regard to pollution prevention, immediately after learning dioxin was an unintended by-product of its pulp bleaching process, the industrylaunched a comprehensive voluntary program to determine the source of, and to substantially reduce, dioxin levels. The industry has voluntarily reduced the amount of dioxin generated annually from pulp bleaching by more than 90%, the aggregate contribution from more than 100 mills is less than four ounces per year nationwide--this is less than 1 percent of all natural and man-made sources (in addition, many major sources that contribute to background dioxin levels are still unknown, according to the EPA). All mills discharging to the Great Lakes have

reduced dioxin in treated effluents to levels below detection, and most other mills around the country are at non-detect levels.

No industry serves the American consumer in more ways than the forest and paper products industry. Wood and paper are part of our lives every moment, every day. But successful industries must change. They need to evolve and reshape around new technologies, new standards, new priorities.

For the forest and paper industry, that change comes in many forms-in new products, new processes, new markets and, importantly, in a new way of relating to the environment. We've made a lot of progress over the past several decades--committing time and energy and capital resources--and we believe we have a good story to tell. But we can do more. We can do it better. And we will.

We're an industry of people and products, conscience and concern, setting new performance goals and living up to them. There's a lot of work still to be done, inside and outside the forest. That's why across the board we're making it our business to improve tomorrow's environment today.

We have been an active participant in the development and implementation of the nation's clean water laws. The Clean Water Act affects us at all stages of our manufacturing process from our raw materials to our finished products. This impact on our industry is unique; therefore, our interest in this reauthorization is substantial.

CLEAN WATER ACT ISSUES

Mr. Chairman, AFPA believes the Clean Water Act has been a true success

story--one that has resulted in real improvements in our nation's water quality. The reasons for its success are simple:

1. In past reauthorizations, Congress has avoided micro-managing the implementation of the Act and resisted writing into the law overly-prescriptive requirements.

2. The statute gives EPA the broad authority and flexibility it needs to address virtually all water quality concerns.

3. The Act is based on a strong Federal-State relationship which results in effective implementation of its requirements.

If there is one message we would like the Subcommittee to hear this morning it is this: The Clean Water Act works--it is not broken. EPA has the authority it needs to solve most of our nation's remaining water quality concerns. We urge you to avoid adopting the highly prescriptive requirements set forth in H.R. 3948, because they are unnecessary and duplicative.

Point Source Discharges/Water Quality

We support the statements made by the other industry representatives here today, in addressing the various point source concerns. As agreed upon, we will be discussing two issues: antidegradation and water quality--as it relates to both point and nonpoint sources; and treatment ponds. We also have addressed intake credits and chlorine as two other primary issues of importance.. AF&PA has numerous concerns about non-point issues raised in the bill; many of those issues however will be discussed in the testimony presented on Thursday's non-point panel.

Therefore, I will not elaborate further at this time, and would like to respectfully request that AF&PA be able to submit additional comments on non-point issues for the record.

Antidegration

The Clean Water Act mandates review and updating of state laws or regulations, and approval by EPA, every three years--as well as adoption of antidegration policies to preserve uses in water quality. These antidegradation policies are intended to assure that designated uses are not impaired either in the present or the future. AF&PA supports EPA's current regulations governing antidegradation because they adequately address changes to the operation of existing facilities or the siting of new facilities that may adversely affect beneficial water quality use by the discharge of additional pollutants into a receiving water. AF&PA opposes however, attempts to significantly restrict current policy by changes to existing law that would require an antidegradation review for even modest changes to operating conditions, when those changes do not affect a facility's ability to operate in full compliance with applicable permit limits.

One of our primary concerns with the antidegradation provision in H.R. 3948 was that it contained a mandatory provision requiring designation of certain waters as Outstanding Natural Resource Waters (ONRWs). In the amendment, that provision (new section 303 (f) (2) (E)) has been revised to provide that States must evaluate those waters for designation as ONRWs. We support that change. However, we are concerned that the language still contains a clause from the original version, that the decision not to designate a water as an ONRW is still reviewable by EPA. This implies

that States cannot make a "no-designation decision" unless EPA specifically approves of that decision. We respectfully request that the language after the words "waters of exceptional recreational or ecological significance" be deleted, to clarify that EPA approval is not needed for this decision to occur. Also of concern is that under one reading of the provision, the language "subject to all applicable requirements" in new sections 303 (f) (2) (C) (ii) and (iii) could mean that no antidegradation waivers would be allowed, even if it was justified on the basis of important social or economic development, unless all point and nonpoint sources discharging to the same water body are in compliance with every applicable regulatory requirement under the Clean Water Act. The recognition of "short term or temporary exceedances," is critical to the successful implementation of an antidegradation policy. While the forest industry supports "short term of temporary exceedances," we believe states should be given the ultimate authority for describing how this phrase is to be incorporated into state water policy. We respectfully request, therefore, that new sections (303) (f) (2) (C) (ii) and (iii) be deleted.

The bipartisan alternative that is part of the discussion today requires states within two years to develop and implement their own antidegradation policies. EPA would be required to issue guidance within one year after enactment and would review and approve or disapprove such state policies. The alternative includes several other clarifying provisions related to pollutants not previously addressed in the permit, or those "newly found in an existing discharge due solely to improved monitoring methods." The ONRW requirements also have been improved. While States would

be required to consider national park, wilderness areas and certain "exceptional" waters, as ONRWs, they would be able to allow for short term or temporary exceedances in these areas.

The approval process in the bipartisan alternative is more flexible than the antidegradation provision contained in the Mineta substitute, yet we continue to believe that no antidegradation provision is necessary in a Clean Water Act Bill. Congress, instead, should require EPA to inventory the current status of state antidegradation policies developed and implemented since the federal regulations were promulgated; EPA should then report to Congress on the effectiveness of those policies. Only after EPA has made an assessment of current programs, and in particular evaluated the benefits of state-tailored approaches, should Congress consider any changes to the current antidegradation policy.

Intake Credits

As you know, the Great Lakes Critical Program Act was enacted in 1990. That law calls for consistent water quality standards to be developed for the Great Lakes Basin. Recently, EPA issued its proposed regulations for those water quality standards, as well as a complex package of implementation requirements.

AF&PA and many member companies are actively involved in the Great Lakes Initiative (GLI) process. Throughout the deliberations, we expressed significant concerns over the quality of science being used to support the water quality guidance, the fast pace in which the process was moving, and the substantial economic impacts likely to occur in Great Lakes communities. Our views have been shared by others,

including many local officials whose communities will be seriously effected.

At issue in H.R. 3948 is intake credits, which can be explained as follows. Water drawn into regulated facilities often contains significant quantities of pollutants. Under the draft regulations as proposed by the EPA, facilities would be required to remove substances from their wastewater that come solely from their intake water and that are not added by the facility.

Moreover, the EPA proposal would impose additional treatment requirements even in the situation where a discharger uses intake water that contains a substance, adds a small amount of the substance from its process, then treats the effluent to a level below that found in the receiving stream. The intake credits language in the substitute bill would not be clear enough to ensure the establishment of a workable intake credits program, because it only authorizes agencies to consider the presence of pollutants in intake waters. Another concern is that it is limited to the Critical Programs Act only; yet, intake credits is an issue anywhere in the United States where water quality-based control is or will be implemented.

We appreciate your proposing to add a provision to address intake credits to H.R. 3948, but we respectfully urge that you revise the current language to preserve the principle that dischargers should not be required to treat effluent to levels below the background level of the pollutant found in the receiving water body, unless the pollutant discharge is causing a violation of the applicable water quality standards in the receiving water body. Further, this should be applicable nationwide. The intake credit language in the bipartisan alternative would address our remaining concerns.

TREATMENT PONDS

Navigable waters are defined in section 502 (7) of the Clean Water Act as all waters of the United States. Courts have interpreted this term to be very broad, even encompassing man-made pits excavated in upland areas. There are numerous cases in the past several years where EPA has brought enforcement actions or threatened enforcement actions against companies or individuals on the theory that they were illegally discharging without an NPDES permit into surface impoundments that they owned or operated, because such impoundments were allegedly "navigable waters" (aka "waters of the United States"). EPA has acknowledged that this approach puts persons trying to comply with the law in a position where "EPA may occasionally bring an enforcement action for unauthorized discharges to a water body the discharger regarded as its waste treatment system." 58 Fed. Reg. 7621 (1993).

Typically, EPA has alleged jurisdiction, either because the impoundment was created in a stream bed or a depression that EPA now asserts could have been considered a "water of the United States," or because EPA asserts that the impoundment itself is a "Water of the United States," often on the basis that it has the potential to be used by migratory birds. Given the extremely broad scope of EPA's assertion of jurisdiction based on migratory birds, virtually any industrial, municipal or agricultural impoundment could be considered a water of the U.S. by EPA and, under current law, EPA could assert that a section 404 permit is required for any work in the impoundment and a section 402 permit is required for any discharge to the impoundment.

The wetlands section, 404 of H.R. 3948 contains a provision that excludes from the definition of "navigable waters" irrigation ditches, stock watering ponds, agricultural settling ponds, borrow pits, and the like, as well as "artificial stormwater detention areas and artificial sewage treatment areas that are not modifications of navigable waters."

While these provisions are desirable, they do not go far enough in three important respects. First, the listed types of "waters" are not broad enough. It is not clear whether cooling ponds would be excluded, for example. In addition, the term "sewage treatment areas" might not include waste treatment ponds other than those treating sanitary sewage. Second, the exclusion for stormwater detention areas and sewage treatment areas does not extend to areas that are "modifications of navigable waters." This would result in the arbitrary inclusion of treatment ponds that have been operated for many years or decades, based on an after-the-fact judgment that they should not have been constructed in their present location.

Finally, and most importantly, the language provides exclusions from the definition of "navigable waters" only "for purposes of this section." i.e., the dredge-and-fill permit requirements in section 404 of the Clean Water Act. This not only limits the value of these proposed exclusions; it presents the possibility that, by implication, Congress will be assumed to have intended to include the specified types of "Waters" as "navigable waters" for all other purposes of the Clean Water Act, especially NPDES permitting for wastewater or stormwater discharges to such "waters."

AF&PA suggests among the alternatives to this section, language that would

exclude these waters from the definition of "navigable waters" in the definitions section of the Clean Water Act, section 502 (7), rather than just section 404 to clarify that discharges to such waters are not subject to the permitting requirements of both section 404 and section 402, nor to other restrictions in the Act.

CHLORINE

Although not addressed in the bill, we understand that there may be interest in offering the Richardson "Chlorine Zero Discharge Act of 1993," H.R. 2898, to this bill. Briefly, the act calls for the elimination of discharges of chlorine and chlorine compounds into water as the result of the production of pulp and paper.

The member companies of the AF&PA wish to express their strongest possible opposition to this bill. This proposal, which effectively prohibits the industry's use of these compounds, is unsupported by scientific evidence or by credible risk analyses, and conflicts directly with revised Clean Water Act regulations currently under development by EPA.

H.R. 2898 would, if enacted, mandate an outright ban on the use of chlorine and chlorine oxidizing agents by the pulp and paper industry within five years. As such, the bill would render obsolete more than $1 billion in recent capital investment in voluntary pollution prevention by dictating a single, unproven technology track for the industry.

In light of the EPA's request to study chlorine and the agency's rulemaking on cluster, H.R. 2898 mandates a command-and-control approach which represents both outdated environmental policy and disastrous economic policy for our industry for the

following reasons:

1. There is no scientific basis which warrants a ban on the use of chlorine by pulp and paper mills. Scientific studies to date have shown that chlorinated organics in the effluent of well-controlled pulp and paper mills do not pose a threat to human health or the environment. In contrast to the extensive testing of effluent from chlorine-based bleach mills, to date, potential environmental impacts of "totally chlorine free" (TCF) bleaching alternatives have not been adequately studied.

2. Technology to eliminate all chlorine and chlorine compounds at all bleached kraft mills is unproven. At the March, 1993, Worldwide Conference on Non-Chlorine Bleaching, participants concluded that despite widespread research and development, "totally chlorine free" bleaching has not gained the status of proven technology. Although some mills can produce TCF grades of bleached kraft pulp to serve specialized product markets, and despite claims to the contrary, "there is no TCF process available which can produce, at competitive cost, high brightness market pulp, with equivalent physical properties to conventionally bleached pulp from chips with a range of quality that permits companies to use all available forestry residuals." Pulp and Paper Canada 95:4, pp. 11-12 (1993).

   Even EPA Administrator Browner has acknowledged this fact, recently stating that TCF technology is "not fully developed" and that "no kraft mills have succeeded in making high brightness pulp from southern softwoods without using chlorine." July 1993 Paper Age, p. 41.

3. EPA, through its revision of effluent guidelines for pulp and paper mills, is currently developing extensive new regulations regarding mill effluent. Under the Clean Water Act, EPA is required to constantly review and update technology-based effluent guidelines for various industrial categories to ensure protection of human health and the environment. For pulp and paper mills, EPA has proposed effluent guideline revisions, based on best available control technology. Relying on extensive analysis, consideration of scientific data, and broad public participation, EPA has thus far rejected efforts to impose a totally chlorine free requirement on pulp and paper mills. Yet even without a TCF requirement, the proposed new regulations are, by EPA's own estimates, expected to cost the U.S. pulp and paper industry $4 billion to fully implement. Billions of dollars of these investments would be rendered obsolete if, after meeting the Agency's BAT requirement, the industry subsequently was forced to achieve a mandatory TCF standard. EPA's

deliberative effluent guideline review process, itself authorized by Congress, is intended to provide for consideration of all affected interests through extensive public review and comment, in order to develop sound regulatory requirements. H.R. 2898 would override this public process by establishing unwarranted, arbitrary prohibitions at the very moment the Agency is developing its new rules.

4. Legislation focusing on chlorine use in the domestic pulp and paper industry is punitive and will result in no environmental benefit. Much of the fear expressed about chlorinated materials is based on the misperception that these compounds are only man-made and have only recently appeared in the environment. However, organochlorines are produced by several natural processes throughout the environment, including the production of chlorine gas at the surface of the world's oceans. Living organisms, from bacteria and algae to plants and animals, produce organochlorines. In fact, scientific research has already identified over 1,500 organochlorines in the environment produced by natural sources.

Thus, while "zero discharge" from any source is unwarranted, "zero discharge" from a single industrial source would be insignificant from an environmental standpoint, and yet would impose substantial economic and social costs on a highly competitive domestic industry, as well as on the communities in which mills operate.

H.R. 2898 is unsupported by credible science or risk-based analysis, and is unwarranted from a regulatory standpoint, given EPA's ongoing efforts. It would also cause severe economic dislocation and hardship to U.S. pulp and paper manufacturers and workers, given the lack of proven alternative technologies. We strongly urge you to withdraw this measure.

NONPOINT SOURCE/WETLANDS ISSUES

New Sources

H.R. 3948 contains a provision that refers to "new and existing" sources of nonpoint source pollution. A "new source" label provides EPA with unlimited authority to establish "environmental" classes of economic activity and mandates that states adopt this classification. The distinction is not necessary and should be deleted because requirements are the same and no distinction is necessary. A "new source" label contradicts Section 404 which exempts "normal silviculture activities" in wetlands from dredge and fill permit requirements where forestry practices are considered established and ongoing. EPA is likely to label established and ongoing forest management and harvesting as a "new source" which could cause confusion and compromise the silvicultural exemption.

STATE NONPOINT SOURCE PROGRAM/BMPs

Since passage of the CZARA Amendments of 1990 and issuance of EPA's Section 6217 (g) guidance in 1993, 29 coastal states and territories have been preparing modifications to their state Section 319 nonpoint source programs for EPA approval. Several other coastal states are considering opting into the program. The House bill does not give coastal States credit for having developed Coastal Zone Act Reauthorization Amendments (CZARA) plans nor allow these management measures to be extended statewide. This restriction will have the unfortunate result of requiring states to establish two separate nonpoint source programs--one in the coastal zone and an entirely distinct program for the non coastal areas--under two separate and likely inconsistent sets of EPA guidance. Since coastal states have already begun the process to amend their Section 319 nonpoint source programs for EPA approval by

June 1995 under CZARA, the bill should specifically give States the option of choosing to expand that program, in its entirety or for certain categories and subcategories, to fulfill their requirements under Section 311 of the revised Act. This would allow the states to establish a consistent program between the coastal and noncoastal areas.

The time schedules and deadlines for monitoring and assessing state waters contained in H.R. 3948 is not technically or administratively feasible nor will it accurately assess water quality improvement. Additional EPA management measures will be imposed on the states based on inaccurate water quality assessments and evaluations. Sufficient time is not provided to evaluate implementation.

States are required to submit biennial reports to the federal government which contains a list of non-attainment waters. The Administrator would then be given the authority to add waters to the state list. AF&PA believes this is an infringement upon States discretion to determine waters of priority concern and fundamentally changes the federal/state relationships that currently exists. Therefore, we would oppose granting the Administrator the authority to add waters to a state list.

ENFORCEABLE POLICY AND MECHANISM

Like the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), H.R. 3948 requires states to adopt "enforceable policies and mechanism" in their nonpoint source programs to obtain EPA approval of their new 319 program. AF&PA would support a flexible, state-developed and state-implemented enforceable policies and mechanisms. As contained in Section 319 (b) (2) (D) of the 1987 Amendments, states must provide adequate authority to implement a nonpoint source program.

State enforceable policies and mechanisms should include a "bad actor" law. This provision would combine a carrot and stick approach. Good faith efforts by landowners to implement state BMPs should be encouraged. In situations where BMPs are implemented but evaluation indicates a failure to achieve water quality standards, states should work with individual landowners to modify existing practices, mitigate problems and, if necessary, revise the BMPs. States should exercise enforcement authority where state BMPs are not implemented and water quality impairment occurs. We believe it is extremely critical that States be given the discretion to adopt the appropriate enforcement mechanisms without the federal government and EPA dictating the specific enforcement tool. Flexibility and state development of enforcement mechanisms is essential. Support for flexible enforcement provisions is contained in the 1990 Senate and House Reports on the Coastal Zone Act Reauthorization Amendments. In discussing the implementation of land use management measures, the reports contain important language that should serve as guidance when contemplating federal mandates. It reads: "States are allowed maximum flexibility in establishing state and local institutional arrangements to accomplish this formidable task. This flexibility has been a hallmark of the CZMA, and key to its success."

The National Oceanic and Atmospheric Administration (NOAA), the agency responsible for CZARA, accurately reflected and interpreted Congressional intent in its issuance of Program Development and Approval guidance. It reads: "enforceable policies and mechanism may be state and local regulatory controls, and/or non-

regulatory incentive programs combined with state enforcement authority. Non-regulatory approaches must be backed by enforceable state authority which ensures that the management measures will be implemented. States are expected to demonstrate that they have the authority to take enforcement actions where incentive or other programs do not result in implementation of management measures, or where significant harm to coastal waters is found or threatened."

Each State has adopted different approaches to protecting water quality and what enforcement mechanism is applied should not be dictated by the federal government.

WETLANDS

AF&PA generally supports the concepts contained in H.R. 1330 including retention of the silviculture exemption, a rationale wetlands definition and protection of private property rights.

H.R. 3948 contains five priority wetlands issues of major concern to the forest industry: (1) the silviculture exemption; (2) a wetlands appeal process; (3) expansion of activities requiring a permit; (4) the wetlands definition and; (5) wetland delineation. These issues are discussed further below.

Silviculture Exemption

The forestry community has a long tradition of practicing compatible forest management activities in wetlands. Forest management is generally recognized as a preferred activity in wetlands that provides an incentive for landowners to maintain and protect wetland functions. Forestry is continually evolving as scientific research

develops improved management techniques and more effective BMPs. In 1977, Congress clearly intended that the activities listed in the "such as" clause of Section 404(f)(1)(a) are examples of exempt forestry practices and did not intend to restrict forest management to these activities only. Congress should make clarification that the listed activities are examples only.

Wetlands Appeal Process

A pre-enforcement administrative appeal process for jurisdictional determinations under section 404, including notices alleging violation of section 404(f), must be adopted. Since EPA is also actively involved in enforcement, the same administrative appeal procedures should exist for EPA as for the Corps.

Expansion of Activities Requiring a Permit

H.R. 350 and H.R. 3465 expand the types of activities that would require a permit to include all activities that would "have the effect of...degrading any area of navigable waters." These bills apparently give statutory license to the highly controversial Tulloch rule and moot a critically important lawsuit challenging that rule. The Congress should designate specific activities to be regulated and avoid broad, unspecific language that can be expanded by judicial decision and agency interpretation. The vague concept of "degrading" gives no guidance to landowners and makes almost any landowner activity in a wetland subject to permitting requirements if the EPA so chooses. As currently interpreted in EPA's August 1993 regulations, activities not considered to be degradation and, therefore, not require a permit include only "walking, bicycling or driving a vehicle" through a wetland. Under

this rule, the landowner "bears the burden of demonstrating that the activity will not destroy or degrade waters of the U.S."

Wetlands Definition

The forestry community supports the proposition that there must be independent verification of all three wetland criteria--hydrology, soils and vegetation--to verify the site as "water of the U.S." Listing specific wetland types in legislation will only serve to confuse the general public and inappropriately influence the independent National Academy of Sciences study on what is a wetland.

Wetlands Delineation

All wetland delineations should be the primary responsibility of the Soil Conservation Service. Since SCS currently has soils maps for both agriculture and forest lands, adjacent agricultural and forest lands share the same general hydrology and soils characteristics, it would make sense technically and for that matter, to administratively streamline the process, to have the SCS conduct agricultural, forest and rangeland delineations, where necessary.

FEDERAL LANDS

H.R. 3948 would subject federal agencies--including any agency "having jurisdiction over any property or facility" or "engaged in any activity resulting...in the discharge of runoff or pollutants"--to "Federal, State, interstate, or local requirements, administrative authority, and process and sanctions respecting the control and

abatement of water pollution." Furthermore, States are required to identify "activities on Federal lands in the State that are inconsistent with the State (nonpoint source water pollution) management program." These provisions would substitute EPA developed watershed planning for the federal land planning required by the Federal Land Policy and Management Act (FLPMA), National Forest Management Act (NFMA), National Wildlife Refuge Act, and other federal land management statutes. The Forest Service and Bureau of Land Management have expended 27 years of work and hundreds of millions of dollars in developing land management plans under NFMA and FLPMA, and only now are nearing completion of the monumental statutory planning mandate. H.R. 3948, however, could render that planning irrelevant by providing for an entirely new round of watershed planning for all land, including federal land, to be conducted by the States with EPA oversight, not the federal land management agencies. This approach to federal land planning would effectively repeal the planning provisions of the federal land management laws and provide EPA and the States with final authority over federal land management decisions and activities.

The bill should require federal land managers to control nonpoint pollution, but should not give EPA and the States authority to override or veto federal agencies' land management plans. Federal land managers should be required to consider EPA and State guidance and, where appropriate, take actions consistent with such guidance.

NONPOINT SOURCE WATER QUALITY CRITERIA

H.R. 3948 requires EPA to "develop and publish....additional criteria for water

quality...with an emphasis on pollutants entering (navigable) waters from nonpoint sources."

Development of nonpoint water quality criteria must take into consideration natural background levels and conditions. (Conditions include historic land use patterns, topography, soils, climate and weather which all-factor into land-bases runoff)

PUBLIC PARTICIPATION

H.R. 3948 includes numerous provisions under which EPA would be permitted to develop guidance in lieu of regulations.

If such policy making is to be allowed without the public participation requirements of the Administrative Procedure Act, the bill should at least require that the procedures under which such guidance is prepared include public notice and opportunity for public comment.

Given the concerns on specific issues addressed above, AF&PA believes the bi-partisan proposal discussion draft represents a more realistic and promising alternative to achieving water quality goals. The bi-partisan proposal seeks more cooperative efforts among private landowners and state agencies to accomplish improved water quality. It relies upon a "carrot and stick" approach that would require states to document improvements rather than automatically impose prescriptive EPA guidance. We believe more federal mandates and intrusions on private landowners will ultimately be more costly and less effective.

Testimony on the Clean Water Act
to the House Subcommittee on Water Resources

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Mr. Chairman and members of the committee, I thank you for the opportunity to speak to you today. As a physician and epidemiologist from the City of Milwaukee, it is reassuring to know that the unique perspective that citizens of our city can bring to the debate on clean water will be heard.

I suspect you have all heard the statistics that quantify the events that took place in Milwaukee just over a year ago, but the story needs frequent retelling as it is an important parable for this debate. Milwaukee draws its water from Lake Michigan, generally a remarkably clean water source. The Milwaukee River drains a large agricultural region north and west of the city. As it flows, it picks up the contaminants associated with agricultural run-off which it carries into the lake. One of these contaminants is a tiny parasite known as *cryptosporidium*.

Last spring, *cryptosporidium* oocysts (or eggs) passed through the city's filtration system in quantities sufficient to infect half of the city's population. Milwaukee residents were forced to boil their water, schools and businesses closed, and hospitals and emergency rooms overflowed. More than 4,000 people were so debilitated as to require hospitalization. *Cryptosporidium* contributed to the deaths of more than 100 of those people most vulnerable to the infection, such as cancer patients.

These numbers, however, do not fully tell the story. Modern urban residents depend completely on a complex web of services to provide them with life's most basic necessities. Few experiences provide a more stark reminder of the vulnerability that this dependence implies than living in a city that has lost its drinking water. Most Milwaukee residents still have a lingering sense of uncertainty about their drinking water. Milwaukee has implemented drinking

water standards far more stringent than the EPA's, but, as recently as last week, *cryptosporidium* appeared in the drinking water supply, prompting the City Health Commissioner to issue an advisory to citizens to boil their water.

I have heard that Milwaukee's experience is being dismissed as a fluke, a strange convergence of events that is so rare as to be considered little more than a curiosity. Nothing could be further from the truth. *Cryptosporidium* has been estimated to be present in approximately 90% of untreated surface water nationwide. Chlorination, the primary tool for water disinfection in this country, is ineffective against *cryptosporidium*. Even after treatment, more than 1 in 4 water supplies using surface water in this country contains this parasite. If we added other pathogens such as *giardia*, viruses, and bacteria to our list of microbes, the rate of contamination would be substantially higher.

The only drinking water standard that addresses the problem of *cryptosporidium* uses turbidity as a surrogate measure. The current EPA standard for turbidity allows peak levels two and one half times the highest level reached in Milwaukee during the outbreak.

Clearly, events in Milwaukee could have occurred elsewhere. In fact, they do occur on regular basis throughout the United States, though in less dramatic fashion. The EPA estimates that 700,000 cases of water borne infections occur each year in the United States just from one parasite, *giardia*. Published estimates of total infections from all waterborne pathogens range from almost one million to fifty million cases per year in the United States excluding the Milwaukee outbreak. Realistic estimates place the true number of clinically significant infections at between one and two million cases per year. Events in

Milwaukee only demonstrate how slim the margin is between the current tenuous level of protection and a major public health disaster.

It is important to recognize that, as recently as 1980, *cryptosporidium* was seen as a microbiological curiosity, primarily of interest to livestock veterinarians. Only in the past ten years has the importance of this parasite as a cause of waterborne infections come to be recognized. The importance of *giardia* as a waterborne pathogen has also only come to be fully recognized during this period. We have lived through an era relatively free from the scourge of infectious disease, but this era may be only a temporary reprieve. It is imperative that we not underestimate our microbiological adversaries, and that we recognize that the struggle against infectious agents will always be with us. Nature views human beings as an ecological niche waiting to be filled, a resource waiting to be exploited. The power of evolution has brought us and will continue to bring us a steady flow of new and deadly enemies. Hanta virus, legionella, HIV, new strains of tuberculosis. . . The growing list must stand as a constant warning against complacency.

How do we guard against these invisible and, perhaps, unidentified foes? Current standards for water treatment does not provide an adequate margin of safety from a public health perspective. You may be thinking that this sounds like a job for the Safe Drinking Water Act, but safe drinking water must begin with clean lakes, rivers, and streams ~~only exists in the artificial world of legislation~~. The notion that safe drinking water is in some way independent from clean water supplies has led us to place tremendous faith in technical solutions to the problem of providing safe drinking water. I ask that the links between these two pieces of legislation be carefully examined as their re-authorization is

considered. Drinking water treatment is necessary, but not sufficient for protecting human health. Safe drinking water must begin with strong watershed protection in the Clean Water Act.

Most outbreaks of waterborne infectious disease begin with contamination of the source water with animal and/or human waste. Watershed protection provides a critical first line of defense against water-borne infectious disease. There is no question as to whether or not it is desirable to protect source water. The only reasonable question to ask is whether or not we have the political will and economic resources to accomplish this task.

It is tempting to look at legislation such as the Clean Water Act and see only the cost of compliance. As you ask yourself whether we can afford the costs of watershed protection, I urge you to consider the costs of inaction. How many days of work can we afford to lose to gastro-intestinal illness? How much French bottled water can we afford to import? To what extent are we prepared to accept the cancer risks associated with the increased degree of chlorination needed as source water quality deteriorates? The costs of not protecting our drinking water are real and substantial.

We in Milwaukee have learned the hard way that regulations protecting America's drinking water supply need serious improvements. There is a clear and present danger in our inertia on this issue. As you consider the Clean Water Act, I only ask that you remember the experience of Milwaukee and strive to assure that these events are not repeated.

SIERRA CLUB

408 C Street, N.E. Washington, D.C. 20002 202-547-1141

PROTECT OUR WATER SUPPLY AND LIVES,

PASS MANDATORY POLLUTED RUNOFF CONTROLS

by Susan Mudd

May 24, 1994

Testimony Before the House Public Works and Transportation Committee, Water Resources and Environment Subcommittee

for Citizens for a Better Environment and the Sierra Club

Fax 202-547-6009

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Good morning. My name is Susan Mudd. I am the State Program Director of Citizens for a Better Environment. I am the mother of a two year old boy, Benjamin, and I am married to the mayor of Milwaukee. I am here today to tell you that we need mandatory cleanup plans for all landowners in polluted watersheds to keep what happened in Milwaukee from happening to you and your community.

Thirteen months ago my son had a very bad day where he was crampy and had bad diarrhea. He was not on antibiotics at the time, was not exhibiting symptoms of flu or other diseases one knows to watch for, did not get it from another child, and had not recently started any new food group. Luckily, the next day, when I would have called his physician had the symptoms persisted, he seemed better.

I might have never known the cause of the incident were it not for the fact that many other people I knew started having similar experiences. Within days numerous colleagues were missing work, there were offices one would call and find almost no one in — suddenly it seemed that virtually everyone was sick.

One evening, days later, while I was trying to entertain my eleven month old son and make dinner, my husband called to say he expected to be home very late, that there were meetings going on to try to ascertain if our city's water was contaminated. Several hours later, just before the late night news he called me to say we should boil our water and that in a few minutes he was going live on the news to issue a citywide boil advisory.

Then, after taking him to the doctor again, Benjamin tested positive for cryptosporidiosis.

Cryptosporidium in our drinking water. What? How? Why? When? Where? For how long? The questions were everywhere, the answers elusive at best. But it changed our lives in Milwaukee forever.

Day after day my husband was in meeting after meeting with state, city, and federal health and publics works officials, trying to learn how the cryptosporidium had gotten into our water and what could be done to get it out. City public health officials had to close one of Milwaukee's two drinking water plants.

Milwaukee had a long standing reputation for clean government, clean streets and good water — that reputation is gone. Most importantly, the confidence of our citizens was shattered. The boil advisory went on for 8 days, affecting 880,000 people. It was in effect on Easter Sunday, prompting one friend of mine to say "An Easter I'll never forget, boiling my water to wash the lettuce I was to serve my family and out of town guests for Easter." The advisory was only lifted when, in answer to my husband's daily question to all the public health officials congregated in Milwaukee, "Would you drink the water?" they all finally said yes.

But for Milwaukee residents, the trauma continued. Even after the boil advisory, people were still sick (because the incubation period for crypto is 7 days) and some were dying (those who were immuno-compromised like cancer patients, the very young and old, and HIV and AIDS patients). People still felt, understandably, nervous about drinking the water.

At last count, more than 100 people died due to our cryptosporidium outbreak and more than 400,000 were sickened. Lost work and health bills cost our community more than $54 million. 1,400 lawsuits are pending as a result.

The inevitable search for the responsible individuals began. The city council started yet another investigation, finger pointing at people in the health and water departments, trying to find someone to blame for the sicknesses and deaths.

To this day, we still do not know the exact cause of last spring's crypto outbreak. Was it the local slaughterhouse, rendering facility or sewage treatment plant? Was it the

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cows upstream? Both dump into the Milwaukee River, which after passing through our harbor, flows into Lake Michigan and south towards the water intake facility where the crypto entered our water. Were those sources always present, but the cause a recent change in flocculent agents used by our water departments? Was it a combination of all of theses? We still aren't sure.

We do know that Milwaukee's water met all federal and state drinking water standards. This means that our drinking and clean water standards are clearly inadequate to protect public health.

We also know and have been reminded frequently by state officials over the years, that Wisconsin has the best polluted runoff, or nonpoint pollution, program in the nation. Wisconsin's program over the last 15 years has spent $75 million of state tax dollars, in addition to federal tax dollars, to clean our state's rivers and streams. The Milwaukee River watershed had, for several years, been included in that program.

We also know that Wisconsin has a rule which is supposed to protect our water from animal manure runoff. This rule, which was adopted 15??? years ago and only after pressure from the environmental community, did not protect our water supply. By design, it only affects farms with 1,000 or more animal units (cows, for example). This means that in the dairy state most of our dairy farms are not regulated. This voluntary program failed us. As Wisconsin's nonpartisan Legislative Audit Bureau 1992 report said, "No project has yet produced demonstrable watershed-wide improvement in water quality (page 19)." This despite spending millions in local, state and federal funds.

In short, all the federal and state laws adopted to date failed to protect the drinking water of our nation's 17th largest city. Two in five of our population was sickened. The U.S. Centers for Disease Control and Prevention estimate that almost one million people are sickened each year due to polluted water and almost 1,000 people die. This is not acceptable.

Nothing can be done to restore the lives of those Milwaukee victims, nor can anything be done to make up for the trauma, illness and costs experienced by the majority of our residents. But no one else, no matter where they live, whether it be a city larger than ours, or a town of 600 people, should have to experience what we did in Milwaukee last year.

Early this year, I participated in an EPA Advisory Committee primarily made up of local government officials from around the country. I was shocked to learn that many of them were opposing changes to the Safe Drinking Water Act which would require them to do more extensive testing of their water for crypto and other contaminants.

And, last week, the Senate voted overwhelmingly to weaken our Safe Drinking Water laws. One day later, as the press clippings show, the City of Milwaukee again had a drinking water scare, issuing a boil water warning to people with weakened immune systems. Despite the tragic outbreak one year ago, Congress continues to drink bottled water at taxpayers expense and weaken our safe water laws, while communities like Milwaukee continue to suffer. This is inexcusable.

And Milwaukee has upgraded its treatment, monitoring and testing procedures, making our system one of the best in the country, yet still we have problems. What does that say about communities without these advantages? What will it say about you, our elected representatives, if you fail to vote for a strong Clean Water Act? This cannot, and must not, happen.

The level of denial of the possibility for repeats of the Milwaukee experience is extremely high and totally unwarranted. Crypto is not just a Milwaukee experience; within the last year boil advisories have been issued in Racine, and Washington, D.C. Just last night Wisconsin natural resource officials announced that cryptosporidium is likely in Lake Winnebago, the drinking water source for 160,000 people in the Appleton, Neenah, Menasha and Oshkosh area. Cryptosporidium has also been found

in Green Bay, Manitowoc and Port Washington water intakes in Wisconsin.

Whenever I travel, including to D.C., I now have a nagging doubt in my mind. Are the water officials wherever I am doing all they can do to monitor the incoming water quality? How often are they testing for crypto and other contaminants? And what is being done in their region to stop the sources of the poisons?

From all we have learned, until we get at the sources of pollution and upgrade our testing and treatment procedures, we can never be sure of safe drinking water again. Other cities must also follow Milwaukee's efforts. City officials authorized $875,000 to modify water treatment and testing procedures, and both water plants have installed new monitoring devices on each filter that count the number and size of particles that pass through the filters. Prior to the April, 1993 outbreak, there was no testing for crypto in the city — since April of last year city officials have tested more than 300 samples. The city has also committed $90,000 to fund a cryptosporidium testing lab in the Health Department to expedite the testing process, and Milwaukee also has two watershed monitoring projects underway to understand possible sources of cryptosporidium.

Our report, *Danger on Tap*, shows that the only way to stop crypto and other deadly parasites from getting into our water is to keep it out of our water. To keep our water safe and clean, this Committee should adopt mandatory control plans from every landowner, urban or rural, in impaired or threatened watershed. The Wisconsin experience demonstrates the need for this. Congress must also fully fund polluted runoff programs; one-half of the U.S. water quality problem should get more than 2.5 percent of the Clean Water funding. And, finally, Congress must also strengthen citizens' and EPA's enforcement authority and oversight to ensure that federal, state and local governments meet clean water standards. Please see the enclosed fact sheets.

CURRENT VOLUNTARY POLLUTED RUNOFF CONTROLS WON'T WORK

The Senate Clean Water bill, S. 1114, and the House bill, HR 3948, both have voluntary approaches to control polluted runoff or have such long timetable to be meaningless.

The Wisconsin's experience shows that these programs will not likely work. The current federal program is spending $80 million a year on a voluntary program that has not achieved major reductions. We cannot throw away $80 million per year on an ineffective, voluntary program.

Wisconsin's pioneering efforts show why. Wisconsin recently passed a mandatory program aimed at improving the voluntary bill. Congress must do the same.

Look at Wisconsin's experience. Wisconsin voluntary nonpoint program has committed over $75 million for the last 15 years while "Overall water quality improvements are not discernable at this time," according to the 1993 Wisconsin DNR and Department of Agriculture, Trade and Consumer Protection report.

An independent 1992 Wisconsin Legislative Audit Bureau report found:

LOW PARTICIPATION REDUCES PROGRESS

> "Little evidence of improved water quality and indications that project participation rates are generally lower than required to achieve water quality improvements." (Wisconsin Legislative Audit Bureau, An Evaluation of the Nonpoint Source Water Pollution Abatement Program, August, 1992, page 2).
>
> "No project has yet produced demonstrable watershed-wide improvement in water quality." (Ibid, page 19)

"The effect of the Nonpoint program on water quality to date appears to be limited. Every watershed evaluated to date has reported disappointing levels of participation among landowners whose property is a source of pollution. (Ibid, page 19)

NEED TO HAVE ALL LANDOWNERS IN THE WATERSHED IN THE PROGRAM

"...implementation [of pollution control measures] had no appreciable impact on bacteria levels, possibly due to the scattered nature of installations." Hay River Final Report (Ibid, page 20)

"...watershed wide improvements to the Root River were not discernable due to low [rates of] implementation by landowners." Root River Water Quality Report. (Ibid, page 19)

PROGRAMS MUST REQUIRE ALL LANDOWNERS TO BE IN THE PROGRAM.

Wisconsin's polluted runoff program is hamstrung since it lacks a mandatory, comprehensive watershed provision. Industry and environmentalists overwhelmingly believe that point sources alone should not bear the entire responsibility for pollution reduction. Everyone must do their fair share.

UNITED FISHERMEN'S ASSOCIATION
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May 23, 1994

TESTIMONY OF:

CAPTAIN RALPH PASTORE
EXECUTIVE DIRECTOR

TESTIMONY BEFORE THE WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE

May 23, 1994

TESTIMONY BEFORE THE WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE

The United Fishermen's Assn. (UFA), was founded in 1984, in response to the State, Department of Environmental Conservation's (DEC), state wide ban, of the sale of striped bass.

The ban was occassioned by the determination that the striped bass were contaminated with PCB's above federal guidelines for consumption. Over 1000 cottage businesses were economically impacted, or totally eliminated by the ban. An estimated 4500 commercial fishermen were affected. The ripple effects were felt throughout the wholesale and retail fish markets. Blue Ribbon fish Co. (who specialized in striped bass), estimated losses in excess of 4 million dollars per anum. The loss of the striped bass in the markets created a greater dependance on other marketable species. For example, one of the species, the blackfish or tautog, which only grows about a pound every five years, could not sustain the additional pressure, and is currently in a severe state of decline. Additionally, the loss of the striped bass caused across the board inflation on the price per pound of all marketable fish species, which is passed on to the consumer. Beyond the fish markets, the ripple effect went on to be felt by bait and tackle distributors, boat and motor manufacturers and other waterfront businesses.

When the Hudson was contaminated with PCB's 13 other species were lost, and with them, the economic viability of the fishermen who depended upon them.

I was among the most affected, as I was totally dependant upon the striped bass resource for all of my income. I lost however a great deal more than my income. I lost a traditional way of life, away from the streets, sirens and stoplights of the nearby city. I lost a traditional way of life, taught to me by my father. I grew up a fisherman, because from my teenage life I began working as a deck hand on boats. I slowly learned, through hands on experience, the skills required to be a successful commercial hook and line fisherman. In life there is little time to become the best, at a sport, or profession, and some never achieve that goal. I did, but when the striped bass were banned because of contamination I lost the ability to exercise and utilize twenty years of experience and accumulated knowledge. Today I still operate a boat, but I no longer produce fish, instead I operate a skimmer boat for the New York City, Dept. of Sanitation inside the Fresh Kills Landfill (the worlds largest landfill), cleaning floating debris from the surface of the waterway. I now fish for garbage.

I spend significant time directing the UFA, as a volunteer, at a personal loss of $10,000 a year. I do it because I am compelled to prevent the contamination of our waterways, so that fishermen do not have their lives torn apart like mine was. I do

it because banning harvest and the consumption of seafood is not an adequate solution. We have seen the results, of the weakness of, our current Clean Water Act. It is obvious that it lacks the strength needed to prevent this scenario, of lost natural resources from re-occurring. We must turn this around, we must begin to bring what we have lost back. The general public has the right to eat safe fish without the fear of devastating adverse health effects. I should have the right to return to my chosen profession. Fishing is a way of living, in harmony with nature. It must be preserved as a viable part of our nation's economy.

S.I.

I live in an area where cancer is very common, in fact, it is among the highest cancer rates per capita in the country. I believe that consumption of contaminated seafood, plays a significant role in this cancer epidemic. The New York Times reported last week (in an article dated May 11, 1994), that exposure to common levels of dioxin found in the natural food chain can cause reproductive and developmental disorders, suppressed human immune system, fetal harm and cancers.

Winter flounder which has never been tested for PCB's, Dioxin, Furan's, etc., are a perfect example of a fishery that is extensively used, yet remains an unknown health risk, in terms of human exposure to contaminants. Winter flounder can be found on the menus of nearly every restaurant and diner in the northeast and are sold as "Filet Of Sole". The Atlantic States Marine Fisheries Commission (ASMFC) has called for a 45% reduction in the catch of winter flounder because of a noted decline in their population size. That means that the income of every flounder fisherman, in the northeast will be cut by 45%. The UFA has reacted to the reduction, by investigating much of the scientific literature that exists on winter flounder. We found that there is overwhelming scientific evidence, to support our belief please see attachment #), that reproductive failure, due to larval exposure to contaminants, may be responsible for as much as 80% of the decline in Winter flounder stocks Fishing pressure being responsible for the additional 20%.

All of the rivers in our region, the Hudson, Raritan, Kill Van Kull, Arthur Kill, Hackensack, and Passaic Rivers are so contaminated, that they can't be dredged, because there is no place to dump the contaminated dredge spoils. The sediments can't be ocean disposed, because they don't meet Federal EPA, ocean dumping criteria. The Port of New York is facing navigational instability, for our failure to address the need, for strong legislation prohibiting the disposal of chemical waste into the environment.

During every outgoing tide, the Hudson and it's tributaries pump out some 55 billion gallons of water into the Atlantic Ocean. This plume carries fine particulate sediments which PCB's, dioxin's, Furan's and other chlorinated substances tend to cling to.

spreading this contamination to the Hudson Canyon and beyond to the edges of the continental shelf

Our environment is unhealthy under the existing Clean Water Act, as is indicated by all the assorted problems that our fisheries, food chain, ports, public health, recreational beaches, and wildlife are facing. The New York Bight is not alone, contamination is rampant throughout the United States. Our environmental statutes have been riddled with loopholes, to allow industry short term profits, at the expense of our dwindling natural resources. These statutes must be strengthened not weakened, now, before its too late. The loopholes must be removed and violators punished to the fullest extent, or we will lose our natural resources forever.

What we put in the ocean today we put in our mouths tomorrow.

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September 20, 1993

ATTACHMENT-A

ALICE WEBER
N.Y.S.D.E.C
REGION # 1
SUNY BUILDING # 40
STONYBROOK N.Y
11790-2356

Dear Ms. Weber

This is a letter, concerning reduced stocks of winter flounder. The decline in landings by commercial and sports-fishermen is of great concern because, reduced landings translates into reduced economic benefits for all user groups.

Many scientific studies have been done in recent years, to identify some of the problems associated with the noted decline in stocks of winter flounder. After reviewing these studies, it became obvious to my staff and I, that reproductive failure due to exposure to contaminants is the most probable cause of stock decline. The current management strategy of catch reduction will help to insure a large adult population exists during spawning season, but will be of little consequence if the young they produce cannot survive because the environmental-deck is stacked against them.

There is evidence that winter flounder tend to return to the same spawning locations in consecutive years, with restricted movement patterns suggesting relatively discrete local groups (Saila 1961; Northeast Utilities Environmental Laboratory 1990). Water quality in Long Island Sound has been compromised due to heavy organic loads, high phosphate levels, and increased concentrations of heavy metals, pesticides and polychlorinated biphenyls (PCBs)(Riley 1971; Gadbois 1982; Greig et al. 1983; CT DEP 1987; USEPA 1988). To determine whether these impacts might compromise fish reproduction, a collaborative study (see Nelson et al 1991) was established to measure the reproductive success of winter flounder, collected from six sites in Long Island Sound. The sites were chosen to represent various levels of anthropogenic contamination based on previous studies showing higher sediment contamination in the western end (Greig et al. 1977), as well as higher levels of contaminants in fish collected from isolated areas of Long Island Sound.

The primary intention was to measure sublethal effects of mutagenic chemicals, and those with teratogenic effects measurable at the cellular level. Previous studies have confirmed the sensitivity of fish reproduction in terms of embryonic development (Longwell et al. 1984; Long and Buhman 1989). Other studies have linked cytogenetic abnormalities in fish to polluted environments (Alink et al. 1980; Pesch et al. [illegible]; Al Sabti and Kurelec 1985; Hose et al. 1987; Metcalfe 1989).

Blastula stage embryos are examined for evidence of mitotic

abnormalities attributable to either chromosome or spindle defects. Several environmental pollutants (aromatic hydrocarbons, trace metals, and PCBs), which have been found in Long Island Sound, are chromosome mutagens or are harmful to the cell's division apparatus (Hooftman and Vink1981; Longwell et al. 1984; Gronlund et al. 1991)

Growth and developmental rates in early lives of finfish may be critical parameters in determining numbers of fish that are recruited into the resource. Tail-bud embryos were analyzed for mitotic count, a practical and sensitive indicator of growth and development rate, and observations of abnormal cell differentiation, which indicated cell death.

Fish embryos have the capacity for early premature differentiation of their cells and abnormal differentiation of pre-hatch embryo cells. this can be in response to general physiological stress or to pollutants (USEPA 1986). Toxic hydrocarbon levels were correlated with differentiation difficulties and mitotic errors in Atlantic Mackerel eggs from the New York Bight by Longwell and Hughes(1980). Field surveys of Atlantic Mackerel and studies of cod and pollock eggs after the Argo Merchant oil spill linked toxic hydrocarbon exposure to abnormal cell differentiation (Longwell 1977; Longwell et al. 1984). Abnormal cell differential was observed as a measure of cytological effects on winter flounder tail-bud embryos.

There is a sewage outflow at Deer Island in Boston Harbor Mass. and it is known that high concentrations of metals, polycyclic aromatic hydrocarbons, PCBs, and chlorinated pesticides in bottom sediments and tissues of winter flounder from Boston Harbor are sewage-related (Zdanowicz et al. 1986). Murchelano and wolke (1985) reported that livers of winter flounder from fish collected from southern shore of Deer Island showed extensive neoplasia designated as hepatocarcinomas (liver cancers), while none of these were observed in fish from unpolluted sites.

Niimi (1983) examined the transfer and toxological effects of 12 environmental contaminants from females' total body lipid concentrations to their eggs among five different fish species. His data suggested the levels of contaminant residues monitored could have detrimental effects on egg and fry survival, with relatively high mortalities of embryos and deformations after hatch. In that same study, female flounder with high levels of mercury and cadmium in their livers and gonads also yielded low viable hatch.

In another study by Westerhagen et al. (1981) found that concentrations as low as 0.12ppm PCBs wet weight significantly decreased viable hatch. Westerhagen set threshold of >0.2 ppm PCBs wet weight, above which impaired reproductive success was probable

PAGE THREE (3) CAUSATIVE FACTORS OF REPRODUCTIVE FAILURE IN WINTER FLOUNDER

Shoreham L.I.(NOAA 1988) was the primary reference station in a three year study which began in 1986 and was completed in 1988.

Flounders from Shoreham in 1986 had the greatest percent viable hatch, whereas in 1988 Shoreham collections had the poorest viable hatch. We believe that the explanation for the anomalous 1988 Shoreham results lies in the dredging of Milford Harbor that went on during the larval culture period. The water became very turbid, even after sand-filtration, and during our daily examination of the embryo cultures it became apparent that many would develop only to the tail free stage and then die. We believe, therefore, that sediment disturbance and subsequent siltation caused by dredging activity may have led to the release of metals and various other chemicals into the water column, severely stressing the embryos. Supporting this belief is a consensus from the workshop on the effects of dredging on eggs, larvae, and juveniles of anadromous fish (NMFS 1988), in which high-priority concerns were chemical mobilization from dredge spoils, as well as particle adhesion by the eggs and ingestion of particles by fish larvae.

Larvae that hatch small are at a disadvantage in survival (Hunter 1972; von Westerhagen 1988). Small larvae must work harder at catching prey than the larger larvae, and are themselves more likely to fall to prey to other organisms. They also have a smaller range of food availability. Buckly et al. (1990) has shown that larger larvae have a higher rate of survival than do small larvae. Ample evidence exists that heavy metals, poly aromatic hydrocarbons, PCBs, and chlorinated pesticides depress larval size(Rosenthal and Sperling 1974; Rice and Harrison 1978; Ojaveer et al. 1980; Somasundaram et al. 1984). We believe that the low larval size observed here probably was related to organic pollution or to a combination of contaminants.

By measuring the yolk-sac length, we had hoped to say something about yolk utilization. In examining the data, however, we found that many of the yolk sacs were irregularly shaped , and that yolk-sac length was related to larval length; that is, small larvae have short yolk sacs and large larvae have long yolk sacs. after considering the irregularly-shaped yolk sacs and noting the direct relation between larval size and yolk sac length, we decided to eliminate the yolk-sac length measurement in favor of yolk-sac volume(Buckley et al. 1990). Deformed or large yolk sacs are indicators of osmotic or metabolic disturbance; it has been demonstrated that petroleum hydrocarbons and heavy metals can cause mitochondrial dysfunction (Rosenthal and Alderdice 1976; von Westerhagen 1988). Lonning (1977), observing cod, plaice, and flounder eggs after exposure to oil, suggested that inhibition of mitochondrial metabolism can delay use of the energy-rich yolk material. WE believe that the signs of reproductive impairment

observed in this study of Long Island Sound reflect habitat degradation-probably due to a combination of contaminants that we are not able to define at this time.

The United Fishermen's Association of NYS Inc.(UFA) feels that the fishermen of NYS are being treated as second, and third rate citizens by Federal and State governmental bodies.

1) Overdevelopment of waterfront industry has reduced fish habitat limiting fishing area, which directly impacts fishermens' economic viability.
2) Government Agencies PERMIT dredging (through the dredging application permitting process) and dumping of Known contaminants into environmentally sensitive areas (FOR EXAMPLE: The Federal Agencies> Army Corps of Engineers and EPA permitted 468,000 tons of dioxin TCDD laced sediments to be dumped at the "Mud Dump Site" {MDS} with as yet, no risk assessment or valid Environmental Impact Statement) with the full knowledge that these contaminants cause reproductive failure in many fish species, which may dramatically reduce the amount of fish available to fishermen.
3) Government then acknowledges these reductions in landings and makes, in most instances, exaggerated claims that over exploitation is the cause of these declines and implements restrictions on harvesting which further impacts the fishermens' economic viability. It is no wonder that this constituency feels totally out of touch with its government and alienated by its governmental agencies.
4) To date, no comprehensive commercial fishing policy exists, that would protect or insure the economic vitality of commercial fishermen in NYS. The NYS DEC has done nothing to protect and defend known fisheries habitat areas, from over-development, contaminant degradation, sewage degradation and other threats that are known to have devastating impacts on fisheries resources.

It is obvious that there are no simple solutions to address the degradation problems associated with our inshore spawning grounds. We have some suggestions however, which may head us in the right direction, while at the same time, may restore some faith in government, that fishermen have long since lost.

A) There is an obvious need to perform a comprehensive species by species analysis of inshore dependant animals to establish the extent of reproductive failure due to contaminants.

B) Identify contaminants and specific isomers that inshore species are known to be sensitive to, and are known to cause reproductive failure.

C) Point/Non point source reduction and remediation. Determine the

sources of chemical contaminants and known sewage discharge lines which contribute to contaminant loads in the areas of concern.

D)Enhancement of stock reproduction. This can be achieved in a variety of ways, for example if healthy fish were reared in

captivity to help them past the vulnerable larval stage and then released into the wild, this would greatly increase survival rates.

E) A steering committee should be activated, composed of citizens groups, scientists, and government agencies to assess and locate the sources of degradation and provide solutions and the means to carry them out.

Our current unidirectional management plan of reducing fishing pressure alone must be revised to include addressing reproductive failure of inshore dependant species, along with reducing fishing pressure, if we are to expect any management strategy to be effective.

I thank you for your concern for winter flounder stocks and hope you will continue to keep me informed on any further management decisions concerning this issue.

Sincerely,

Captain Ralph Pastore
Executive Director

RP/ag

Working for the Nature of Tomorrow®

NATIONAL WILDLIFE FEDERATION

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TESTIMONY BEFORE

Water Resources and Environment Subcommittee of the Public Works and Transportation Committee

U.S. HOUSE OF REPRESENTATIVES

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MAY 24, 1994

Introduction

Thank you for the opportunity to present to the Water Resources and Environment Subcommittee of the Public Works and Transportation Committee this statement on reauthorization of the Federal Water Pollution Control Act (the "Clean Water Act," hereinafter the "CWA") and to offer our views on pending legislation.

The National Wildlife Federation (NWF) is the nation's largest conservation education organization. Founded in 1936, the NWF works to educate, inspire and assist individuals and organizations of diverse cultures to conserve wildlife and other natural resources and to protect the Earth's environment in order to achieve a peaceful, equitable, and sustainable future. Our members are deeply concerned about polluted water and the continued loss of wetlands, and have long worked to clean-up our nation's waters and protect valuable wetlands resources.

Our testimony focuses on wetlands protection and is outlined as follows: the first section explores the many functions and values of wetlands; the second section examines the status and trends of our nation's wetlands resources; section three explains NWF's wetlands agenda; and section four addresses NWF's position on wetlands legislation pending before this Committee. Section five addresses wetlands, private property and takings. In addition, section six addresses Alaska's wetlands, due to the importance of preserving these critical wetlands that benefit the entire country, and section seven addresses agriculture and federal wetlands regulation, due to the numerous misconceptions about the treatment of farmers under the Act. Finally, section eight summarizes and concludes the testimony.

Wetlands Functions and Values

The scientific literature irrefutably demonstrates that wetlands provide vast array of critical ecological functions from which all Americans derive enormous economic and other benefits. The Environmental Protection Agency noted that in 1991 alone, activities which rely heavily on wetlands such as hunting, fishing, camping and wildlife photography added approximately $59.5 billion to the nation's economy.[1] Dozens of lengthy texts and hundreds of publications have devoted thousands of pages to analyzing wetlands functions and values, thus this testimony can only hope to provide a cursory overview of the topic. Because economics is the axis on which many wetlands debates turn, it is vital that this Committee understand the tremendous economic value of wetlands. Wetlands losses, which continue under current law, have innumerable adverse economic, ecological and social ramifications.

Scientists generally agree that wetlands provide the following functions and values:[2]

Flood Conveyance
Storm Surge Abatement
Water Quality -- Nonpoint Pollution and Sediment Control
Groundwater Recharge and Discharge

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[1] Environmental Protection Agency Wetlands Fact Sheet #4: Economic Benefits of Wetlands (March 1993), p. 1 (hereinafter, "EPA Fact Sheet").

[2] The Conservation Foundation, "Protecting America's Wetlands: An Action Agenda. The Final Report of the National Wetlands Policy Forum" (1988).

Habitats for Rare and Endangered Species,
Waterfowl and Other Wildlife
Habitats for Fish and Shellfish
Recreation
Water Supply
Food Production
Timber Production
Historic and Archeological Sites
Education and Research
Open Space and Aesthetics

Our testimony below addresses several of these functions.

Flood Conveyance

A 1987 Federal Emergency Management Agency (FEMA) study stated that 17,466 communities, including 9.6 million households, and an astounding $390 billion in property value are at risk from flooding.[3] More precisely, flooding causes approximately $3 billion in damages and the loss of 191 lives annually.[4] It is likely that wetlands save $30.9 billion in repair costs related to damage from flooding each year.[5]

At times of peak runoff, rivers and streams often overflow their banks into adjacent floodplains. Wetlands, which act as natural sponges, soak up much of the water and slow its rate of flow. One acre of wetland can store about 360,000 gallons of water if flooded to a depth of only one foot.[6] This ability to absorb floodwaters and release them gradually over time gives these systems extraordinary value as sites for temporary water storage. In short, when wetlands are present to retain this overflow, peak flows of flood waters are reduced, and floods are less damaging.

Wetlands are especially valuable as flood moderators because the water they retain almost never reaches watercourses when they are at flood stage. For example, a study conducted in

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[3] Jon Kusler and Joseph Larson, "Beyond the Ark: A New Approach to U.S. Floodplains Management," Environment, v. 35 (June, 1993), p. 13 (hereinafter, "Beyond the Ark").

[4] How Wet Is a Wetland? The Impacts of the Proposed Revisions to the Federal Wetlands Delineation Manual, Environmental Defense Fund and World Wildlife Fund (1992), p. x (hereinafter, "How Wet is a Wetland?").

[5] Valuing Wetlands: The Cost of Destroying America's Wetlands. 1994. National Audubon Society. p. 24. Data estimated from U.S. Army Corps of Engineers 1991 report.

[6] "Wetlands are Critical to Flood Control". National Wildlife Federation. 1993.

Wisconsin showed flood flows to be reduce up to 80% in basins with wetlands and lakes.[7] Moreover, wetlands which are not adjacent to streams and rivers (non-riparian or "isolated" wetlands) also hold rain and runoff water and contribute to flood control. Destruction of prairie potholes in the Midwest,[8] for instance, greatly increases the rate at which water moves off the landscape and into the floodplain.[9] Increasing acreage of hard-surface areas, such as highways, shopping centers, and housing developments within a watershed adds to the frequency and intensity of river and stream flooding and the need for wetlands to control and contain flood waters.

These flood control benefits of wetlands translate into tremendous economic savings for Americans. For example, the U.S. Corps of Engineers estimated that the loss of floodplain wetlands in the Charles River Basin in Massachusetts would increase flood damages annually by $17 million dollars per year. This translates into an annual flood protection value from wetlands of $2024 per acre per year.[10] If just 40 percent of those wetlands are destroyed, at least $3 million in flood damages will be incurred annually, resulting from a 2 to 4 foot increase in floodpeaks.[11] Realizing the importance of these wetlands to the prevention of millions of dollars of annual flood damage, the U.S. Army Corps of Engineers concluded that the best solution was to preserve the wetlands. Therefore, instead of constructing dams, the Corps purchased or protected by easements approximately 8,000 acres of wetlands along the Charles River. The average annual benefits were $2.4 million for an average cost of $617,000 - a very wise economic and ecological investment.[12] Furthermore, the total acquisition costs of wetlands were about $10 million, which was much lower than the $100 million in estimated costs for the construction of upstream levees and dams.[13]

However, the elimination of wetlands can cause severe physical and economic damage due to the increased intensity and destructiveness of floods. For example, the loss of wetlands in

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7 R.P. Novitski, "Hydrology of Wisconsin's Wetlands," U.S. Geological Survey, Madison Wisconsin (1982); S. Feierabend, "Status Report on Our Nation's Wetlands" National Wildlife Federation, Washington, D.C. (1987) (hereinafter, "NWF Trends Report.")

8 Prairie potholes are depressional areas that were left by glaciers as they moved through the midwest. Prairie potholes fill with water during the spring and provide critical habitat for migratory waterfowl, in addition to aquifer recharge, floodwater retention and other vital functions.

9 S.E. Faber, "Letting Down the Levee," National Wetlands Newsletter (November/December 1993) at 5.

10 Thibodeau, F.R., and Ostro, B.D. 1981. "An Economic Analysis of Wetland Protection," Journal of Environmental Management, 12:19-30.

11 Office of Technology Assessment, Congressional Board of the 98th Congress, Wetlands: Their Use and Regulation 10 (1984), pp. 37 and 45.

12 William Neiring, "Wetlands of North America," (1991), p. 22.

13 Jon Kusler and Larry Larson, "Beyond the Ark," (1993), p. 13.

DuPage County, Illinois has led to frequent extreme flooding that resulted in $120 million in damages in 1987 alone, which cost up to $50,000 per damaged residence to repair.[14]

When the Mississippi overflowed its banks last summer, we further learned how important wetlands can be for flood abatement. The latest damage estimates for the midwest flooding range from $10 billion to $15 billion, with 45 lives lost[15] and 40,000 to 50,000 homes and business affected. FEMA estimated that as many as 80 percent of the affected buildings may have suffered damage in excess of 50 percent of their value. Many of these buildings were underwater for weeks after the floodwaters first arrived. The American Red Cross approximated that 56,295 family dwellings were affected by the flood, and that the Red Cross, alone, provided 145 shelters to house 14,502 people in the region, supplied 2.5 million meals, and spent over $30 million in flood relief efforts.[16] The federal government also contributed $6 billion in emergency relief funds to assist in the massive cleanup efforts.[17] When the floodwaters finally receded, they left behind broken buildings, leaking industrial and agricultural poisons, and rotting waste that presented a real public health hazard.

The widespread flooding in Iowa, Missouri and Illinois graphically illustrates what happens when wetlands are drained on a massive scale. According to the U.S. Fish and Wildlife Service (FWS), Iowa has lost 89 percent of its wetlands since colonial times -- mostly due drainage for agriculture, and Missouri and Illinois have lost, respectively, 87 and 85 percent of their wetlands.[18] Collectively, more than 19 million acres of wetlands have been eliminated from the drainage basins of the Mississippi and Missouri rivers north of Saint Louis.[19] In view of the well-established link between wetlands drainage and flooding, it is no wonder that we have experienced grave flooding in the midwest.

The Clinton Administration has acknowledged the scientifically supported cause and effect relationship between the disappearance of wetlands in the Midwest and the intensity of the 1993 floods. Recognizing the flood-absorbing capacity of wetlands in the natural floodplains of the

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[14] How Wet is a Wetland?, p. x.

[15] Michael Hanback, "Focus on Flooded Wildlife: Profound, Often Permanent, Change Resulted in the Midwest Deluge," Outdoor Life, v. 192 (Nov., 1993), p. 38 (hereinafter "Focus on Flooded Wildlife"). This article placed the amount of monetary damages at over $12 billion.

[16] Mary Fran Myers and Gilbert F. White, "The Challenge of the Mississippi Flood," Environment, v. 35 (Dec., 1993), p. 6 (hereinafter, "The Challenge").

[17] "Focus on Flooded Wildlife", p. 46.

[18] T.E. Dahl, Report to Congress: Wetlands Losses in the United States, 1780's to 1980's, U.S. Fish and Wildlife Service (1990), p. 6 (hereinafter "FWS Report").

[19] "Letting Down the Levee" at 5.

region, the Administration called for wetlands acquisition and restoration programs targeted to areas devastated by the flood.[20]

In direct response to the 1993 floods, the USDA Emergency Wetlands Reserve Program was authorized $15 million to restore 25,000 acres of wetlands within the flood area. Since its inception in 1990, the non-emergency USDA Wetlands Reserve Program has also been active in wetlands restoration in the Midwest and elsewhere. For example, the Program was appropriated $50 million in 1992 to restore 50,000 acres of wetlands in nine states, including Missouri, Iowa, and Minnesota, with a large percentage of the money going into the flood area. After an unfunded hiatus in 1993 and in the wake of the summer 1993 floods, the Wetlands Reserve Program has been expanded this year to include 20 states, and has been appropriated $67 million to restore 75,000 acres of wetlands. Furthermore, in the FY1995 budget request nearly $1 billion is dedicated to wetlands, a 41 percent increase over the 1994 budget. Included in the 1995 budget is $283 million for the Wetlands Reserve Program to retire from agricultural production up to 300,000 acres of current or former wetlands. The stated goal of the program is to enroll 975,000 acres of wetlands by the year 2000.[21]

Finally, the testimony of Ron Nargang, Director of the Minnesota Department of Natural Resources' (MDNR) Division of Waters, vividly illustrates the economic ramifications of eliminating wetlands and the flood conveyance function they perform.[22] Mr. Nargang testified that it costs Minnesota nearly $300 for each acre-foot of flood storage it has to create. In other words, if development eliminates a one acre wetland that holds 12 inches of water during a storm, the replacement cost to taxpayers is $300. Because an estimated 5,000 acres of wetlands are destroyed every year in Minnesota, the cost of replacement floodwater storage to the State's residents is $1.5 million, which exceeds the State's annual appropriation for flood control. As the DNR concludes, wetlands drainage -- based on flood conveyance function alone -- is simply bad economics.

Storm Surge Abatement

Coastal wetlands absorb and temper the impact of storm surges and protect economically significant coastline. For example, according to one estimate, the elimination of one mile of wetlands along Louisiana's 250 mile coastline would cause approximately $63,676 in increased hurricane damage annually (1980 dollars).[23] Wetlands associated with barrier islands, salt marshes, and mangrove swamps act as giant storm buffers and can weather major storm events

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[20] Protecting America's Wetlands: A Fair, Flexible and Effective Approach. White House Office on Environmental Policy, (August 24, 1993), p. 26.

[21] Telephone interview with Billy Teels of the Soil Conservation Service, and fax of the NASDA News (National Association of State Departments of Agriculture), on file with the National Wildlife Federation.

[22] Testimony presented to the Domestic Policy Council's Wetlands Task Force. Ron Nargang, Director, Division of Waters. Bismarck, North Dakota. August 17, 1990. (hereinafter "MDNR Testimony").

[23] S. Farber, "The Value of Coastal Wetlands for Protection of Property Against Hurricane Wind Damage," Journal of Environmental Economics and Management, 14(2) (1987), p. 143-151.

without sustaining lasting damage. The low gradient of many shorelines and the capacity of wetland vegetation to absorb and dissipate wave energy combine to counteract storm surges and prevent shoreline erosion. As a result, federal flood insurance is no longer available to coastal communities to subsidize destruction of mangrove swamps.

When Hurricane Andrew buffeted the shores of Florida and Louisiana in 1992, the nation was reminded of the tremendous buffer coastal wetlands can provide. The storm hit both states with approximately the same strength, yet Florida, which has lost 9.3 million acres of its original wetlands - the most acreage of any state,[24] sustained between $15 to $30 billion in damage compared to the $1 billion sustained by Louisiana, with its large coastal wetland buffer.[25] The flood insurance claims that were paid in the wake of the hurricane came to $115 million in Florida, as compared to $30 million in Louisiana. And tragically, almost 70 hurricane-related deaths occurred in Florida; however, none occurred in Louisiana.[26] While other factors also were important, the importance of wetlands protection is obvious.

Coastal development, which destroys or degrades wetlands in barrier islands and other critical coastal wetlands, estuarine saltmarshes, and lakeshore marshes, weakens the ability of our coastlines to rebound from the pounding they receive from storms. The assemblage of dunes, marshes, and woody vegetation that comprise our coastal wetlands provide priceless protection to existing homes and businesses from hurricanes and storms.

Water Quality, Sediment Control and Nonpoint Pollution

One of the most important functions that wetlands provide is helping to maintain and improve the water quality of our nation's rivers, streams, and other surface and groundwaters. Protecting wetlands is fundamental to achieving the CWA goal to "maintain and restore the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. §1251; see also, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). Wetlands act as "nature's kidneys,"[27] filtering polluted waters, removing and retaining nutrients, processing organic wastes, and reducing sediment loads to receiving waters. Water entering wetlands is slowed by aquatic vegetation growing in and around the wetland. The high rate of biological activity associated with wetlands can result in many organic wastes being absorbed, converted and incorporated into the plant tissue or given off as a gas. Compounds containing nitrogen are broken down into products useable by plants, and bacteria convert much of the nitrogen gas that escapes into the atmosphere.

Replacing the natural water quality protection functions of wetlands with artificial pollution control mechanisms would be extremely expensive. For example, the improvements in sewage

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24 FWS Report.

25 "Beyond the Ark," p. 8.

26 "Beyond the Ark," p. 8.

27 J.A. Kusler, et al., "Wetlands -- These havens of biodiversity are often endangered because they can be hard to identify. Understanding their variable characteristics can lead to more successful conservation efforts," Scientific American (January 1994) at 64B.

treatment plants that would be necessary to compensate for the estimated increase in nitrogen pollution alone would cost an estimated $70 billion.[28]

The Alcovy River system in Georgia typifies how natural wetlands restore and maintain water quality. Researchers in the late 1960's found that -- after flowing through a three-mile stretch of wooded swamp -- water polluted with chicken excrement and human waste was significantly improved in water quality. The value of this wetland for water pollution control alone was estimated to exceed $1 million annually.[29] In another case, researchers at the University of Michigan discovered that a 1,700-acre peat bog could treat 100,000 gallons of secondarily-treated wastewater a day. The wetland removed roughly 70 percent of ammonia nitrogen, 99 percent of nitrite and nitrate present, and 95 percent of total dissolved phosphorous from the wastewater, generally in less than 24 hours.

Other examples of the economic benefits provided by the pollution reduction functions of wetlands demonstrate their high monetary value. For example, valuable water quality functions are provided by the South Carolina Congaree Bottomland Hardward Swamp wetlands, such as excess nutrient and sediment removal. According to the EPA, the least cost substitute for such services would be a water treatment plant costing $5 million (in 1990 dollars).[30] In addition, each day 17 tons of pollutants are removed from sewage water by a wetlands marsh near Philadelphia.[31]

According to the Minnesota DNR, combined federal and state expenditures in the State on nonpoint pollution control (i.e., polluted runoff from farms, parking lots, and other areas) over the last ten years alone reached almost $20 million. Based on its experience, Minnesota concluded that it is economic folly to continue to destroy its natural filters -- wetlands -- thereby increasing costs to control polluted runoff.[32]

Groundwater Recharge and Discharge

Wetlands frequently play an important role in replenishing, or "recharging," groundwater supplies. Wetland recharge sites maintain groundwater levels throughout the country by trapping waters, filtering them, and allowing them to percolate and migrate down to underlying aquifers. In Massachusetts, for example, a 2,700-acre wetland recharges a 16-square mile shallow aquifer at

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28 How Wet Is a Wetland?, p. xi. See also, Dianne Dumanoski, "Heavy Toll Seen if 'Drier' Wetlands Are Developed," Boston Globe (December 10, 1991), p. 1 (this article estimates the replacement costs for advanced sewage treatment plants to be $75 billion).

29 NWF Trends Report, p. 12.

30 EPA Fact Sheet.

31 U.S. Fish and Wildlife Service, Wetlands of the United States: Current Status and Recent Trends 31 (1984), p. 18; as cited in Jerry Jackson, "Wetlands and the Commerce Clause: The Constitutionality of Current Wetlands Regulation under Section 404 of the Clean Water Act," Virginia Journal of Natural Resources Law, v. 7, n. 2 (Spring 1988), p. 317.

32 MDNR testimony.

the rate of eight million gallons a day. The aquifer provides much of the drinking water for the town of Amherst.

Prairie potholes, glaciated wetlands of the northeast and midwest, and southern cypress swamps serve as some of the most valuable recharge areas. These wetlands occur where there are elevated water tables, and they often contribute to underlying, shallow aquifers. Seasonal wetlands in the prairie pothole region are vital to maintaining high water tables. High water tables, in turn, provide water for livestock during droughts and can be critical to the long-term water balance of the prairies by providing significant recharge to soil moisture.[33] Not only does enhanced soil moisture recharged by prairie wetlands improve crop production, but emergent wetland plants found in these areas can provide abundant forage for livestock. Moreover, groundwater recharge through wetlands filtration also improves the quality of the water source, as sediments and nutrients are removed by the wetlands.[34]

With supplies of clean water becoming increasingly scarce throughout the nation, we cannot afford to overlook the important role wetlands play in the cycle of water. Although research is needed to understand more fully the dynamics of water movement into, through, and out of wetlands, we do know that wetlands and groundwater are inextricably linked. Strong wetlands protection programs, therefore, are essential to protecting and providing an abundant and healthy water supply for all Americans.

Habitats for Rare and Endangered Species, Waterfowl, and Other Wildlife

Wetlands are critical habitats for a variety of plants and animals. Research has demonstrated that wetlands of less than one acre in size support an abundance of life forms. The loss of wetlands -- both large and small -- therefore, impacts a broad array of plants and animals. One of the more obvious groups of animals to be affected by the destruction of wetlands is waterfowl.

Ducks, geese and swans are some of the more prominent wildlife species to make use of wetlands, and -- as discussed below -- are important economically. Prairie potholes alone provide vital habitat for 50-80% of North America's waterfowl. Therefore, the well-being of waterfowl populations is tied directly to the status and abundance of wetland habitats. Simply said, as the wetlands go, so go our waterfowl. That waterfowl populations reached record low levels in recent years should come as no surprise to anyone who understands that the Nation's wetlands inventory is at its lowest level in recorded history.

Besides waterfowl, a large number of federally-listed threatened and endangered species rely on wetlands for their survival. Loss of habitat is by far the greatest single cause of species extinction. As of June 1993, 408 animals and 384 plants were listed as threatened or endangered in the United States. According to a recent NWF report, of the 592 species listed in 1992, fully forty-three percent (256) of these animals an plants depend directly or indirectly on wetlands to

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33 D.E. Hubbard, "Glaciated prairie wetland functions and values: a synthesis of the literature." U.S. Fish and Wildlife Service (Washington, D.C. 1988).

34 Jan Goldman-Carter, A Citizens' Guide to Protecting Wetlands, National Wildlife Federation, Washington, D.C. (March 1989), p. 30.

complete their life cycle successfully. In addition, of the more than 2,500 plants in need of federal protection, as many as 700 are wetland-dependent or related.[35]

The economic impacts of the loss of plant and animal species cannot be overemphasized. Forty-three percent of North American freshwater mussel species, which form the basis of a thriving industry worth over $700 million annually and supporting approximately 10,000 U.S. jobs, are either endangered or extinct. Over 100 stocks and subspecies of trout and salmon are extinct and another 200 are at risk in the Pacific Northwest, due in part to the destruction of wetlands. Commercial and recreational salmon fishing in this region provides 60,000 jobs and $1 billion annually in personal income, but this industry is in trouble as salmon decline due to habitat degradation.[36]

Additionally,40% of all medicinal prescriptions are either based on or synthesized from natural compounds from different plant and animal species. Not only do these species save lives, they contribute to a booming pharmaceutical industry contributing over $40 billion annually to the nation's economy. Unfortunately, scientists have screened only 5% of the known plant species for their medicinal values, although we continue to lose up to 100 species daily. Examples of recently discovered uses for plant species include the promising cancer treatment application of the bark of the Pacific yew, which contains the substance taxol. In addition, the purple foxglove has yielded a drug that alleviates heart disease in more than 3 million Americans, who would otherwise find their lives cut short within 72 hours.[37] Wetlands could well be the site of discovery for the next wonder drug.

Aside from the threatened and endangered species that depend on wetlands for their survival, 5,000 species of plants, 190 species of amphibians, and 270 species of birds are estimated to occur in the Nation's wetlands. As if to confirm what many ecologists have long suspected, in 1991 The Nature Conservancy (TNC) reported that North America's aquatic fauna were in serious trouble.[38] According to TNC, one out of three North American fishes and two out of three of the continents' crayfishes are rare or imperiled. The primary reason for the decline of these aquatic-version of the "canary in the mine" --not surprisingly-- appears to be habitat loss and degradation.

For years we have relied on fish and wildlife resources as an "early warning system" and an indicator of environmental quality. For anyone willing to listen, the bells and sirens have sounded for our nation's wetlands --these systems and the myriad plant and animal communities that depend on them are in serious trouble, and so are we. Greater wetlands protection --not less-- is the only remedy.

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35 National Wildlife Federation "Endangered Species, Endangered Wetlands: Life on the Edge," (1992) p. 7..

36 National Wildlife Federation Factsheet, "The Disintegrating Web of Life: Causes of Species Extinction," (March 1993); and National Wildlife Federation Factsheet, "Why Should We Save Species?," (January 1994).

37 Ibid.

38 "Aquatic Animals: Endangered Alert," The Nature Conservancy Magazine (March/April 1991).

Fish and Shellfish

Wetlands are the cradle of the nation's seafood industry. Fish and shellfish depend on estuaries for spawning and nursery grounds, food production, and migration. For example, the marshes of Louisiana produced an annual 1.2 billion pounds of commercial fish and shellfish worth $244 million in 1991.[39] As another example, the Great South Bay, a shallow tidal estuary in New York, has extensive naturally productive habitat that has contributed approximately 92% of New York's commercial hard clam landings with a reported dockside value in excess of $16.7 million.[40] The connection between wetlands and seafood is most simply illustrated by a bumpersticker frequently seen in coastal North Carolina, which succinctly states the importance of wetlands to the fishing industry -- "No Wetlands, No Seafood." It doesn't get any simpler, or truer, than that.

The National Wildlife Federation and others have long emphasized to Congress the importance of preserving wetlands to protect the nation's seafood industry. The dockside value of the fish landed in 1991 was $3.3 billion,[41] which provided the base for a fishing and processing industry worth $26.8 billion employing hundreds of thousands of people.[42] Approximately 75% of these commercial fish and shellfish landings consist of species dependent on coastal wetlands and estuaries.[43]

The annual economic value of estuarine habitats is roughly $14 billion. In the late 1980's, commercial landings of estuarine-dependent species contributed some $5 billion to the economy. In California alone, for example, the value of commercial fish landings exceeds $126 million per year, and this industry contributed $111 million per year in value-added products.[44] Despite the tremendous contribution wetlands make to our economy, over half of the nation's fishery-supporting wetlands have been destroyed; according to the National Marine Fisheries Service (NMFS) this dramatic wetlands loss cost the American fisheries economy $208 million each year in the mid-1980's.

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39 EPA Factsheet.

40 Fox, R.E. 1981. "An Estimate of the Recreational Harvest of Hard Clams from Great South Bay, New York". New York Fish and Game Journal 28 (1):81-87.

41 Fish species dependent on wetlands account for nearly $2 billion of the $3.3 billion worth of fish landed by the commercial fishing industry.

42 EPA Factsheet.

43 James R. Chambers, "Coastal Degradation and Fish Population Losses," in Stemming the Tide, Ed. R.H. Stroud, Proceedings of the Marine Recreational Fisheries Symposium (12:45-51) by National Coalition for Marine Conservation, Savannah, GA 1991.

44 Farber, Stephen. "A Socioeconomic analysis of the Impact of Wetlands Preservation Programs in Louisiana." 1993.

Recent data compiled and published by the NMFS dramatically underscore the wetlands-fisheries nexus.[45] For example:

- 75% of U.S. commercial fish and shellfish landings consist of species dependent on coastal wetlands and estuaries.

- All fish species harvested commercially or recreationally off Atlantic, Pacific, and Gulf of Mexico Coasts have been reduced to historic low levels of abundance.

- There has been a 42% decline in commercial landings of fish and shellfish along the southeast Atlantic and Gulf of Mexico Coasts since 1982.

- The loss of 91% of California's coastal wetlands has played a major role in reducing populations of key commercial fish species in the region to historically low levels.[46]

- The Maryland oyster harvest has declined 90% since 1890.

- Migratory fish in the Chesapeake Bay have declined, on average, 82% between the 1960's and the 1980's.

- 33% of the Nation's remaining shellfish waters are closed on any given day because of pollution.

Depending on the region of the country, the percentage of wetland-dependent fish species varies. For example, 98% of all species in the commercial seafood harvest in the Gulf of Mexico spend part of their lives in wetlands and marshes. In the southeastern U.S. this percentage is slightly lower -- 94%. With wetlands currently being destroyed at a rate of approximately 300,000 acres per year, the trends are clear. Historic commercial fish and shellfish harvests are in steep decline and the primary factor for these declines appears to be the loss and degradation of wetlands.

Florida has been dramatically affected. According to published accounts, shrimp harvests in that state have decreased by more than 75% since the early 1980's, and the fishery off the southwest tip of Florida is on the verge of total collapse. Scientists believe the collapse can be traced to a number of significant changes in the wetland-tidal ecosystem, including -- restricted flows of freshwater from the Everglades, runaway development that has converted thousands of acres of mangrove swamps and other critical wetlands, loss of seagrass beds from onshore development, and high levels of pesticides and other contaminants in agricultural runoff.

Clearly, concern for a strong and proactive §404 program now extends well beyond the environmental community which --for the past 20 years-- has worked to improve and expand on the program. And, while the environmental community will continue to press for improvements to §404, Congress can no longer ignore the burgeoning constituencies, such as commercial fishermen and shell fishermen whose passions, and --in many instances whose livelihoods -- hinge entirely on a strong federal wetlands protection program.

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[45] Chambers Report.

[46] Chambers Report.

Recreation

Wetlands support a myriad of American recreational activities -- including hunting, fishing, and photography. Not only are these activities important to the emotional well-being of many Americans, they make an important contribution to the American economy. For example, the U.S. Fish and Wildlife Service (FWS) estimates that in 1985, 6.3 million hunters (38 percent) spent almost 86 million days hunting on wetlands acreage. A breakdown of these figures by type of hunting reveals that some 3.5 million big game hunters spent over 28 million days of hunting on wetlands; 3 million small game hunters spent over 26 million days of hunting on wetlands; 2.4 million waterfowl hunters spent almost 20 million days of hunting on wetlands, and 645 thousand people hunting other animals spent almost 11 million days hunting on wetlands.[47]

Recreational fishing is also an important wetland-dependent activity that generates millions of dollars annually. Nation-wide, according to FWS estimates, some 35.6 million anglers took 454 million trips for 511 million total days, spending almost $24 billion in the process in 1991. In the 23 states represented by this Subcommittee, over 23 million freshwater anglers spent 300 million days afield fishing in 1991. The total annual expenditure on recreational fishing in those states was $16.6 billion -- an average of more than $720 million per year in each state.[48] Nationwide, approximately 77% of these expenditures are due to species dependent on wetlands therefore showing the tremendous economic importance of wetlands.

The amount of money spent by Americans on other wildlife-related activities associated with wetlands involves billions of dollars each year. For example, the FWS estimates that 55 million people spent almost $10 billion in 1980 observing and photographing waterfowl and other wetland-dependent species of birds. This is an annual expenditure of almost $200 per person.[49]

Wetlands provide opportunities for a tremendous variety of other recreational interests, including boating, bird watching, hiking, painting, and automobile sightseeing. The total value of wetlands for all types of recreation in just one state, California, is conservatively estimated to be $160 million per year.[50]

Clearly, wetlands are important to the nation for hunting and fishing, as aesthetic retreats and places of diversity for nature study and other activities, and are central to the enjoyment of millions of Americans.

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[47] 1985 National Survey of Fishing, Hunting, and Wildlife Associated Recreation. U.S. Fish and Wildlife Service (hereinafter cited as 1991 FWS Survey. p. 88

[48] 1991 National Survey of Fishing, Hunting, and Wildlife Associated Recreation. U.S. Fish and Wildlife Service. (hereinafter cited as 1991 FWS Survey) p. 106-120

[49] NWF Trends Report, at 7.

[50] Allen, Jeff, et. al, The Value of California Wetlands, 1992, p. 9.

Economic Benefits of Wetlands

Throughout the preceding testimony, we touched on a number of ways in which wetlands provide major economic benefits. The message is simple: wetlands conservation is good economics. When a single three mile stretch of river in Alcovy, Georgia improves water quality at an estimated value of $1 million annually, when wetlands refill the aquifers that supply drinking water to thousands of communities like Amherst, Massachusetts, and when wetland buffers save states like Louisiana billions of dollars in potential hurricane damage, the benefits of wetlands protection are self-evident. This message becomes even clearer when one considers that it would cost $70 billion to replace just the filtering functions of "drier-end" wetlands.

In Maryland, the Department of Economic and Employment Development estimates the value of the Chesapeake Bay at $678 billion. Despite the degraded condition of the Bay --due partially to the loss of wetlands-- over 100 million pounds of seafood are annually harvested by commercial fishermen, oystermen, and crabbers. As we have seen, 75% of commercial and recreational fish catches depend on wetlands for part of their life cycles, and commercial landings of estuarine-dependent species contribute $6 billion annually to the U.S. economy.

A typical acre of Louisiana coastal wetlands provides at least five times more in productivity to the economy than the fair market value of the parcel reflects. As noted above, the value that a one-mile stretch of Louisiana coastal wetlands provides in protection from hurricane damage is estimated to be $63,676. Another study has estimated the economic value of these wetlands to be between $2,500 and $17,000 per acre, whereas the market value is approximately $500 (exclusive of mineral rights).[51] Other estimates of the value generated by these wetlands range from $5,000 to more than $80,000 per acre.[52]

In Michigan, a 1977 study estimated that the state's coastal wetlands produced an aggregate economic value of $51.8 million (in 1977 dollars) in activities such as sports fishing, recreation, waterfowl hunting, fur trapping, and commercial fishing.[53]

Americans across the country spend billions of dollars each year on wildlife-related recreation activities. According to the FWS, almost 109 million people took part in wildlife-related activities in 1991, spending some $59 billion in the process. In 1980, 55 million people spent almost $10 billion dollars photographing waterfowl and other wetland dependent-species of birds alone. Be it for hunting, fishing or photographing wildlife, the value of wetlands as a recreational resource cannot be ignored.

Every year millions of dollars are spent to reduce shoreline erosion and to maintain the navigability of waters that fill with eroded sediment. Shoreline erosion has destructive and costly impacts, including the loss of public and private property and the subsequent loss of taxation revenue for local governments, siltation of wildlife and fish habitat, filling of navigable water

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51 Robert Costanza and Lisa Wainger, "Ecological Economics," Business Economics, v. 26 (Oct, 1991), p. 48.

52 James O'Byrne and Mark Schleifstein, "Gulf Waters Close in on a Way of Life," New Orleans Times Picayune (Monday, July 8, 1991), p. A1.

53 EPA Factsheet.

bodies and channels with eroded sediment, increased turbidity of waters, and loss of valuable sand beaches used for recreation. Not only do wetlands resist such erosion, but they also provide protection for areas shoreward of the wetlands that are more easily erodible. Thus, the wetlands in existence today are averting the need to spend millions more in shoreline erosion control.[54]

Wetlands bestow other economic benefits as well. By providing unique opportunities for research and education, containing historic and archeological sites, providing habitat for rare and endangered species, and providing open space and aesthetic improvements to communities, wetlands improve surrounding property values and yield countless other benefits. Medical discoveries from plants, fish and wildlife have already been worth billions of dollars to industry, the full value of which also must be measured in terms of human life and health.

Because it is difficult to quantify their values, wetlands often fare poorly when competing against other uses. Government subsidy programs in the form of tax incentives and agricultural price supports often inadvertently support continued destruction and degradation of wetlands. As a result, destruction of wetlands continues at an alarming rate.

Wetlands Provide Jobs

It is important that the Members of this Subcommittee realize that wetlands provide jobs - jobs that in many cases are irreplaceable. For example, the $55 billion commercial and recreational fishing industry employs over 1 million workers across the country. In the 23 states represented by the Members of this Subcommittee, total expenditures in the sport fishing industry are over $20 billion per year, and more than 637,000 people work in recreational fishing-related jobs. Since nationwide, approximately 77% of these expenditures and are due to species dependent on wetlands, the jobs created by these expenditures are dependent on wetlands as well.

America's wetlands also support a large portion of the commercial fishing industry. Over 125,000 jobs on commercial fishing vessels and 210,000 total commercial fishing jobs are dependent on species that depend on wetlands.[55]

The commercial and recreational fishing industry in Florida, for example, employs 110,444 people. The dockside value of the 1991 commercial catch was $162 million; and annual sport fishing industry expenditures in the state topped $3 billion. In New York, recreational fishermen spent $1,074 million dollars in 1991, supporting 28,000 people in fishing-related industries. In California, the commercial and sport fishing industries employ 90,236 people, with total annual expenditures for recreational fishing at over $2.2 billion, with the dockside value of the commercial catch at $140 million. Additionally, $1.9 billion is spent annually in Texas in sport fishing expenditures supporting over 60,000 jobs, and the $214 million brought in as the dockside value of the commercial catch gives rise to 9,000 jobs in the commercial fishing industry. Without the wetlands, the fish and the jobs that depend on them will disappear, because many commercial

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[54] OTA Report, p. 46.

[55] National Wildlife Federation, "Valuing Wetlands - The Cost of Destroying America's Wetlands," (1994) p. 14-15.

fishing species depend on wetlands for their survival.[56] For example, in the Pacific Northwest, 52% of the commercial seafood harvest consists of species dependent on wetlands. In the Southeast Atlantic area, 94% of the seafood harvest is dependent on wetlands. Lastly, in the Gulf of Mexico, fully 98% of the commercial seafood harvest depends on wetlands.[57]

Status and Trends of Our Nation's Wetlands

Wetlands destruction is changing the face of America. Water that once remained in low spots and provided habitat for wildlife now collects in ditches and tile lines and is rushed to the nearest stream. Millions of acres that once grew cattails, wildrice, and pondweeds now support wheat, corn, houses, factories, airports and roads...many millions of acres of good waterfowl habitat have been destroyed and the loss continues.[58]

This straightforward observation on wetlands destruction, taken from the 1964 U.S. government publication Waterfowl Tomorrow, is more timely today than when it was first written 30 years ago. As discussed below, according to the most recent, official estimate, the loss of wetlands in America continues at an unacceptably high rate –almost 300,000 acres per year.

Considering the tremendous functions and values these systems provide, the fact that America has lost 50 percent of its wetlands, and the sobering realization that wetlands now occupy only 5 percent of the country's surface area (excluding Alaska), should be cause for alarm. For too long this nation has embraced a myopic wetlands philosophy that can only be described as "squander now, pay later."

Unless Congress awakens to the fact that the status quo is no longer acceptable, and unless its Members are bold and courageous enough to take aggressive and positive steps to strengthen and improve on §404, there will be fewer and fewer wetlands in our future and the entire nation will suffer.

Despite disingenuous arguments from groups such as the American Farm Bureau that the nation's wetlands resources are actually increasing, it is abundantly clear that the nation continues to lose these critical resources. A 1990 FWS study found that, in the lower 48 states, more than half of the nation's original wetland acreage is now gone.[59] This translates to a loss in excess of 60 acres per hour –one acre per minute– in the 200 years since the 1780's. Some states' wetlands

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[56] Amy Hitchcock and Philip Clapp, "George Bush: No Friend of the Fisherman," Clean Water Action (October 1992).

[57] James R. Chambers, "Coastal Degradation and Fish Population Losses," 1991., in Amy Hitchcock and Philip Clapp, "George Bush: No Friend of the Fisherman," Clean Water Action (October 1992).

[58] Waterfowl Tomorrow. 1964. Bureau of Sport Fisheries and Wildlife. Washington, DC. 770 pages.

[59] Dahl, T.E. 1990. Wetland losses in the United States 1780's to 1980's. U.S. Dept of the Interior, Fish and Wildlife Service, Washington, DC. 13 pp. Hereinafter, "1990 FWS Report."

losses have been extreme. For example, California and Ohio have lost more than 90 percent of their original wetlands, and Iowa, Indiana and Illinois have lost 89 percent, 87 percent, and 85 percent, respectively. Ten states have lost 70 percent or more of their original wetland acreage. The serious erosion of our national wetlands inventory is underscored by the fact that 22 states have now lost more than 50% of their original wetlands.

Wetlands losses in states of Members of this Subcommittee are no exception to this rule. As graphically illustrated on the following pages, seven states [Arkansas, California, Delaware, Maryland, New York, Pennsylvania, and Texas] have lost in excess of 50 percent of their original wetlands and all but one state have lost at least 25 percent of their original wetlands. With these losses go the tremendous wetlands functions and values discussed above. Alarmingly, California has lost 91 percent of its original 5,000,000 acres of wetlands, so that only 454,000 acres remain. Whether it is the valuable fish and shellfish nursery grounds in Delaware, Florida, Louisiana, New Jersey, Maryland, or Rhode Island, critical hurricane control in Florida or Louisiana, or important fish and wildlife recreational opportunities in Arkansas, California, Oregon, Pennsylvania, or South Carolina, the unabated loss of wetlands in these states is taking its toll on their economies, their residents, and their residents' quality of life. As the 1990 FWS report starkly concludes,

...these data on the Nation's wetlands loss provide a clear indication that continued loss will jeopardize a valuable resource. Over a 200-year timespan, wetland acreage has diminished to the point where environmental and even socio-economic benefits [i.e., groundwater supply and water quality, shoreline erosion, floodwater storage and trapping of sediments, and climatic changes] are now seriously threatened."[60]

In addition to the 1990 FWS Report, the FWS released another major wetlands study in 1991 entitled Status and Trends of Wetlands in the Coterminous United States. This report confirms that the nation's wetland hemorrhage continues, with the primary cause of wetlands destruction still conversion to agricultural land uses. Some of the findings of the report include the following:

- During the nine year study period, the nation had a net loss of 2.6 million wetland acres. This translates to an average annual net loss of approximately 290,000 acres, which is about two-thirds of the loss rates measured from the 1950's to the 1970's.

- More than 3 million acres of freshwater wetlands were lost during the study period. These losses represent the vast majority [98%] of wetland losses documented between the 1970's and 1980's.

- Estuarine wetlands declined by 70,000 acres, primarily in the Gulf Coast States, due largely to the shifting of emergent wetlands to open salt water.

- Although wetlands losses attributable to agricultural conversions declined from the previous study period, these losses still represent the majority [54%] of wetland losses in the U.S. Importantly, conversions to "other" land uses accounted for more than 40% of the total losses documented. Depending on how this category --which describes wetlands

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[60] 1990 FWS Report.

cleared and drained but not yet put to an identifiable use-- is treated, the percentage of wetlands lost to agricultural conversion could be much greater than reported.[61]

Fortunately, a wake up call has sounded and the nation is beginning to comprehend the enormity and gravity of the wetlands crisis. As a result, Congress has begun taking positive --albeit limited-- steps to begin stemming the tide of wetlands loss. The 101st Congress enacted several wetlands laws that included new wetlands protection provisions of the Food, Agriculture, Conservation and Trade Act of 1990, provided for funding of wetlands conservation projects pursuant to the North American Wetlands Conservation Act ["NAWCA"], and established the Coastal Wetlands Restoration and Protection Act to begin combatting runaway coastal wetlands losses in Louisiana and in other states. These newly-enacted laws provide the nation with considerable new spending authorities for wetlands protection and --if fully funded-- will bring important new resources to bear on the wetlands crisis.

While these efforts are both meritorious and ambitious, they alone cannot get the job done. Fiscal limitations and simple disregard for the functions and values of wetlands preclude a non-regulatory program --one reliant on acquisition, easements, tax breaks and other fiscal subsidies-- from ever stemming the tide of wetlands losses. Thus, programs such as the NAWCA will be insufficient unless the Nation has a strong, complementary regulatory program that redirects development out of wetlands and restricts the conversion and destruction of yet more wetlands to development. Federal non-regulatory programs to purchase and restore wetlands must be complemented by real restrictions which protect the functions and values of wetlands that accrue to the public at large. We simply cannot "maintain and restore the chemical, physical, and biological integrity of the Nation's waters" -- the central goal of the Clean Water Act -- without a combination of strong regulatory programs and ambitious acquisition and restoration efforts.

Moreover, Congress must continue to push for greater wetlands protection and not be lulled into a false sense of complacency by some misinterpretations of recent data on wetlands losses and restoration. Recent Corps and National Resource Inventory (NRI) data reflect that the Section 404 regulatory program and Swampbuster are working. These figures do not show, as some opponents of wetlands protection suggest, that wetlands protections should be weakened. The Corps and NRI data only give a partial accounting of recent wetlands loss in this country. The NRI loss statistic -- 29,000 acres of wetlands converted to nonwetlands in 1991 -- only focuses on a subset of wetlands losses. The NRI was never designed, or intended, to provide estimates of national wetlands loss. In fact, the NRI data intentionally omits nearly 30 percent of the U.S. and fails to examine even the most significant coastal wetland losses. Similarly, the Corps' loss statistic -- 13,000 wetland acres in 1992 -- only accounts for some of the direct impacts the Corps authorized in 1992. It does not account for the literally thousands of acres of wetlands destroyed under loopholes, such as the ditching and draining loophole (700 acres of valuable pocosin wetlands were destroyed in just one instance under that loophole). The Corps figure also does not reflect frequently large secondary impacts (in one case, a 0.07 acre wetland fill had secondary impacts on 240 acres of pristine wetlands), and it does not reflect unauthorized discharges and the possibly 40,000 discharges authorized, without notice to the Corps, under general permits. The U.S. Fish and Wildlife Service figure is the only comprehensive and reliable estimate of wetlands

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[61] For example, there is reason to speculate that many of the "other" wetland areas were cleared and drained for agricultural purposes but, because of economic or other factors, have not yet been planted to crops.

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loss we have. FWS reported that as of 1980, we were losing a staggering 290,000 acres of wetlands a year.[62]

Therefore, an effective and vigorous §404 program is essential for protecting wetlands and other waters of the United States. To achieve a strengthened and improved §404 program, we must maintain the key components of the existing program, make minor adjustments to the current program to ensure it operates smoothly, and --most importantly-- strengthen the program to surmount its serious deficiencies that continue to allow the destruction of wetlands and other aquatic systems.

The National Wildlife Federation Wetlands Agenda

Because wetlands perform critical ecological functions in the hydrological cycle, their protection is critical for meeting the Clean Water Act goal "to restore and maintain the chemical, physical, and biological integrity of our nation's waters." 33 U.S.C. §1251. It is for precisely this reason that the Committee should adopt policies to strengthen and expand protection of the nation's wetlands resources.

In the past, implementation of the §404 program has been plagued with institutional and administrative problems which have frustrated the regulated community and the environmental community, while allowing the nation's wetlands base to continue eroding. Although these problems must be remedied, wholesale changes to the program are not the answer. Instead we must work within the existing framework and fine-tune the process.

Most of the criticism of §404 does not involve major programmatic deficiencies but instead focuses on delayed delineations and ambiguous permitting expectations. Some landowners reportedly have experienced long delays in receiving delineations from the Corps District offices. Other applicants claim to have received inaccurate delineations that were conducted by poorly-trained consultants. And, partly as a result of misinformation generated and circulated by the regulated community and other opponents of §404, still others remain confused by the program's content and scope.

A number of environmental groups, including NWF, have shared many of the same frustrations in obtaining timely answers and dependable information from Corps and EPA personnel. Therefore, we urge this Committee to explore our recommendations to provide timely resolution to these problems. Many of the recommendations are included in H.R. 350, the "Wetlands Reform Act," introduced by Representative Don Edwards (D-CA). The NWF strongly supports H.R. 350, and urges its inclusion in the Clean Water Act reauthorization. Some of our recommendations are also included in H.R. 3465, the "Wetlands Protection and Management Act," introduced by Chairman Gerry Studds and Representative E. (Kika) de la Garza. Unfortunately this Committee's wetlands provisions, titled Amendments to H.R. 3948 (hereinafter H.R. 3948), would seriously weaken the existing wetland protection provisions in §404 of the Clean Water Act. The NWF must oppose this bill unless it is substantially revised. Finally, NWF completely opposes H.R. 1330, "The Comprehensive Wetlands Conservation and Management Act of 1993". It would replace the current wetlands provisions in the Clean Water Act with a system that would promote massive wetlands loss and bankrupt the taxpayers.

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62 U.S. Fish and Wildlife Report: Wetlands Status and Trends in the Coterminous United States Mid-1970's to Mid-1980's, (1991), p. 1.

Our specific recommendations for amending Section 404 of the Clean Water Act are as follows:

- Expand CWA §404 to cover drainage, dredging, flooding, clearing, channelizing, placement of piling-supported structures, and other significant physical wetlands alterations, regardless of whether any of these activities entail a discharge of dredge or fill material. The NWF, and more recently the National Wetlands Policy Forum, recognized that the nation cannot seriously address the problem of wetlands loss without the ability to control all major forms of wetlands destruction and degradation -- not just discharges of dredged or fill material as provided under the existing §404 program. The current rate of wetlands loss is a stark reminder that many activities that destroy wetlands often go completely unregulated by §404 and other state and federal programs, and continue unabated. We strongly recommend that the Committee amend §404 to cover these sources of wetlands destruction and degradation.

  Expanding the scope of regulated activities would offer greater protection to wetlands, and it would actually help decrease much of the uncertainty associated with the program. Partly due to lack of clear direction, the Corps has historically made overly narrow and often inconsistent interpretations of what constitutes a discharge of dredged or fill material requiring a §404 permit. As a result, activities that entail discharges, such as ditching, stream channelization, and clearing and bulldozing of wetlands vegetation, have been inconsistently regulated, and a lot of time and resources have been expended by the regulatory agencies, the regulated public, and environmentalists debating this problem. Expansion of §404 to explicitly cover all major physical alterations of wetlands is necessary to fully protect wetlands and to eliminate this source of uncertainty and needless resource drain.

- The Corps should continue to administer the §404 program with EPA oversight. As the author of the §404(b)(1) Guidelines -- the heart of the §404 regulatory program -- and with 20 years of experience overseeing implementation of the §404 program, EPA plays a critical role in administering the §404 program. Moreover, in the past, the Corps' weak implementation and enforcement of the §404 has been a substantial impediment to achieving the goals of the CWA and the overall effectiveness of protecting wetlands under §404. Recently, however, the Corps and EPA have begun working together to resolve longstanding problems with the §404 program. These initiatives include the establishment of the Wetlands Mitigation Memorandum of Agreement, execution of a new §404(q) Memorandum of Agreement (streamlining interagency permit appeals), finalizing the rule that closes the loophole for "de minimis" discharges incidental to ditching and draining wetlands, and execution of the recent Memorandum of Agreement coordinating wetlands delineations on agricultural lands. All of these initiatives demonstrate that the program can run smoothly while maintaining dual agency oversight.

- Explicitly include wetlands in the Clean Water Act goal statement. Although an explicit wetlands protection goal does not currently exist in the Clean Water Act, wetlands are an essential component of the waters of the United States, of §404, and of other CWA provisions. We, therefore, recommend amending the CWA goal section to include explicit reference to wetlands to ensure that all relevant provisions of the CWA contribute to wetlands protection.

- Strengthen the general permit program. The Corps' general permit program, particularly Nationwide Permit 26, sanctions the unreviewed and unmitigated loss of thousands of wetland acres annually. Furthermore, inadequate public involvement in

overseeing this program seriously weakens its implementation and does nothing but expedite wetlands losses. Therefore, we recommend amending §404 to (1) require general permits to include adequate measures to track activities conducted pursuant to general permits; (2) forbid authorizing activities under general permits for which states have denied §401 water quality certification; and (3) provide the public and state and federal resource agencies with predischarge notifications and an opportunity to comment before activities are undertaken pursuant to general permits. Section 404(e) should be amended to require that each Corps district prepare reports documenting the amount of acreage affected and the activities authorized by each general permit and to require the Corps to submit a biennial report to Congress of cumulative impacts to wetlands and other aquatic areas under each general permit.

- Reaffirm the existing role of the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) in §404 permit process. The Fish and Wildlife Coordination Act and the Clean Water Act require the Corps to consult with the FWS and NMFS on all §404 permits, and the special expertise of FWS and NMFS is critical to a strong wetlands protection program. These coordination requirements are not burdensome; FWS and NMFS have acted to increase coordination and to streamline permitting by entering into new §404(q) Memoranda of Agreement and the Agriculture MOA. To ensure that FWS and NMFS participation remains meaningful, we recommend amending §404 to require the Corps to provide written explanation of its reasons for rejecting FWS or NMFS comments and to explain how the Corps' permit determination is consistent with the purposes of the Clean Water Act and the §404 (b)(1) guidelines.

- Earmark §404 enforcement penalties for §404 implementation. Historically, the Corps' and EPA's §404 implementation programs have been severely underfunded. To make available additional resources over and above appropriated monies from general revenues, we recommend amending §404 to establish an account into which §404 enforcement penalties would be deposited for use by the EPA and Corps for §404 program implementation.

- Clarify and modify §401 state water quality certification requirements to help assure better protection of aquatic ecosystems. While states are required to give or waive §401 certification before a §404 permit can be issued by the Corps of Engineers, in a few state court jurisdictions questions have arisen over whether state water quality standards designed to protect the biological health of certain streams applies to Federal Energy Regulatory Commission licensing, whether the Corps can effectively stop a state from denying a §401 certification for a general permit, and whether states can – or must – include narrative standards to protect wetlands and other aquatic habitats from degradation. Therefore, we recommend amending §404 to expressly broaden the protections provided by §401 and direct states to address physical and biological alterations of aquatic areas, as well as chemical pollution of those waters. The majority of state courts that have addressed §401 issues have strongly supported the states efforts to protect their resources. A clarification, however, similar to that included in H.R. 350, and in Section 602 of S. 2093, the Senate Clean Water Act reauthorization bill, is needed to assure that states can continue to adequately protect their aquatic resources under Section 401. We have provided to the Committee legislative language that would clarify and enhance the effectiveness of the state certification programs. This language comports with long-standing EPA policy and enjoys the strong support of the States and a broad range of conservation organizations.

- Legislate EPA's definition of "fill material." For years the Corps and EPA have been at odds over the regulatory definition of "fill material." The result has been massive

confusion and both agencies shirking the regulation of discharges of a number of materials that destroy wetlands [e.g., waste tires and mine tailings]. For this reason, we recommend amending §404 to legislate EPA's definition of fill as any material which has the effect of replacing an aquatic area with dry land or of changing the bottom elevation or configuration of a waterbody.

- Strengthen the CWA citizen suit provision (§505) to provide for stronger wetlands protection by citizens. Given the paucity of agency enforcement resources, vigilant citizen enforcement of §404 is critical to protecting the nation's wetlands. One reform which should be made is to clearly provide that §505 applies to §404 violations. Section 505 should also be amended to encourage courts to overcome their reluctance to impose restoration requirements in cases in which restoration of degraded wetlands is both practical and desirable.

- Make the §404 program more efficient by adopting a fast track provision for minor permits. Special priority should be given to minor permit applications (e.g., permits for activities that would disturb no more than 1 acre of wetlands) to ensure that they are processed within 60 days. Section 404(q) should be amended to require the Corps to allocate sufficient personnel to expedite minor permit applications in this fashion.

We urge the Committee -- and Congress -- to step back from the controversies and reaffirm the critical role that the §404 program plays in attaining the central goal of the Clean Water Act -- to restore and maintain the integrity of the Nation's waters. We also urge the Committee to assist our efforts in securing and applying more resources to §404 wetlands delineations, mapping, outreach and education, and to the program in general, and thereby make its value and importance more understandable to everyone. Finally, we urge Congress to support the nation's burgeoning passion to protect wetlands by expanding the reach of regulated activities under §404 and by incorporating the additional strengthening amendments highlighted above. These are progressive and necessary changes if we are ever to achieve the goals of the CWA and end the long history of wetlands loss in this nation.

Pending Legislation

NWF commends this Subcommittee for working to resolve the controversial, complex, and extremely important issue of wetlands protection. We look forward to working closely with the subcommittee and the Public Works and Transportation Committee to craft legislation as part of the Clean Water Act reauthorization that will finally check the continued destruction of this nation's wetlands.

H.R. 350 and S. 1195, "The Wetlands Reform Act"

NWF strongly supports H.R. 350, the "Wetlands Reform Act," introduced by Representative Don Edwards (D-CA) on January 5, 1993. This bill, identical in content to S.1195 introduced by Senator Barbara Boxer (D-CA), presents a balanced solution to the wetlands issue. Importantly, H.R. 350 would finally close the existing loopholes in the scope of Section 404 of the Clean Water Act, by specifically regulating most activities that destroy and degrade wetlands, not just the discharge of dredge and fill material. The bill also ensures that automobile tires and other trash are considered fill and cannot be dumped into wetlands without a §404 permit. These changes would fully satisfy our strong desire to see that the scope of regulated activities is expanded to address most activities that destroy wetlands.

H.R. 350 also explicitly includes wetlands in the Clean Water Act goal statement. The bill proclaims a strong, clear national policy to preserve the quantity and quality of the nation's wetlands and to restore wetlands that have been degraded, reaffirming Congress's commitment to protect wetland resources. It also incorporates the regulatory definition of wetlands into the Clean Water Act.

The Edwards bill strengthens the general permit program. It provides accountability by requiring the Corps to track wetlands losses from general permits, such as Nationwide Permit 26 -- the loophole through which thousands of wetlands have been destroyed. The bill also requires the Corps to review each general permit every two years to determine whether the permit has had more than minimal individual and cumulative adverse effects on the environment. In addition, to avoid further abuses under general permits, H.R. 350 requires EPA concurrence upon the issuance of general permits, thereby strengthening EPA's oversight role.

Beyond strengthening EPA's oversight role, H.R. 350 also reaffirms the role of FWS and NMFS, and ensures that their comments are given meaningful consideration by requiring the Corps to respond to their comments in writing. In addition, H.R. 350 ensures that wetlands delineations are based upon good science by requiring that any changes to the Wetlands Delineation Manual consider the findings of the National Academy of Sciences Study now underway. Finally, the Edwards bill strengthens wetlands protection by encouraging more citizen enforcement of §404 through clarifying that the citizen suit provision applies to §404 violations.

H.R. 350 is a balanced bill in that it addresses the concerns of the regulated community as well as responding to the need for greater environmental protection. For example, H.R. 350 addresses the concerns of the agriculture and development communities regarding permitting delays by featuring a new expedited permitting procedure, requiring the processing of small-scale permits within 60 days. The bill also improves permit processing by requiring the General Accounting Office perform a needs assessment to determine whether EPA and the Corps require additional personnel and resources to expeditiously conduct wetlands delineations and process permit applications. H.R. 350 provides funds to implement the Corps wetlands delineation training and certification program, and it expedites completion of wetlands maps by the FWS National Wetlands Inventory. These changes will facilitate faster wetlands delineations and provide permit applicants with more certainty.

H.R. 350 addresses many of the concerns raised by the agriculture community. It reaffirms current statutory exemptions for normal, ongoing farming, ranching and silvicultural activities. The bill also serves the agricultural community by putting in place through legislation existing exemptions for the agricultural community and by exempting normal farming activities on wetlands used for crop production at least once every five years.

Finally, the bill encourages landowners to conserve wetlands. It creating tax incentives for wetlands preservation and for compatible uses of wetlands. Collectively, these provisions strike an admirable balance between the concerns of the regulated community and the environment. If enacted into law, the Edwards bill will make the §404 program more efficient, fairer, easier to use and more protective of the environment.

Wetlands Amendments to H.R. 3948

The proposed wetlands amendments to H.R. 3948, the "Water Quality Act of 1994," (hereinafter referred to as H.R. 3948), would seriously weaken the existing wetland protection provisions in §404 of the Clean Water Act. The National Wildlife Federation urges the Committee

to substantially revise the wetlands provisions to strengthen existing protections so that we may restore and maintain the integrity of our nation's waters.

As currently written, the wetlands amendments to H.R. 3948 do little to improve wetlands protections and, would, if enacted into law, do a great deal of damage to existing wetlands protections. In addition, like Title VII of S. 2093, H.R. 3948 responds to the concern for private property rights by reaffirming the full protection of private property rights afforded by the Constitution. As discussed more fully later in our testimony, the proposals in H.R. 1330 and H.R. 3875 purport to protect private property owners from takings without just compensation, but, in truth, these bills distort the Constitution, undermine private property rights, and add tens of billions of dollars to the federal deficit. The following is a discussion of the specific wetlands provisions of the wetlands amendments to H.R. 3948:

H.R. 3948 Would Redefine and Expand the Clean Water Act Exemption for "Prior Converted" Cropland.

The Soil Conservation Service (SCS) defines "prior converted cropland" as areas that were drained or otherwise manipulated, prior to December 1985 (hence the name "prior converted" or "PC"), in order to make possible the production of a "commodity crop." SCS defines a "commodity crop" narrowly to include annually-planted but not perennial crops. As EPA and the Corps noted in their August 1993 regulation exempting PCs, the fundamental rationale for a "PC" exemption from the Clean Water Act (CWA) is to make wetlands regulation under the Food Security Act (Swampbuster) and the CWA consistent.

H.R 3948 would completely redefine the term prior converted cropland, and completely undermine the consistency rationale for the PC exemption in order to extend the exemption far beyond the farmers affected by Swampbuster. EPA and the Corps considered and rejected such an expansion of the PC exemption when they promulgated the PC exemption in their regulations.

This bill would expand the PC exemption to include any "agricultural land" (including not just cropland, but pastureland, rangeland, orchards, vineyards, forest land and any land used to produce or support the production of any annual or perennial crop, aquaculture product, nursery product or livestock). The land would be exempt as long as it was used to produce at least one crop after 1985, and is either no longer wetlands or is a wetland used to participate in the environmental conservation acreage reserve or conservation reserve programs. This language indicates that wetlands could qualify for this newly-crafted PC exemption (and therefore be available for full-scale development) precisely because they were placed in a conservation reserve at federal taxpayer expense! Simply put, this bill does not exempt PC cropland. It exempts a much broader range of agricultural, forest, and range lands.

H.R. 3948 Would Literally Gut the §404 Permit Standards.

Based on guidance in §404(b)(1) of the CWA, EPA, in conjunction with the Corps, issued the §404(b)(1) guidelines in 1980 to guide §404 permit decisions. These permitting standards require permit applicants to first try to avoid wetland impacts by pursuing practicable alternatives, and then to minimize wetland impacts. These standards have guided Corps and EPA §404 permit decisions for over 13 years, and have now been adopted by many state permitting programs in an effort to make state and federal wetlands regulation more consistent. The emphasis in the guidelines on impact avoidance has proven effective in reducing (though not eliminating) wetland losses at both the state and federal level.

H.R 3948 would now gut these time-tested permitting standards, and once again destabilize the §404 permitting program. First, the bill modifies the existing statutory language in §404(b)(1) in a manner that raises new questions about the applicability of the §404(b)(1) guidelines to certain regulated activities. This uncertainty will only foster new litigation and further weaken the §404 program.

Second, H.R. 3948 directs EPA to limit the scope of the alternatives analysis in the guidelines based on wetland function and "relative importance in the watershed." This provision is unnecessary to ensure "flexibility" in the alternatives analysis, because the guidelines themselves and the Clinton Administration's September 10, 1993 "Guidance on the Flexibility of the §404(b)(1) Guidelines" already serve this purpose. The purpose of this provision is to rank wetlands – requiring a serious examination of practicable alternatives only where the most "important" wetlands are at stake.

Finally, the death blow to the permitting standards is wielded in section 405(b)(2)(C), which would require the Corps to base its §404 permitting decisions on local wetland management plans. As explained more fully below, these plans are not required to meet strong wetlands protection standards. Consequently, local and regional wetlands ranking schemes would be able to completely undermine the existing federal wetland protection standards. We would be reduced to a wetlands program that means vastly different things from watershed to watershed and that would put locales that favor strong wetlands protection at a real competitive disadvantage.

H.R. 3948 Wetlands Management Plans Would Further Weaken the CWA's Wetlands Protection Standards.

H.R. 3948 encourages the development of local wetland management plans to be implemented by "public entities" designated by the Governor of the State in which the management unit is located. These plans are likely to undermine federal wetlands protection because, where they are in place, §404 permits must be issued within 60 days of publication of a notice of completed application. This sixty-day review effectively precludes careful scrutiny of each individual project proposal by the permitting agency, federal and state resource agencies, and the public. Consequently, the permitting agency would often be forced to base its permit decisions on the more general environmental and land use information gathered in the wetland management planning process conducted by the local management entity.

These local wetland management plans, in turn, would not be required to meet strict wetlands protection safeguards. A wetlands management plan need only contain:

(1) an inventory and mapping of wetlands and water resources, including wetland restoration and enhancement sites;

(2) a schedule for plan implementation;

(3) mechanisms for implementing and monitoring achievement of "its stated goals";

(4) adopted programs, policies, and measures that will be consistent with the proposed CWA "no overall net loss" of wetlands goal; and

(5) a provision for periodically reporting on implementation of the plan.

The only substantive standard embodied in this provision is the requirement that programs, policies, and measures be consistent with the no overall net loss of wetlands goal. There is no

clear requirement that the plan be designed or implemented to achieve the no overall net loss of wetlands goal. Moreover, the no net loss goal itself is not much of a standard -- it can easily be twisted by claiming to achieve no net loss in terms of functions and values that are tallied in a completely self-serving manner. There is also no clear requirement that the wetlands inventory and mapping be conducted in accordance with the best available scientific information, or in accordance with uniform federal guidelines.

H.R. 3948 would also weaken federal wetlands protection by requiring EPA and the Corps to assist management entities in the establishment of mitigation banks and state program general permits based upon these loosely-defined management plans.

Not only would these plans allow widespread deregulation of activities that destroy wetlands, they could also create disparate, inconsistent, and confusing permitting standards in different watersheds. Watershed-based wetlands inventories, mapping, and identification of potential restoration opportunities are all valuable functions of state and local governments -- if conducted in accordance with uniform federal methodologies. However, the incentives for such watershed planning must not be weaker federal wetlands regulation.

H.R. 3948 No Net Loss of Wetlands Goal is Too Weak.

This bill's wetlands goal is too weak because it emphasizes the no overall net loss of wetlands through the restoration and creation of wetlands to offset natural wetland destruction, rather than emphasizing the preservation of existing wetlands and the restoration of wetlands that have been degraded or destroyed. It is this weak goal to which the local wetland management plans are tied -- and this bill does not even require that the goal be achieved by these management plans.

H.R. 3948 Would Legalize Nationwide Permit 26 and Encourage New General Permits for Less "Important" Wetlands.

This bill creates a new form of general permit for "categories of waters", allowing the Corps (and states that assume the §404 program) to identify and "deregulate" certain wetland categories deemed to be of less importance. This is precisely what the Corps has already done with isolated wetlands and stream headwaters under Nationwide Permit (NWP) 26, albeit without any congressional authority. This country loses tens of thousands of isolated and headwater wetland acres each year through activities authorized under NWP 26 alone. While the filling of an isolated wetland "here and there" may seem "unimportant," the cumulative impact of scores of such wetland acres filled within a watershed can be dramatic. These "category of waters" general permits constitute yet one more means for ranking and then deregulating wetlands under this bill.

Worse yet, this bill so manipulates the existing general permit provision that very few constraints are placed on these new "category of waters" general permits. The fundamental constraint on all §404 general permits -- that they authorize only activities with minimal individual and cumulative adverse environmental effects -- would not apply to these new general permits, despite (or possibly because of) their proven devastation of wetlands.

H.R. 3948 Would Legalize State Program General Permits Without Adequate Environmental Safeguards.

This bill creates a new form of general permit for activities that are regulated under an existing state permit programs. These state program general permits (SPGPs) allow states to take considerable control over §404 permitting without having to formally assume the §404 program.

While the Corps has already issued such SPGPs, they have never before been authorized by Congress. Unless both the development and the implementation of these SPGPs are required to meet strict environmental standards, they will be used to weaken wetlands protection in many states.

Yet, just as with the new "category of waters" general permits, the fundamental constraint that §404 general permits authorize only activities with minimal individual and cumulative adverse environmental effects -- would not apply to SPGPs under this bill.

One of the key additional safeguards that must accompany SPGPs is a "kick-out" provision that can be used by the federal resource agencies to screen activities eligible for the SPGP, and "kick them out" of SPGP review and into individual §404 permit review if necessary. This "kick out" provision would allow federal resource agencies to require the Corps of Engineers to conduct individual §404 review for projects which have been determined to result in more than minimal individual or cumulative adverse impacts on the environment. This is similar to current practice in states with SPGPs, such as Massachusetts and New Hampshire. The "kick-out" provision included in this bill provides "kick-out" authority to the Corps of Engineers only, and thus does not give the resource agencies the necessary "kick-out" authority.

The bill also lacks other critical environmental safeguards. SPGPs should be subject to a one wetland acre impact ceiling, a requirement for full mitigation sequencing (avoidance-minimization-mitigation), and a requirement to comply with other major environmental laws (the Endangered Species Act, in particular). In addition, the Corps should be strictly required to revoke or modify an SPGP in any case where the SPGP is authorizing more than minimal individual and cumulative adverse effects. A citizen suit provision should also be included in the bill to clearly allow for citizen enforcement of this requirement. None of these safeguards are included in this bill.

H.R. 3948 Contains a Thinly-Disguised Special Interest Exemption for Cranberry Growers.

Hidden away in this bill's amendment on compliance is a huge exemption for cranberry growers. This bill would effectively exempt from §404 permitting and enforcement all activities associated with expanding cranberry operations, as long as the expansion did not disturb more than 10 acres of waters or wetlands -- the equivalent of 7 football fields -- every five years. By creating multiple cranberry production "operations," and by staging expansions over 5 year periods, cranberry operators could destroy thousands of wetland acres without ever applying for a §404 permit.

If cranberry growers receive special treatment under the Clean Water Act, other industries will demand special treatment, too. In fact, the Texas Farm Bureau testified in late March 1994 before the Environment and Natural Resources Subcommittee of the House Merchant Marine and Fisheries Committee that "In addition to the exemption of water management activities relating to cranberry farming, we also urge you to include similar activities used in the production of rice and aquaculture."

Conversion of wetlands to cranberry beds can have devastating impacts on the environment, and should be reviewed by the Corps through the permitting process. In Wisconsin alone, over 5,000 acres were lost in the past ten years due to expansion of cranberry production. When natural wetlands are converted to cranberry beds, the rich, vibrant, diverse natural vegetation is frequently stripped away, the hydric soils removed and replaced with a layer of sand and beds of cranberry vines.

Cranberry growers already receive streamlined review for converting wetlands and streams into cranberry beds under Nationwide Permit 34 (NWP 34). If the cranberry language in H.R. 3948 becomes law, states would lose their existing authority under Section 401 of the Clean Water Act to condition or deny water quality certification for NWP 34. The states' right to act to preserve the quality of their waters must not be abrogated by amending the Clean Water Act to provide special treatment for cranberry growers.

H.R. 3948 New Administrative Appeals Provision is Unfair.

This bill establishes a new -- and completely one-sided -- right to administratively appeal §404 decisions. Landowners could appeal jurisdictional determinations, decisions that an activity is not exempt or eligible for a general permit, decisions to deny or condition permits, and orders requiring remedial action due to a §404 violation. Under this bill, neighbors, downstream landowners, and concerned citizens would have no access whatsoever to administratively appeal §404 decisions that allow the destruction, degradation, or deregulation of wetlands, no matter how gravely this wetlands destruction harms their homes, livelihoods, or lives.

The bill allows these "third parties" only a very limited right to intervene when a landowner brings an appeal described above. If one of these "third parties" fails to obtain notice of, and participate in, the public comment process associated with the challenged action, or if there is no public comment process associated with the challenged action, then the interested person loses even this limited right to intervene in the landowner's administrative appeal. This unequal access to justice is not only unfair, but it skews the record put before the hearing officer clearly in favor of wetlands destruction.

Another related problem with the administrative appeal provision is that it requires a decision on appeal within 90 days. Given the complexity of many wetland cases, this deadline is totally unworkable. To put such a deadline in place, particularly with an entirely new administrative appeal system, is a recipe for poorly documented administrative decisions.

Finally, the bill's postponement of penalties, mitigation, and restoration requirements pending appeal would both encourage frivolous -- and expensive -- appeals and, in some cases, seriously threaten the environment. Indeed, a series of ditches in a wetland could quite effectively destroy the wetland and flood downstream property before even the unrealistically-speedy 90-day appeal could be decided.

The National Wildlife Federation would not oppose the creation of an administrative appeals process if it was a fair administrative appeals process. Unfortunately, the administrative appeals provisions in H.R. 3948 are gravely unbalanced, putting far too much ammunition in the hands of developers and landowners -- and virtually none in the hands of the public at large.

H.R. 3948 Promotes Sham Mitigation Banks That Cannot Ensure the No Net Loss of Wetlands.

This bill creates mitigation banks that will foster natural wetlands destruction and truly make a sham of the no overall net loss of wetlands goal. First, this bill would allow mitigation banks to convey wetland improvement credits to permit applicants as mitigation for newly-permitted wetland losses before those wetland improvements have actually materialized at the mitigation banking site. In other words, permittees would be allowed to "withdraw money from the bank before they ever deposited any money." Not only does this subvert the concept of a "bank," it also is poor policy because enhancing and restoring wetlands is very risky business. The mitigation banking infrastructure, now in its infancy, is hardly prepared to deal in "wetland futures."

Mitigation banking must be limited to the conveyance of wetland mitigation credits that have already materialized -- that are already "in the bank." Mitigation banking should also be limited to wetland restoration because restoration of previously degraded or destroyed wetlands generally has a higher probability of success, and more demonstrable environmental benefits, than wetland creation or "enhancement," which is a relative term and is entirely in the eye of the beholder (for example, a wetland "enhancement" to a duck-hunter may destroy wetland filtration functions more highly valued by a neighboring landowner).

Ignoring the risky nature of mitigation banking, this bill fails to include many other safeguards that are essential if mitigation banks are to actually replace the functions and values of newly-permitted wetland losses. First, the use of the banks must be as a last resort, with a strong requirement for first avoiding and then minimizing additional impacts to existing wetlands. If the §404(b)(1) guidelines are modified as this bill proposes, mitigation banks will be in great demand. With this literal "run on the bank," successful long-term replacement of all the natural wetland functions and values that will be lost will be sheer fantasy.

Second, unlike the Senate Committee bill, this bill contains no requirement that banks provide for the long term management and perpetual protection of mitigation banking sites. If the banking site is to actually replace the scores of wetlands that have been irretrievably converted to homes, roads, and parking lots, the banking site must be maintained as functioning wetlands in perpetuity.

It is also of critical importance that the actual ecological value of the wetland mitigation credits maturing in the bank and the actual ecological value of the wetland losses to be offset are closely regulated. Just as in the traditional banking industry, without close monitoring of mitigation credit accounts, the accounts will likely be overdrawn. In the wetland banking world, an overdrawn account means additional wetlands are being destroyed and are not being replaced through the mitigation bank. This bill does not ensure that wetland mitigation banks will remain solvent.

Unlike the Senate Bill, this bill also does not ensure that the permittees who benefit from wetlands development -- rather than taxpayers -- will be responsible for the full cost of wetland replacement. The idea of a mitigation bank is to allow both the permittee and the aquatic environment to take advantage of certain "economies of scale" offered by a well designed mitigation bank. Nevertheless, the idea of mitigation, generally, is that permittees incorporate into the cost of their development activities the cost of offsetting aquatic resource losses. The permittee, not the public at large, should shoulder the full cost of wetland replacement.

Finally, the mitigation banking regulations and the mitigation guidance required by this bill should be developed by the Corps and EPA in conjunction with the U.S. Fish and Wildlife Service, as is more typically the case with major §404 guidance, rather than "after consultation with...the heads of other Federal agencies." Other appropriate federal agencies will have an opportunity to review the mitigation guidance through normal Executive Branch channels.

H.R. 3948 Confuses Rather than Clarifies the Scope of Regulated Activities.

This bill does a disservice to the CWA debate by further muddying the waters on the extent to which ditching and other excavation is regulated under §404. EPA and the Corps promulgated a clear, carefully considered regulation on this issue in August 1993. The Senate Committee bill essentially adopts the agencies' language. The Senate/agency language does not establish the broader scope of regulated activities sought by environmentalists; it still requires specific,

identifiable discharges of dredged or fill material. The Edwards bill and the Studds-de la Garza bill would go further to require the regulation of other activities that destroy wetlands.

Rather than adopt either of these approaches, this bill manipulates the more limited Senate/agency language in a manner that only raises more questions about the extent to which excavation activities are regulated.

H.R. 3948 Permitting Deadlines Are Too Short For Most Activities Affecting Wetlands.

This bill would require the Corps to determine within 30 days of receipt of a permit application precisely what materials are required to complete the application and make a permit decision. The permit decision would then have to be made within 90 days of the completed application.

The Corps already places an extraordinarily high priority on speedy permit issuance. However, the careful environmental scrutiny of activities that impact wetlands and require individual §404 permits (a very small percentage of all regulated activities) realistically cannot be completed within 90 days except under the most advantageous circumstances. Such circumstances would have to include an agency staff workload at reasonable levels, and permit applicants responding quickly and positively to agency recommendations for project modifications and mitigation).

Even the 30-day review for completeness, while a fine idea in principle, is too short. The State of Maryland, for example, uses a 45 day deadline for this completeness determination.

H.R. 3948 Undermines Current Law on the Definition and Delineation of Wetlands.

H.R. 3948 attempts to modify the Corps and EPA's uniform, regulatory definition of wetlands that has been in place and time-tested since 1977. The bill's new wording raises – but does not answer – new questions about the applicability of §404 to isolated wetlands.

The bill also raises the issue of revisions to the Federal Manual for Identifying and Delineating Jurisdictional Wetlands, but does not adopt the widely-accepted National Academy of Sciences Study compromise that was worked out in Congress in the last session.

Finally, this bill further undermines federal wetlands jurisdiction by defining "agricultural lands" so broadly, that, unlike S. 2039 and even H.R. 3465, it entrusts virtually all wetlands delineations to the Soil Conservation Service, rather than the Corps and EPA.

H.R. 3948 Improves Reporting Requirements as to the Extent of Wetlands Losses and the Effectiveness of Mitigation Efforts

H.R. 3948 would improve the reporting of wetlands losses incurred under both individual and general permits, and of the extent and success or failure rates of mitigation efforts. This would significantly improve our knowledge of how the §404 permit program is working, but, if the general permit, mitigation banking, and other provisions of these wetlands amendments are not substantially revised, this reporting requirement will simply give us a sharper view of widespread, unmitigated wetlands losses.

H.R. 3465, "Wetlands Protection and Management Act"

NWF supports many of the provisions of H.R. 3465, the "Wetlands Protection and Management Act, introduced by Representative Gerry Studds (D-MA) and E. (Kika) de la Garza (D-TX) on November 8, 1993. We believe that, with strengthening amendments, the bill can make a significant contribution to the overall goal of preserving, protecting and restoring our nation's wetlands.

H.R. 3465 would, like H.R. 350, finally ensure that the majority of activities that destroy and degrade wetlands would be explicitly regulated by the Clean Water Act. It would expand the scope of regulated activities to include draining, dredging, excavating, channelization, flooding, pumping, driving of pilings, placement of obstructions, mechanized landclearing, ditching, diversion of water, and other actions that destroy or degrade wetlands and other waters. By providing comprehensive protection for wetlands, this provision would tremendously further the goal to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. §1251.

The Studds-de la Garza bill would end the spurious debate about the wetlands protection mandate by clarifying that it is national policy to "protect the quantity and quality of the Nation's remaining wetland base and restore wetlands that have been degraded." The bill also strengthens this mandate by adding congressional findings of the economic and ecological functions and values wetlands provide, and by incorporating the regulatory definition of wetlands into the Act.

H.R. 3465 strengthens the permitting process in a number of significant respects. It requires the Corps to ensure, to the maximum extent practicable, that each permit issued results in no net loss of wetlands and to write enforceable mitigation provisions in permits. In addition, the bill requires the Corps to track the impacts of each general permit and report every two years on the wetlands acreage, functions and values lost or degraded as a result of activities authorized under each general permit. This change will vastly improve our ability to determine each general permit truly complies with the minimal individual and cumulative adverse effects standard in §404(e). H.R. 3465 also strengthens compensatory mitigation by requiring EPA and the Corps to promulgate guidelines that would specify mitigation techniques, require performance bonds, establish monitoring standards, and mitigation preferences (favoring in-kind, on-site restoration).

The bill will help increase awareness of wetlands in a number of ways. It will ensure that wetlands delineations will be based on good science by forbidding changes to the 1987 Corps manual until the NAS study, except changes to reflect regional variations (and these interim changes must be reviewed after the NAS study is issued). In addition, H.R. 3465 provides funding to states to assist in the development in wetlands conservation plans (that map wetlands and encourage consideration of wetlands in landuse planning), establishes a wetlands delineator training program, and an education and outreach program.

The Studds-de la Garza bill also balances environmental protection and the concerns of some of the regulated community on some key issues in wetlands regulation. In deference to landowner concerns, the bill creates an administrative appeals process, but it ensures that permit applicants and interested members of the public can initiate appeals of permit denials and issuances. H.R. 3465 also imposes a 60-day permitting deadline on minor permits (discussed more fully below), and it further satisfies the concerns of the regulated community by authorizing mitigation banking (importantly clarifying that mitigation banks cannot award credits in advance of mitigation, but, unfortunately, allowing mitigation banks for wetlands restoration and enhancement, even though enhancement of one wetland function frequently destroys another wetland function).

Furthermore, responding to calls from the regulated community to streamline and increase the flexibility of wetlands regulation, H.R. 3465 legalizes state programmatic general permits (SPGPs) --a large concession since SPGPs are clearly illegal under Section 404(e) as it is written now. But, significantly, the bill does not authorize the issuance of programmatic general permits (PGPs) to regional and local government entities -- local and regional PGPs would fragment federal conservation authority and enforcement and would be unduly susceptible to pressure from local development interests, resulting in less wetlands protection and accelerated wetlands loss. Furthermore, H.R. 3465 includes some important environmental conditions upon SPGPS, such as a federal agency kick-out provision (allowing the Corps, EPA, FWS and NMFS to kick-out more than minor activities from SPGPs and to require the Corps to review them under the individual permit process), a requirement to comply with all other Federal environmental laws (such as the Endangered Species Act), a mandatory revocation clause, and the minimal individual and cumulative effects standard that applies to all general permits issued under current law.

Finally, the Studds-de la Garza bill addresses many of the agriculture community's concerns. It exempts prior converted cropland (pc) from regulation, but it adopts a scientifically defensible definition of pc areas. The bill also adds haying, grazing, fence building, and activities associated with cranberry farming to the list of statutory exemptions from §404 regulation. Like H.R. 350, the Studds-de la Garza bill exempts certain artificial wetlands from regulation, such as irrigation ditches in uplands. Significantly, H.R. 3465 also transfers responsibility for wetlands delineations on agricultural lands to SCS and adjacent nonagricultural lands. The bill defines agricultural lands far more broadly than the Clinton Administration did in its Memorandum of Agreement on Agriculture (giving SCS responsibility for wetland delineations on agricultural lands and certain related areas). Alarmingly, H.R. 3465 broadly defines agricultural lands to include "pastureland, haylands, [and] rangelands," which SCS defines as all non-forested areas grazed by herbivores regardless of whether they are domesticated (this definition would, for example, deem suburban yards grazed by deer to be rangeland). To alleviate concerns over this vast expansion of SCS's responsibilities, the definition of agricultural lands should be narrowed to agricultural land that is intensively managed or lacking in natural vegetation, and SCS should not be given responsibility over non-agricultural lands.

There are several other key respects in which H.R. 3465 needs strengthening amendments. First, and foremost, by authorizing the Corps to issue general permits for categories of waters, the bill would legalize nationwide permit 26 (NWP 26) --the infamous loophole through which countless acres of prairie potholes and other valuable isolated and headwater wetlands have been destroyed-- and would open the door for the Corps to issue more general permits to write-off types of allegedly "low value" wetlands. Congress has never authorized, and must not authorize now, general permits which blanketly allow discharges into certain types of wetlands. Wetlands often serve a myriad of functions and cannot be accurately categorized as high or low value. The wetland that provides valuable flood storage, for example, may not provide good duck habitat. Whether such a wetland is a low or high value wetland depends upon individual perspective (e.g., are you a duck hunter or a nearby homeowner?). Moreover, classification is not necessary. The Section 404 permitting process already contains the flexibility to allow regulators to more intensively review particularly destructive activities or proposed discharges in sensitive wetlands. Accordingly, the devastating general permits for categories of waters provision must be deleted.

In addition, while we support efforts to make the Section 404 program more efficient, requiring minor permits to automatically issue if they are not processed within 60 days promotes efficiency at the expense of the environment. This "hammer clause" sets a bad precedent, and, even though it is restricted to "minor" permits, it could have serious cumulative adverse effects on the environment. A better way to promote the twin goals of efficiency and environmental protection is to provide a permitting deadline but specify, as S. 2093 does, that if the deadline is

exceeded, the permit applicant has the option to treat the permit application as denied and initiate an administrative appeal.

Although the Studds-de la Garza bill includes some important environmental safeguards, there are other key environmental safeguards that must be added. Of foremost importance of these is the inclusion of a citizen suit provision that would allow citizens to show, by a preponderance of the evidence, that a general permit has had more than minimal adverse environmental effects and would empower courts to order the Corps to revoke or revise the general permit. In addition, although H.R. 3465 requires general permits to be based on the §404(b)(1) Guidelines, it should further state that general permits shall require full mitigation sequencing (i.e., avoidance of discharges, minimization of impacts and compensatory mitigation). Finally, the bill should put a ceiling on discharges that may be authorized under general permits, such as a bar on discharges affecting more than one acre of wetlands or other navigable waters.

Finally, to ensure that precious federal grant funding is spent wisely, H.R. 3465 should specify that state wetlands conservation plans may only receive federal funding if they are based on good science, employ federal standards, protocols and delineation methodologies, and do not weaken the federal program.

Title VII of S. 2093

There are many provisions of Title VII of S. 2093, introduced by Senators Max Baucus (D-MT) and John Chafee (R-RI), that NWF supports. With strengthening amendments, the bill could significantly contribute to the overall goal of preserving, protecting and restoring our nation's wetlands.

Perhaps the most significant gain for wetlands in S. 2093 is the clarification that ditching and draining, landclearing, channelization, and other excavation activities that entail discharges and destroy and degrade wetlands are regulated under the Section 404 program. Unfortunately, S. 2093 does not offer wetlands the comprehensive protection provided by H.R. 3465, H.R. 350 and S. 1195 from activities, such as pumping, that destroy wetlands but do not entail discharges. But, like these bills, S. 2093 clarifies that the national policy to protect and restore wetlands, incorporates the regulatory definition of wetlands into the Act, and adopts EPA's definition of fill material -- all significant gains in strengthening the program.

There are many other ways in which Title VII would improve the §404 program. Significantly, unlike H.R. 3465, Title VII does not legalize NWP 26 by authorizing the Corps to issue category of waters general permits -- a Pandora's Box for wetlands. The bill creates a landowner assistance program helping small landowners with the delineation of wetlands on their properties. Title VII requires the Corps and EPA to track the impacts of each general permit on the environment, and it requires a needs analysis to determine whether the agencies need additional funding or staffing to implement the §404 program. Title VII also institutes a wetlands restoration pilot program, creates a wetland delineator training program, and makes information on the requirements of the §404 program more readily accessible to the regulated community and the public. The bill also provides authorization and funding for state wetlands conservation plans, and forbids changes to the wetlands delineation manual until completion of the NAS Study.

Like the Studds-de la Garza bill and the Edwards and Boxer bills, S. 2093 balances environmental protection and the concerns of the regulated community on some key wetlands regulatory issues. In deference to landowner concerns, the bill creates an administrative appeals process, but it ensures that both permit applicants and members of the public who participated in the permit process can initiate appeals of permit denials and issuances (the public, however, can

only initiate appeals of problems they identified in their comments on proposed permits). This creates a fair process that we fully support.

Responding to calls from the regulated community to streamline and increase the flexibility of wetlands regulation, S. 2093 legalizes state programmatic general permits (SPGPs), a major change since SPGPs are clearly illegal under Section 404(e) as it is currently written. Significantly, like H.R. 3465, S. 2093 does not authorize the Corps to issue programmatic general permits to local and regional government entities. In authorizing SPGPs, the bill also includes some meaningful environmental sideboards, such as a federal agency "kick out" provision (that allows the Corps, in consultation with EPA, FWS and NMFS, to "kick out" more than minor actions from the SPGP and to review them under the individual permit process), a mandatory revocation clause, and the minimal individual and cumulative effects standard that applies to all general permits issued under current law.

Like the House bills, S. 2093 addresses many of the concerns of the agricultural community. The bill exempts prior converted cropland (pc) from regulation, but it adopts a scientifically defensible definition of pc areas. It also entrusts SCS with responsibility for conducting wetlands delineations on agricultural lands, certain associated non-agricultural lands, and rangelands. Like the Studds-de la Garza bill, S. 2093 should be revised to only require SCS to conduct delineations on agricultural wetlands it currently delineates under Swampbuster, and the rangeland provision should be deleted.

Although S. 2093 and H.R. 3465 contain permitting deadlines which are more stringent than the 180-day deadline in H.R. 1330, S. 2093 balances permitting efficiency and environmental protection by specifying that if the deadline is exceeded, the permit applicant has the option to treat the permit application as denied and initiate an administrative appeal.

S. 2093 also responds to the concern for private property rights by reaffirming the full protection of the private property rights afforded by the Constitution. As discussed more fully later in our testimony, the proposals in H.R. 1330 and H.R. 3875 purport to protect private property owners from takings without just compensation, but, in truth, these bills distort the Constitution, undermine private property rights and add tens of billions of dollars to the federal deficit. Title VII of S. 2093 offers the only true protection in pending legislation for takings due to the Section 404 program.

Like H.R. 3465, S. 2093 provides specific authorization for mitigation banking, but, unlike H.R. 3465, it only authorizes mitigation banks that restore wetlands.

There are, however, some key respects in which S. 2093 needs strengthening amendments. For example, S. 2093 authorizes $20 million in grant funding for states to operate state assumed programs and SPGPs. The bill also authorizes grant funding for mitigation banking. These provisions cannot be justified in light of the federal government's extreme budget crisis and should be deleted.

S. 2093 also should be amended to include important environmental sideboards for SPGPs, such as required compliance with other major federal environmental laws, clear authority for citizens to sue to invalidate SPGPs that have more than minimal adverse environmental effects, a bar on subdelegation of permitting responsibilities to local governments, and an acreage ceiling (to ensure that the most serious projects are carefully reviewed under the individual permit process by the Corps) and a requirement to comply with full mitigation sequencing.

Finally, unlike H.R. 3465, S.2093 includes a wetlands and watershed planning section in addition to the wetlands conservation plan section. The wetlands and watershed planning section needs to be revised to ensure that planning is based on good science and does not weaken protection provided by the Section 404 regulatory program, by so severely truncating review of even major projects that the Section 404 program would merely "rubber stamp" projects authorized by wetlands and watershed plans.

With strengthening amendments, S. 2093 could significantly advance wetlands protection, improve the efficiency and fairness of the permitting program, and protect the rights of private property owners.

H.R. 1330, "The Comprehensive Wetlands Conservation and Management Act of 1993"

NWF strongly opposes H.R. 1330, believing a more appropriate title for the bill would be "The Comprehensive Wetlands Destruction Act of 1993." H.R. 1330, introduced by Representative Jimmy Hayes (D-LA), is designed to weaken, and for more than half the nation's existing wetlands, actually eliminate federal protection. The bill completely rewrites Section 404 of the Clean Water Act and disregards the 20 years of experience the agencies and the regulated community have acquired during its implementation. If H.R. 1330 is enacted, §404 would be rebuilt from scratch to develop a completely new regulatory program, creating years of confusion for wetlands regulators and the regulated community alike.

The flaws in H.R. 1330 are almost too numerous to list, and, thus, we will only focus on some of the most major deficiencies of H.R. 1330 in this testimony.

H.R. 1330 eviscerates the Section 404 program, throwing the baby out with the bath water by eliminating the Section 404(b)(1) Guidelines -- the heart of the Section 404 program -- and terminating EPA's role in the Section 404 program. Despite the flexibility in the §404(b)(1) Guidelines, the bill would replace the §404 permit program with a policy of "wetland triage" that ranks wetlands into high, medium and low value categories with the latter two categories receiving little or no protection. This completely fails to recognize the natural diversity of functions which wetlands provide, by essentially setting up an arbitrary system of comparing apples and oranges and then determining that one is more important than the other. The bipartisan alternative includes five criteria before land can be classified Type A. Classifications as Type A may be considered a "taking" warrenting compensation. A May 17, 1994 bipartisan alternative to H.R. 3948 contains wetlands provisions similar to H.R. 1330.

H.R. 1330 would strip away protection under the §404 program for half of the nation's wetland acres. By replacing the scientific definition of wetlands (which all four agencies use) with an arbitrary and politically motivated standard, the bill would define wetlands so narrowly that large tracts of even the Everglades and the Great Dismal Swamp would no longer be considered wetlands.

Furthermore, the bill imposes astronomically new financial liabilities that would bankrupt the federal treasury by *requiring* federal acquisition, at the discretion of the landowner, of so-called "high value" wetlands. A conservative estimate by the Congressional Budget Office suggests a $10-$45 billion cost for the land acquisition components alone of H.R. 1330. This payment provision is completely unnecessary in light of the protection already provided by the Fifth Amendment of the Constitution.

In short, H.R. 1330 converts the existing §404 regulatory program to little more than a costly "rubber stamping" program for issuing wetlands destruction permits. This bill is a disaster for wetlands, and a disaster for all of us.

The Clinton Administration Wetlands Policy - "Protecting America's Wetlands, A Fair and Flexible Approach"

The Clinton Administration's wetlands policy – "Protecting America's Wetlands, A Fair and Flexible Approach" – (hereinafter the Clinton Plan) attempts to devise a sound and manageable wetlands protection policy, but falls far short of the mark. While the Clinton Plan improves some aspects of federal wetlands policy, overall the proposal represents a "net-loss" for wetlands; it must be strengthened to truly protect and rebuild the nation's wetlands resources. Many of the beneficial proposals in the Clinton Plan resemble some of the positive provisions in H.R. 350, S. 1195, H.R. 3465, and S. 2093.

The Clinton Administration, for example, has, in a major achievement, acted to ensure that wetlands receive the full protection from ditching and draining they deserve under the Act. It finalized a rule that closes the loophole in the EPA and Corps regulations that many developers used to ditch and drain thousands of wetlands without §404 permits, even though these activities entail discharges. Many Corps districts did not regulate this wholesale wetlands destruction where developers minimized associated discharges to a small or so-called "de minimis" amount.

The "de minimis" exception created confusion and inconsistent treatment of regulated persons, often regulating "mom and pops" who sidecast dredged material into wetlands while allowing sophisticated developers who minimized discharges to evade permitting requirements even though both drained wetlands and discharged excavated material into wetlands. This loophole allowed literally thousands of acres of wetlands to be destroyed. In 1990, the NWF and North Carolina Wildlife Federation filed a law suit, because the Wilmington District of the Corps used the "de minimis" loophole to allow two developers of upscale housing to ditch and drain 700 acres of valuable coastal plain wetlands in North Carolina without a §404 permit. In February, 1992 the Bush Administration settled the lawsuit, proposing to amend the Corps and EPA regulations by eliminating the *de minimis* loophole, and in August, 1993, the Clinton Administration finalized the rule.

NWF also strongly supports the Administration's decision to withdraw the proposed Alaska One Percent rule announced in August 1993 as part of the President's Wetland Plan. As noted in that Plan, this proposal would have revised the §404(b)(1) Guidelines to strip protection from 1.7 million acres of Alaska's wetlands. However, NWF remains deeply concerned that the "Alaska Wetlands Initiative," which replaced the One Percent rule, now may serve as an administrative or legislative vehicle to undermine the Section 404 program in Alaska. We urge the Sub-committee to reject such efforts and to rely on the factual record to do so. Due to the importance of the resources at stake, we devote a complete section in this testimony to the issue of Alaska's wetlands.

NWF strongly endorses the Administration's call for a broad-based effort to restore the nation's historic wetlands base. It is important that the Administration supports appropriations for expansion of the Wetlands Reserve Program and also supports other voluntary and cooperative efforts to restore wetlands on private lands. NWF also endorses the Administration's commitment to training federal wetlands delineators in order to increase the reliability and accessibility of wetlands delineations. NWF applauds the Administration's support for legislation including the regulatory definition of wetlands in the Act. We also support Administration plans to add regional conditions restricting the scope of NWP 26, a loophole that has destroyed literally thousands of

wetlands with little or no environmental review. However, NWF strongly opposes the Administration's call for legislation authorizing a category of waters general permit. This would simply open wide the door for more wetlands loss through the issuance of more permits like NWP 26.

The Clinton Plan, however, offers more concessions that weaken wetlands protection than improvements in environmental protection. For example, in response to concerns of the regulated community, the Clinton Plan would create an administrative appeals process; however, unlike H.R. 3465 and S. 2093, the Administration appeals process would provide wetland developers ready access to challenge Corps and EPA wetlands delineations and permit denials, but would "shut out" neighboring and downstream landowners and other concerned citizens from challenging wetlands delineations and permit approvals. This lack of equal access to an administrative appeals process is unfair and badly biases wetlands decisions in favor of wetlands destruction. The Clinton Plan also promises a 90-day permitting deadline.

The Clinton Plan addresses many of the concerns of the agricultural community, but fails to adequately protect the environment. Pursuant to the Plan, EPA, FWS, the Corps, and the Soil Conservation Service (SCS) have already executed a memorandum of agreement (MOA) consolidating wetlands delineations on agricultural lands in the hands of the SCS. This is a major concession to the agricultural community, allowing farmers to go to one agency for Swampbuster and CWA delineations. However, it remains to be seen whether the limited safeguards in the MOA will ensure that the SCS will do an adequate job of identifying wetlands so they can be protected. SCS has a dismal record of identifying agricultural wetlands. In southwest Kansas alone SCS determined there were only three wetlands in a seven-county area known to have tens of thousands of valuable playa wetlands.

Under the Clinton Plan, the Administration has also finalized a rule cementing a Bush Administration exemption for so-called "prior converted cropland" (pc) from wetlands regulation, even though many pc areas continue to function as wetlands. Wetlands that were drained or otherwise manipulated to enable a farmer to plant commodity crops, before December 23, 1985, are considered "prior-converted." Farmers can farm these wetlands as they have since December 23, 1985, without penalty under Swampbuster. Despite being cropped, many of these prior-converted wetlands continue to provide flood control, pollution filtration, groundwater recharge, wildlife habitat, and other important wetlands functions. Even though many pc areas continue to function as wetlands, and even though many prior-converted wetlands would revert to wetlands if farming was discontinued, the Bush Administration initiated a policy exempting them from §404 protection, thereby allowing these cropped wetlands to be permanently converted to commercial, residential and other uses, thereby destroying their existing wetlands functions. By codifying this disastrous Bush Administration policy into regulation having the force and effect of law, the Clinton Administration has allowed a relatively benign Swampbuster classification to become a blanket §404 exemption authorizing the permanent destruction of all existing and latent wetlands functions and values in these pc areas and opening the door for farm fields to grow bumper crops of condominiums.

Although the White House plan wisely rejects nationwide a priori ranking of wetlands -- as technically, fiscally, and scientifically unworkable, it, nonetheless, supports categorization within watershed plans and the issuance of general permits for wetlands deemed to be of little value. While we support the Administration's rejection of the wetlands triage scheme in H.R. 1330, we urge the Administration to focus its resources on improving protection for wetlands, not increasing "flexibility" to destroy all but the most "high value" wetlands. The Corps' own permitting statistics show that only 6 percent of all individual permit applications are denied. Clearly, there is already more than enough "flexibility" in the §404 program. Using wetlands and watershed plans

to reduce protection for low -- or even average -- value wetlands facilitates the destruction of thousands of wetlands, particularly in urban areas subject to intense development pressure, diverts resources desperately needed by the Corps and EPA to protect wetlands, and subverts the goal of maintaining the waters of the United States.

Moreover, although NWF supports using watershed management to improve wetlands protection, we do not support the Administration's proposal to use wetlands and watershed plans to weaken §404 permitting requirements. In addition to encouraging wetlands ranking and categorization on a watershed basis, the Clinton Plan would reduce the §404 regulatory program to a "rubber stamp" by giving high priority to issuing programmatic general permits to local governments, despite their susceptibility to local development pressure, and by using general permits and streamlining to authorize projects with little or no environmental review.

Finally, the Clinton plan endorses widespread use and federal financing of mitigation banks despite the grave risk that many of these banks, particularly those that purport to "create" rather than restore wetlands, will fail. Taxpayer dollars should not be spent subsidizing private development of wetlands by funding mitigation banks.

Wetlands, Private Property and Takings

The issue of private property rights is cleverly being used by those who oppose wetlands protection as a battering ram against the Clean Water Act's Section 404 permit program. Myths are continuously perpetrated that Constitutional rights to private property are violated by the Section 404 program, leading to calls for major legislative reforms. However, in truth, implementation of §404 rarely results in a "taking" of private property requiring compensation under the Fifth Amendment to the Constitution. The payment provisions proposed in bills such as H.R. 1330 and H.R. 3875, the "Private Property Owners Bill of Rights," introduced by Representative Billy Tauzin (D-LA), are unwarranted, unfair, and a disaster for private property rights and wetlands protection. These bills are based on misinterpretations of constitutional law, threatening to place the taxpayer's pocketbook at tremendous risk while unfairly providing a windfall of benefits for a select few. Just as local governments do not pay landowners for complying with local zoning ordinances, federal taxpayers should not be expected to give money to property owners for protecting wetlands -- a "resource of the commons". Benefits provided by wetlands, such as flood control and water purification for downstream homes, schools and businesses, are not restricted to property boundaries and should not be compromised by overly expansive definitions of private property.

The Status of Wetlands Regulations and Takings Law

Landowners share the responsibility to manage their lands so as not to jeopardize the public health, safety, welfare and private property of adjoining landowners and the community at large. When filling in wetlands floods private property downstream -- as has happened time after time throughout the United States -- property rights been destroyed, not protected. Our nation has always recognized the power of the government to place limitations on the use of private lands in order to protect the public good. In the 1970's, the government restricted mining companies from extracting coal to the point of causing land subsidence under homes, schools, churches, and graveyards. Similarly, the government can place limitations on landowners seeking to drain and fill our nation's waters.

Despite insupportable claims to the contrary, only occasionally does the balance of public and private responsibilities to protect wetlands raise a valid takings claim under the Fifth Amendment to the Constitution. In fact, the Supreme Court has found that where there is an

overriding state interest -- as is the case with most environmental regulations -- a regulatory taking does not occur unless virtually all economic uses of the land are eliminated and the landowner has been refused a legitimate use of his land. A landowner would not have a valid taking claim if, for example, he wanted to build an animal rendering plant in Chicago but Illinois law prohibited construction of these odiferous plants in urban areas as a nuisance. In instances where a regulatory taking has occurred, the Constitution guarantees the landowner full and fair compensation for his property. The regulation continues to apply unless it is revoked by the federal agency.

Still, takings concerns have been grossly exaggerated in cases involving wetlands regulation. Contrary to the uproar being made over takings and Section 404, the stark reality is that -- despite the Army Corps of Engineers' annual processing of approximately 10,000 individual Section 404 permits and an estimated 80,000 actions under general permits -- there have been only three cases in which the courts have found a "Constitutional taking" requiring the payment of just compensation. One of these cases is still pending on appeal, while a fourth case was just overturned and remanded by the U.S. Court of Appeals for the Federal Circuit.[63] Simply put, the jury is still out on two of the three Section 404 cases that even passed the muster to meet the court's Constitutional test for a taking.

Moreover, the Section 404 permit program frequently does not interfere with making an economically viable use of wetland property. As discussed more fully later in this testimony, the §404 program simply does not regulate such uses as normal ongoing farming, silvicultural activities. Of course, as the Supreme Court observed in Riverside Bayview Homes, in cases where it is necessary to apply for a permit, the mere requirement to apply for a §404 permit does not result in a taking. Furthermore, the Corps' permitting statistics show that the Corps only denies about 6% of all individual permits. Accordingly, the §404 program rarely precludes property owners from making an economic use of their wetland property.

National Wildlife Federation's Position on the Equitable Implications of Wetlands Regulation

Clearly, the fact that "waters of the United States" -- including wetlands -- are public resources situated on private land raises legitimate questions about how to equitably share the responsibility for wetlands protection. The 1988 National Wetlands Policy Forum recommended that the public must share this responsibility with private landowners. Hence, it may, for example, be appropriate that the government to provide tax incentives to encourage landowners to protect wetlands on their property. Similarly, it is also appropriate that the government finance wetlands restoration projects and conduct wetlands research and inventories which will assist landowners in planning and land use.

H.R. 1330 is Not the Way to Protect Private Property

Because very few wetlands restrictions have resulted in Constitutional takings, the compensation provisions of H.R. 1330 are wholly unnecessary. Under H.R. 1330, the federal government is automatically required to purchase all "high value" wetlands, regardless of how the owner intends to use the land. The landowner does not even have to apply for a permit, let alone wait and see if the government denies the permit application. There is a total lack of demonstrated need for these provisions since only two successful takings claims (one of which is under appeal) have resulted from literally hundreds of thousands of permit applications.

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[63] Florida Rock Industries, Inc. v. United States, Fed. Cir. No. 91-5156 (March 10, 1994).

While purporting to protect and advance private property interests, H.R. 1330's heavy-handed measures would actually have the opposite effect, severely eroding the protection for wetlands provided under Section 404 and destroying private property rights. In enacting the Clean Water Act and in subsequent amendments to the Act, Congress has consistently understood that failing to protect wetlands and other waters would severely undermine private property rights by, among other things, degrading water quality, diminishing available supplies of freshwater and exposing more homes, schools and businesses to flood and hurricane damage. If Congress enacts H.R. 1330, some property owners will be lavishly paid, but the majority of protection for wetlands will be stripped away and all property owners will suffer.

Even more egregious, however, is the fact that the ill-considered payment provisions of H.R. 1330 would impose ruinous financial liability on federal taxpayers. According to a 1992 Congressional Budget Office study, federal acquisition of just the high value wetlands[64] will cost American taxpayers between $10 and $45 billion. Thus, not only does H.R. 1330 impose tremendous financial liabilities, it also ignores the public's interest in waters of the U.S. and the legal responsibility of landowners to use their property in a way that does not harm neighboring property owners and the public in general.

Finally, H.R. 1330 grossly shortchanges Americans by (1) paying private property owners bloated prices for wetlands, (2) creating a bonanza for lawyers, and (3) failing to fully protect the lands once they are acquired by the federal government. H.R. 1330 precludes acquisition by the federal government of water rights that may be critical in keeping wetlands wet, and subsurface rights to oil, gas or minerals that may underlie wetlands. Because it would fail to secure water, oil, gas and mineral rights for acquired lands, "protected" wetlands financed by taxpayer dollars could still be destroyed by oil, gas and mining activities or by dewatering. Moreover, H.R. 1330 would entice landowners to sue the federal government, by bloating the alleged "fair market value" of property and by paying for their attorney fees.

H.R. 3875 would bloat the federal deficit and undermine private property rights

Like H.R. 1330, H.R. 3875 is a thinly disguised back-door attempt to gut protections for wetlands and endangered species, laws which protect private property and the general public's health and safety. This budget-buster would radically increase the federal budget and feed the litigation explosion in this country.

Even more ambitious than the automatic payment provision in H.R. 1330 (which only applies to "high value" wetlands), H.R. 3875 would require taxpayer dollars to be paid to speculators and developers whenever wetlands or endangered species protections supposedly reduce the potential value of the "affected portion of the property" by 50 percent. Thus, if the Section 404 program protected neighboring property owners from flooding by preventing a developer from filling in a lake bed on a small fraction of his property, the taxpayers would have to pay if there were a 50 percent decrease in the value of the affected portion, even though no federal court has ever held that this would constitute a taking! This budget-buster is sure to cost federal taxpayers tens of billions of dollars and should be opposed on this ground alone. In fact, similar

[64] Under H.R. 1330, the federal government would also continue to be liable for any takings that occur of any other privately-owned wetlands.

state "takings" bills have been opposed by fiscally conservative Republicans as "Budget-Busters which would require large and undeterminable new costs."[65]

Moreover, H.R. 3875 makes it virtually impossible to protect the environment, miring the agencies in a host of new bureaucratic procedures, raiding their budgets to pay takings claims, and drowning them in a massive wave of litigation. And by eviscerating protection for wetlands and other waters, the Tauzin bill would destroy cherished private property rights and jeopardize public safety by, among other things, degrading water quality, diminishing available supplies of freshwater, and exposing more homes and businesses to flood and hurricane damage. Thus, although H.R. 3875 promises to be "the Private Property Owners Bill of Rights," the bottom-line is, if this bill is enacted, it will destroy and degrade private property rights, at a huge cost to the taxpayer.

Alaska's Wetlands

The protection of Alaska's wetlands is another critical, albeit emotionally-charged and controversial, issue that must be of high priority and central focus for this Subcommittee. As with so many other facets of the wetlands debate, there is no shortage of misinformation, distortion, and "horror stories" being generated by those who seek to relax protection for Alaska's wetlands. For example, the chief of the Regulatory Branch of the Army Corps of Engineers in Alaska wrote:

> Over the past several years, a number of stories have surfaced detailing the perceptions of frustration and outright abuse suffered by citizens seeking §404 permits. The Alaska District has generated its share of these stories, and they continue to be a part of the popular culture, as well as official testimony. There is no question that the program is a bureaucracy, with its inherent delays and frustrations. However, many of these "horror stories" evolve with repeated retelling, and do not stand up to scrutiny.[66]

Due to the importance of Alaska's wetlands to the Nation's economy and the continuous threat they are under, it is important that we specifically address this issue.

Following, we provide an overview of the many important functions and values Alaska's wetlands provide our Nation, a discussion of the ecological and economic significance of these habitats to Americans and to the international community, and an overview of the threats to Alaska's wetlands. This is followed by an in-depth discussion and analysis of what the NWF Alaska Natural Resource Center and many of our colleagues in the environmental community consider to be the single most important wetlands issue facing Alaska: previous efforts by the Bush Administration's and continued threats under the Clinton Administration's Alaska Wetlands Initiative to dramatically weaken the Section 404 regulatory program in Alaska.

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65 Letter to Congress from Richard Russman (N.H. State Senator) and Tony Grampsas (Chairman of the Colorado House Appropriations and Joint Budget Committees).

66 Jeffery K. Towner and Robert K. Oja. "Striking a Balance on the Last Frontier." National Wetlands Newsletter. September/October 1993. Page 8. The authors then conduct a "reality check" of four of "Alaska celebrity cases" to illustrate their point.

An Overview of the Resource at Stake

America's largest state is also its wettest. Almost half of Alaska --170 million acres-- can be classified as wetlands. With nearly two-thirds of the Nation's wetlands within its borders, Alaska boasts many of the most diverse and critical wetland habitats on the continent. The State's coastal estuaries, saltwater lagoons, river corridors, marshes, muskegs, bogs and wet tundra all support an astounding variety of fish and wildlife species. In fact, no complex of natural systems has had a greater influence than Alaska's wetlands in shaping the State's economy.

Alaska's Fisheries

Alaska's wetlands sustain some of the world's richest commercial and sport fisheries. Because the maintenance of customary and traditional lifestyles is dependent upon fish and wildlife resources sustained by wetlands, 200 of the 209 remote villages in Alaska are located in, or near, wetland ecosystems.

For Alaskans, fish are one of the most important natural resources critically dependent on the State's wetlands. This point is dramatically driven home in the just-released report entitled, "Fisheries, Wetlands and Jobs -- The Value of Wetlands to American Fisheries."[67]

> Alaska's disregard for wetlands places the state's *three billion dollar a year* fishing industry at risk [emphasis in original]...
>
> Alaska's fishery work force includes the crews of nearly 18,000 vessels which land six billion pounds of seafood a year, fully 60 percent of the Nation's total...
>
> Seventy-six percent of Alaska's 1991 seafood harvest came from inshore and wetlands dependent species...and
>
> Nearly three billion pounds of Alaska pollock was landed in 1992, a catch worth a third of a billion dollars.

Freshwater wetlands provide essential spawning, feeding, rearing and over-wintering habitat for all five species of Pacific salmon found in Alaska as well as trout, whitefish, grayling and pike. Wetlands also provide a valuable source of inland and marine detritus to coastal estuaries, supporting shrimp, crab and other shellfish as well as a number of commercially-important marine fish species. Alaska's wetlands are essential in maintaining water quality in salmon spawning streams and rivers and in near shore spawning and rearing areas for marine fish and shellfish.

In addition:

- The gross revenues from harvest of salmon in Alaska exceed $500 million annually [ex-vessel]. Gross revenues to processors exceed $1 billion annually. The salmon harvest alone involves nearly 17,000 licensed vessels, over 500 processors and buyers, and more than 70,000 jobs.

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67 William M. Kier Associates. 1994. Fisheries, Wetlands and Jobs. Prepared for the Campaign to Save California Wetlands. 24 pages.

- The seafood industry is the largest private industry employer in Alaska, accounting for more than one quarter of all the personal income generated by private industry in Alaska.

- As a result of the economic activity generated by the harvesting, processing and marketing of fish, every major region of the state is directly or indirectly affected by the health of the commercial fishing industry.

- Sport fishing in Alaska sustains a significant service industry. Anglers pay for tackle, boats, moorage, transportation, lodging, food and beverages, guiding, and other fishing-related goods. Collectively, sport anglers' annual expenditures in Alaska result in gross business revenues of approximately $350 million, 5,000 full-time jobs, and $115 million in personal income.

- Gross revenues, jobs and personal income generated outside Alaska by sport fishing in the state equal or exceed those generated within the state due to importation of goods and payment for goods and services occurring outside the state.

- Almost two-thirds of the annual subsistence harvest is composed of fish and shellfish. Subsistence fishing supplies over 20 million pounds of food annually to rural areas in Alaska.

- Fish provide a major portion of the diet of rural Alaskans. In comparison to the average American who consumes about 13 pounds of fish per year, the average rural Alaskan consumes approximately 230 pounds of fish per year.

Alaska's Wildlife

Many of Alaska's wildlife species, including moose, brown bear, caribou, beaver, mink and otter rely on Alaska's wetlands during some, or all, of their life cycle. These wildlife resources sustain a significant segment of the State's economy.

Similar to sport fishing, hunting in Alaska supports a broad-based service industry. Hunters pay for guns, ammunition and other equipment, transportation, lodging, food and beverages, guides and guiding services, meat processing and other related goods and services. Hunter expenditures alone contribute $82 million annually in gross revenues to Alaska businesses.

In addition:

- Conservative estimates of the nonconsumptive values of Alaska's wildlife include over one-fourth of the $400 million spent annually by tourists in the State. Aesthetically and biologically, wetlands generate a large portion of this revenue.

- Alaska's wetlands provide nesting, rearing and staging habitats for millions of waterfowl and shorebirds important to hunters and bird watchers throughout the Nation. For example:

    - Thirty-four species of waterfowl nest in Alaska's wetlands, including eight species that nest nowhere else in the United States.

- Eighty percent of the world's Trumpeter Swans and 50 percent of all Tundra Swans nest in Alaska's wetlands.

- Ten million ducks, 750,000 geese and 80,000 swans migrate annually from nesting grounds in Alaska to wintering areas in the lower 48 states, Canada, Mexico, and Asia. Another two million ducks and 300,000 geese depend upon Alaska's wetlands for critical staging areas.

- Alaska's wetlands support up to 60 percent of North America's Northern Pintail ducks, 25 percent of Wigeon, and nearly 20 percent of Scaup and Canvasbacks.

- Seventeen percent of all geese and 11 percent of all ducks harvested in North America are reared in Alaska's wetlands.

Finally, Alaska's wildlife comprise a significant component of the subsistence economies of the State's rural villages. Of the estimated 35 to 45 million pounds of food harvested annually by subsistence users, approximately 18 percent is land mammals [primarily wetlands-dependent species such as moose and beaver] and nearly eight percent includes waterfowl and wild plants. The remainder of the harvest includes fish, shellfish and marine mammals.

Alaska's Wetlands are at Risk

Despite their vastness, their critical role in supporting abundant fish and wildlife populations, and the significant contribution they make to the State's economy, Alaska's wetlands are at risk. Development and urban expansion threaten America's last remaining stronghold of expansive wetland ecosystems. In carrying out their aggressive attack on Alaska's wetlands, pro-development forces have tried to cleverly use the argument that, because Alaska's wetlands are more abundant than wetlands in the Continental United States, the regulations protecting them are unnecessary and far too stringent.

The truth is that, while Alaska's wetlands acreage is indeed vast, many critical wetland habitats are extremely limited in extent. For example, Alaska's coastal salt marshes --literally the cradle of an array of economically-important fish and shellfish species-- comprise only 345,000 acres and are especially vulnerable because most of Alaska's urban development occurs in coastal areas. Despite blanket statements that Alaska is up to its ears in wetlands, losses in some parts of the State have been dramatic. For example, nearly 60 percent of Anchorage's original wetlands base and 30 percent of Juneau's Mendenhall Valley have been destroyed by development. These losses, in fact, exceed the national average.

Efforts to Legislatively Exempt Alaska from Wetlands Mitigation Sequencing [The "One Percent Rule"] Must be Soundly Rejected

The NWF and numerous other national and local conservation and environmental organizations strenuously oppose revising the Clean Water's Act's Section 404(b)(1) guidelines to exempt Alaska from mitigation sequencing. Although the Administration plans to withdraw from consideration the EPA proposal, we have every reason to expect that an aggressive effort will be made to seek a legislative remedy to this mis-perceived problem.

The Alaska One Percent Rule was proposed by the Bush Administration on the eve of the general election and was driven by politics, not science. The EPA has provided little evidence

supporting the "assumptions" underlying this ill-conceived proposal and --in fact-- are contradicted by the agency's own experts as well as those from other resource agencies who dispute the need to grant an exemption to Alaska.

As proposed, EPA would have provided a blanket exemption to oil interests and developers in Alaska to disregard cost-effective alternatives to wetlands destruction and avoid the requirement, applicable in every other state, that wetlands destruction be offset by compensatory mitigation. At a time when the Nation is striving for no net loss of wetlands it is inconceivable that the EPA would have granted the opening up of 1.7 million acres of Alaska's wetlands --an area larger than the state of Delaware-- to development.

The proposed exemption would have unacceptable adverse effects on the environment

The objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251. In fact, the EPA has explicitly singled out wetlands as a resource especially deserving of protection [see, e.g., 40 C.F.R. §230.1(d)]. Special treatment for Alaska would strip protection from these "special aquatic sites" and, in so doing, flatly ignore the national and international importance of Alaska wetlands to fish, waterfowl, shorebirds, and marine and terrestrial mammals. Even the EPA's own experts in its Regional Office, and those of the U.S. Fish and Wildlife Service, have articulated compellingly that the loss of millions of acres of Alaskan wetland habitat as a result of the One Percent exemption would cause irreparable harm to the fish and wildlife populations that depend on these aquatic ecosystems.

The proposal to exempt Alaska wetlands from mitigation sequencing under Section 404 would have severe negative environmental effects and, from a resource perspective, would actually undermine the objective of the Clean Water Act to preserve the waters of the United States.

The One Percent exemption would have unacceptable adverse effects on the economy of the State of Alaska

As discussed at length above, the wetlands of Alaska are a keystone to the State's economy. Thus, anything to erode or diminish the State's wetlands base will also diminish the health of its economy. This is because the State's commercial and recreational sport fisheries -- which employ thousands of people and generate billions of dollars annually-- would be put at risk by the exemption.

For example, the wetlands most critical to Alaska's fisheries and subsistence economies are also among its scarcest. According to the government, only 345,000 acres of the State's wetlands are vegetated estuarine or intertidal wetlands. These are precisely the rare and productive coastal wetlands that are the most vulnerable to urban growth and development. Thus, loss of one percent of the State's wetlands, as has been proposed, could entirely eliminate Alaska's coastal wetlands and the enormous and sustainable economic benefits they provide.

In summary, withholding full Clean Water Act protection from millions of acres of Alaska wetlands will have a negative impact on the functions and values of those systems. Because the Alaska economy relies, in substantial part, on the health of its wetlands, the economy would unquestionably suffer as well. In its barest form, adopting the One Percent Rule would be an economic and an environmental disaster.

The premises underlying the One Percent exemption are not supported by the evidence

The chief premise of the One Percent Rule is that the Section 404 program, generally, and the Section 404(b)(1) guidelines, specifically, are unacceptably rigid and burdensome to the regulated community operating in the state of Alaska. Thus, it is unpersuasively argued that an across-the-board Alaska wetlands exemption is an appropriate remedy because (1) there are a lack of practicable alternatives to developing in wetlands and (2) opportunities to perform wetlands compensatory mitigation in Alaska are extremely limited.

The NWF tested the underlying premise of the proposed exemption and its assumptions in respect to mitigation sequencing by serving Freedom of Information ["FOIA"] Requests on the Corps and the EPA. In evaluating the issue of unacceptably rigid and burdensome requirements, we requested, reviewed and analyzed documents establishing the implementation record of Section 404 in Alaska during the past 20 years and all records justifying EPA's decision to protect wetlands in Alaska less stringently than in other states. The agencies' responses to our requests were striking and, by almost any standard, demonstrate beyond a doubt that the existing guidelines are already extraordinarily flexible and that the Section 404 program is not an unreasonable impediment to wetlands development in Alaska. The fact sheets appended to this testimony graphically illustrate the hollowness of the arguments routinely made that the Section 404 program shackles Alaska's economic growth and prosperity.

In its request, NWF obtained all records indicating the number of Section 404 permits processed, approved, and denied in Alaska in the 20 years since 1972. We also requested all records reflecting the number of occasions in which compensatory mitigation was required by the Corps. According to the government's own records, of the 3,997 individual permits processed by the Corps between 1 January 1972 and 15 October 1992, only 108 [2.7%] were denied. Of the 3,017 individual Section 404 permits authorized by the Corps during that time, only 15 [0.5%] were conditioned on compensatory mitigation. Clearly, the Corps' records do not support the premise that the Section 404(b)(1) guidelines are unduly rigid in Alaska and require weakening. If anything, these data suggest the guidelines have proven too flexible to accomplish the important task of protecting the Nation's waters.

With respect to the second issue, that there is a lack of available upland sites for development, NWF submitted a FOIA requesting of EPA all records indicating that lack of available uplands sites has prevented development in Alaska. The EPA was unable to produce a single responsive document and --in fact-- the agency actually produced four documents demonstrating quite the opposite, that "lack of available upland sites has not limited or prevented" development in the State. The contention that in many cases there are no practicable alternatives for development in Alaska except in wetlands is apparently an opinion with little basis in fact.

In a similar vein, EPA produced only slightly more evidence that compensatory mitigation in not feasible in Alaska because of technical difficulties and a lack of restoration sites. Our analysis of this issue is beyond the scope of this statement and can be read in the attached comments, but suffice it to say that the government has provided little hard evidence to demonstrate compellingly that developers are unable to compensate for wetland losses in Alaska.

In conclusion, although the proponents of the One Percent Rule argue that the Section 404 program has been too restrictive in Alaska, that there are limited practicable alternatives, and that mitigation sequencing is impracticable, a thorough review of the administrative record compels the conclusion that these tenets are unfounded and largely without merit.

NWF Position on Alaska Wetlands

For the aforementioned reasons, NWF vigorously opposes the exemption of Alaska from the mitigation sequencing provisions of the Section 404(b)(1) guidelines and any other efforts to weaken, relax, or somehow undermine the States' federal wetlands regulatory program. Our independent analysis of records from the Army Corps of Engineers plainly demonstrate that the Section 404 program has been no more burdensome to the regulated community in Alaska than in any other state and that "special treatment" of permit applicants of Alaska is unwarranted and inequitable.

The flexibility already built into the Section 404(b)(1) guidelines has easily accommodated the allegedly "unique" Alaska circumstance of pristine and abundant wetlands. The Alaska Exemption or any other regulatory backsliding would take an already flexible program and convert it into a giveaway. Adoption of such environmentally-regressive proposals by Congress would not only permit developers to fill wetlands even when there are convenient upland alternatives, but as well ignore obvious opportunities for compensatory mitigation. The result would be the unmitigated loss of millions of acres of Alaska's wetlands. Such proposals simply cannot be justified, and we urge the subcommittee to soundly reject efforts to legislate an Alaska One Percent Rule and any to the provisions to weaken or relax the State's Section 404 regulatory program..

Other Efforts to Legislatively Relax the Section 404 Program in Alaska Must Also be Soundly Rejected

The Clinton Administration recently released the Final Report of the Alaska Wetlands Initiative. The Initiative was first released last August in response to the allegation of industry and others that the Clean Water Act's section 404 program places a heavier burden on Alaskans than other people in other states.

The purpose of the Initiative was to consider "environmentally appropriate means to assure regulatory flexability" in Alaska. Interest group representatives were asked to help the federal agencies identify "legitimate concerns" with respect to the §404 program and to provide "relevant factual information."

The Administration has now released the final report of the Alaska Wetlands Initiative. After eight months of public meetings and debates, a statewide teleconference, several notice and comment periods, and the analysis of thousands of pages of correspondence and agency documents, the Administration reached an inescapable conclusion: The §404 program in Alaska is already fair, flexible, and adequately accommodates the reasonable concerns of development interests.

Although there are some problematic provisions, the package as a whole emphasizes program efficiency and public education, rather than the deregulation of activities harmful to wetlands.

Agriculture and the Section 404 program

Throughout the present Clean Water Act reauthorization, some members of the agricultural community have ceaselessly portrayed federal wetlands protection programs as an ever-tightening noose around their necks that soon promises to strangle their operations and kill their livelihoods. Typical assertions to support these bold claims include farmers being precluded from plowing fields that have been cultivated for generations, farmers being unable to maintain existing drainage systems, and farmers being unable to graze their livestock on grasses growing in marshy fields.

Like so many other attacks that have been made on the nation's federal wetlands program, these claims are fraught with misinformation, often lacking in any factual basis and frequently distorting the Section 404 program. The truth of the matter is that farming practices are largely exempted from Section 404, and that regulatory policy exempts much of what's left – even at the expense of the environment.

Statutory Exemptions for Agriculture

Section 404 provides a staggering array of exemptions and allowances for the farming community, despite the historic loss of over 100 million acres of wetlands – mostly due to conversion of wetlands to agriculture. In fact, 87 percent of all wetland losses from the 1950's to the 1970's were attributable to agricultural activities. Agriculture was also responsible for over 50 percent of the wetland losses between the mid-1970's and the mid-1980's. Indisputably, agriculture has been, and continues to be, the primary cause of wetlands destruction in the United States.

This is in large part because the agricultural community has been the "favorite son" of the federal wetlands regulatory program, enjoying exemptions and special treatment far more extreme than that enjoyed by any other segment of the regulated community. The following activities are explicitly exempted from the Section 404 program if they are part of an established, normal, ongoing farming, ranching or forestry operation, even if they do result in the discharge of dredged or fill material into wetlands:

- plowing
- cultivation
- normal crop rotation
- resumption of farming in a wetland that is fallow as part of a normal rotational cycle
- seeding included in normal operations, including placement of soil beds for seeds or seedlings
- discharges associated with established wetland crop or forestry production on established farm lands (for example, building rice levees)
- emergency removal of material blocking or constricting drainage ways that are part of an established crop production
- maintenance, including emergency reconstruction of serviceable structures such as dams, dikes, levees, and causeways

- construction or maintenance of irrigation ditches and apportionment facilities

- maintenance of drainage ditches

- construction or maintenance of farm or stock ponds, or farm, forest, or temporary mining roads, provided that such roads are constructed and maintained according to best management practices

- land leveling for rice production in areas of established farming activity

The above activities are not exempted from Section 404 if they are associated with conversion of a wetland to a new use that reduces the reach, or impairs the flow or circulation, of waters of the United States. For example, discharges associated with construction of a drainage ditch that converts a bottomland forested wetland to an upland are not, and should not be, exempted.

Some of the regulatory concessions to agriculture

In a huge concession to agriculture, the Clinton Administration issued a final rule cementing the Bush Administration policy of exempting certain cropped wetlands from regulation under the Section 404 program. Under this rule,wetlands converted to cropland prior to December 23, 1985 that are flooded for less than 14 consecutive days during the growing season (with the exception of prairie pothole and playa wetlands) are considered to be "prior-converted ("pc") croplands." Despite the fact that many of these areas continue to perform vital wetland functions and that the majority of them would revert to wetland if farming was discontinued, the pc rule exempts pc areas from §404 regulation, allowing farm fields to be converted to fields of condominiums without §404 permits.

Many agricultural activities not otherwise exempted are quickly authorized, with little or no environmental review, under general permits. For example, under Nationwide Permit 26 (NWP 26), farmers and others can fill up to 10 acres of isolated or headwater wetlands without seeking an individual §404 permit. In addition, there are regional and national general permits that solely benefit agriculture, such as the nationwide permit for cranberry production.

Swampbuster and the §404 program

The Swampbuster provision of the 1990 Farm Bill is intended to reduce the loss of wetlands and to benefit American taxpayers by eliminating subsidies from producers who convert wetlands to croplands. Swampbuster is not a regulatory program or a component of Section 404, and it does not prohibit agricultural conversion of wetlands. Rather, it simply eliminates a producer's eligibility for federal subsidies if that producer elects to convert wetlands to an agricultural commodity.[68]

H.R. 1330 tears away the little protection there is for farmed wetlands

Despite the staggering losses of wetlands due to agriculture and the paucity of regulation of wetlands destruction due to agriculture, H.R. 1330 rolls back virtually all protection for agricultural wetlands. First, as discussed above, H.R. 1330 narrows the definition of wetlands to exclude 50 percent of our nation's wetlands, including extensive portions of national parks, such

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[68] National Wildlife Federation Wetlands Factsheet, "Agricultural and Federal Wetlands Regulation: Separating the Wheat from the Chaff," (March 1993).

as the Everglades and the Great Dismal Swamp. In addition, this wetlands destruction bill adds broad and severely destructive exemptions to the already lengthy list of statutory exemptions for agriculture. These new exemptions would blanketly authorize certain expansions into wetlands of farming operations, discharges into farmed wetlands, and destruction of "prior converted" wetlands.

Congress must not sign a death warrant for these valuable wetland resources. The many, existing agricultural exemptions and accommodations completely eclipse those enjoyed by other members of the regulated community. In light of this and the fact that agriculture is the single leading cause of wetlands destruction, when the American Farm Bureau Federation comes knocking on the door asking Congress for greater relief through H.R. 1330, it's time to ask, "where's the beef?" We need to strengthen wetlands protection, not add to the already over-generous list of exemptions and accommodations enjoyed by agriculture.

Summary and Conclusions

Wetlands provide many critical ecological functions and values that are vital to the health, safety, economic and psychological welfare of all Americans, including: flood conveyance; storm surge abatement; water quality maintenance; habitat for endangered and threatened species and other wildlife; fish and shellfish habitat; recreational opportunities; water supply; food production; timber production; historic and archeological sites; education and research areas; and open space and aesthetics.

Despite the irrefutable economic, ecological, and sociological benefits of wetlands, wetlands have been destroyed throughout our history, and they continue to disappear today at an alarming rate. While defenders of the ongoing destruction of the nation's wetlands often cite narrow "economic" arguments to support their positions, any sound analysis of the wetlands regulatory protection program must include the broad ecological, economic, and social ramifications of further reducing America's valuable wetlands resource.

The pending legislation offers a clear choice between improving environmental protection or retreating, and between protecting private property rights and instituting a knee-jerk compensation provision that threatens the public fisc, undermines private property rights, and erodes environmental protection. H.R. 350 and S. 1195 (The Wetlands Reform Acts of 1994), introduced by Representative Don Edwards (D-CA) and Senator Barbara Boxer (D-CA) respectively, offer a balanced solution to the problem of wetlands protection that is flexible and fair. In addition, H.R. 3465 (the Wetlands Protection and Management Act), introduced by Representatives Gerry Studds (D-MA) and E. Kika de la Garza (D-TX), and Title VII of the Senate Environment and Public Works bill, S. 2093 would, with strengthening amendments, make a significant contribution to the overall goal of preserving, protecting and restoring our nation's wetlands.

Unfortunately, the wetlands provisions of H.R. 3948 fail to strengthen wetlands protection and, actually, significantly weaken existing protections for wetlands and our Nation's waters. NWF urges this subcommittee to overhaul the proposed wetlands provisions to this bill and replace them with provisions from H.R. 350 and H.R. 3465 that strengthen vital protections for wetlands and our Nation's waters.

In contrast, H.R. 1330 (The Comprehensive Wetlands Conservation and Management Act of 1993), introduced by Representative Jimmy Hayes (D-LA), is clearly designed to gut meaningful federal protection of wetlands and to add tens of billions of dollars to the federal debt.

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H.R. 1330 writes-off environmental protection for fully half of America's wetlands by its restrictive, unscientific definition of wetlands and then slices the pie even thinner by adopting an arbitrary system of wetlands triage that only protects a fraction of even the most economically and ecologically significant wetlands. In addition, H.R. 1330 and H.R. 3875 (the Private Property Owners Bill of Rights), introduced by Representative Billy Tauzin (D-LA), would increase the federal budget deficit by tens of billions of dollars by automatically compensating landowners of certain wetlands for the alleged impacts of wetlands regulation, even though no taking of property had occurred. These thinly-veiled back-door attempts to gut wetlands protection would undermine private property rights and endanger public health and safety by, among other things, degrading water quality, diminishing available supplies of freshwater, and exposing more people, homes and businesses to flood and hurricane damage. The true agenda of the so-called private property provisions of H.R. 1330 and H.R. 3875 is to allow unrestrained wetlands destruction, not preservation of property rights.

Furthermore, while the Clinton Administration plan advances wetlands protection in some significant respects, it offers far too many concessions to the regulated community at the expense of the environment. Such concessions as the one-sided permit appeals process proposal, the 90-day permitting deadline proposal, the final rule exempting 54 million acres of prior-converted wetlands, and the endorsement of the concepts of wetlands categorization and mitigation banking, answer virtually all of the regulated community's agenda and put the environment at great risk.

With the reauthorization of the Clean Water Act this year, Congress can send an important message - that we will no longer tolerate the annual loss of nearly 300,000 irreplaceable acres of wetlands. Each day of inaction only exacerbates the problems we face today: polluted drinking water for our families, flood damage to our homes, collapsing commercial and recreational fisheries, and a downward spiral of biodiversity.

The time has come to pass a stronger, more effective national wetlands protection policy. In the past, we allowed, indeed, even encouraged, the destruction of more than half of the nation's heritage of wetlands. We now understand what has been lost and the values of the natural wetlands that remain untouched. We must not, in the name of political expediency or a misbegotten "private property" agenda, ignore the dire consequences of continued wetlands loss to our health, safety, economic prosperity, private property rights and aesthetic enjoyment of the environment.

Congress must take a leadership role, casting aside specious arguments, false horror stories, and political pressures, to strengthen protection for our wetlands and other waters. The course is clear and it remains only for resolve to be translated into action.

TABLE 1: Anglers, days spent fishing, and expenditures in 1991 in states represented by Members of the Public Works and Transportation Committee. (Note: Nationally, Approximately 77% of Sport Fishing Species depend on Wetlands.)

State	Anglers	Days Fishing	Expenditures
Alabama	909,000	11,767,000	$ 728,501,000
Arizona	480,000	3,901,000	$ 299,592,000
Arkansas	769,000	10,686,000	$ 286,091,000
California	2,677,000	23,936,000	$ 1,795,949,000
Florida	2,677,000	36,528,000	$1,654,594,000
Georgia	1,106,000	15,245,000	$ 534,539,000
Illinois	1,359,000	16,465,000	$ 1,111,262,000
Louisiana	899,000	14,214,000	$ 686,201,000
Maryland	700,000	6,624,000	$ 467,292,000
Massachusetts	652,000	8,904,000	$ 454,240,000
Michigan	1,762,000	24,517,000	$ 1,286,368,000
Minnesota	1,450,000	17,701,000	$ 846,246,000
Mississippi	663,000	8,968,000	$ 263,084,000
Missouri	1,329,000	14,857,000	$ 439,234,000
New Hampshire	319,000	2,871,000	$ 86,978,000

Table 2. Wetland Losses in Selected States

State	Wetland Acres 1780's	Wetland Acres 1980's	% Loss
Alabama	7,567,6000	3,783,800	-50%
Arizona	931,000	600,000	-36%
Arkansas	9,848,600	2,763,600	-72%
California	5,000,000	454,000	-91%
Florida	20,325,013	11,038,300	-46%
Georgia	6,843,200	5,298,200	-23%
Illinois	8,212,000	1,254,500	-85%
Louisiana	16,194,500	8,784,200	-46%
Maryland	1,650,000	440,000	-73%
Massachusetts	818,000	588,486	-28%
Michigan	11,200,000	5,583,400	-50%
Minnesota	15,070,000	8,700,000	-42%
Mississippi	9,872,000	4,067,000	-42%
Missouri	4,844,000	643,000	-87%
New Hampshire	220,000	200,000	-9%

New Jersey	963,000	11,718,000	$ 774,375,000
New York	1,836,000	22,546,000	$ 867,242,000
North Carolina	1,481,000	15,909,000	$ 577,546,000
Ohio	1,515,000	18,430,000	$ 861,554,000
Oklahoma	804,000	11,823,000	$ 442,036,000
Oregon	717,000	7,273,000	$ 461,297,000
Pennsylvania	1,397,000	23,849,000	$ 677,152,000
South Carolina	842,000	10,226,000	$ 398,587,000
Tennessee	996,000	13,263,000	$ 493,174,000
Texas	2,589,000	34,868,000	$ 1,475,470,000
Utah	317,000	2,539,000	$ 154,205,000
Virginia	1,034,000	11,899,000	$ 431,082,000
Washington	995,000	11,837,000	$ 1,009,309,000
West Virginia	339,000	3,949,000	$ 109,209,000
Wisconsin	1,470,000	20,299,000	$ 782,388,000

Source: U.S. Fish and Wildlife Service, 1991 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation.

New Jersey	1,500,000	915,960	-39%
New York	2,562,000	1,025,000	-60%
North Carolina	11,089,500	5,689,500	-49%
Ohio	5,000,000	482,800	-90%
Oklahoma	2,842,600	949,700	-67%
Oregon	2,262,000	1,393,900	-38%
Pennsylvania	1,127,000	499,014	-56%
South Carolina	6,414,000	4,659,000	-27%
Tennessee	1,937,000	787,000	-59%
Texas	15,999,700	7,612,412	-52%
Utah	802,000	558,000	-30%
Virginia	1,849,000	1,074,613	-42%
Washington	1,350,000	938,000	-31%
West Virginia	134,000	102,000	-24%
Wisconsin	9,800,000	5,331,392	-46%

Source: Dahl, T.E.1990. Wetlands Losses in the United States 1780's to 1980's. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. 13pp

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"WETLANDS REGULATION IN THE REAL WORLD": AN UNREAL REPORT

On March 1, 1994, a study entitled "Wetland Regulation in the Real World" (Report) was released by Beveridge and Diamond, P.C., a firm often working on behalf of clients who drain and fill wetlands. While purporting to be an unbiased study, the Report does not represent the Section 404 wetlands regulatory program of the Clean Water Act because it ignores the tens of thousands of regulated activities which proceed rapidly and without controversy.

The Section 404 program is designed to stem the continued loss of wetlands -- about 290,000 acres per year according to most recent official reports -- without unduly burdening the regulated community. In fact, for most Section 404 permit applicants, the federal wetlands review process requires only an average 19 days. Moreover, only about 6% of individual federal wetlands permit applications are ultimately denied. With these facts in mind, the following examines the Report in light of the entire Section 404 program.

The Report is not representative of 99% of the Section 404 Program.

- The Report was restricted to a small, hand-picked sample which represents a mere 1% of the Corps' total Section 404 permitting activity.

- The Report primarily focuses on individual permitting actions that involve commercial and residential development projects and road construction. The Report better chronicles the experience of builders of large scale development projects.

The Report grossly under-reports actual wetland losses.

- The most recent U.S. Fish and Wildlife Service estimates reveal an annual loss of 290,00 wetland acres. The Report attempts to refute this estimate by focusing on 11,600 acres of known, authorized wetland impacts in fiscal year 1993. The Report, including the anecdotal evidence the report references, does not accurately reflect actual wetlands loss because it:

  -- totally ignores the literally hundreds of thousands of acres of wetlands destroyed through regulatory loopholes. One loophole, closed only in August, 1993, allowed developers to ditch and drain thousands of wetland acres without permits. And, only in February, 1994, the EPA finally closed the loophole allowing developers to convert forested wetlands to pine plantations without a Section 404 permit;

  -- does not reflect frequently large secondary impacts of proposed projects. For example, a 0.07 acre Florida Power Corporation fill will adversely affect approximately 240 acres of pristine forested wetlands that are part of an ecological system that supplies the City of Tampa with 75% of its drinking water;

  -- does not reflect impacts to waters other than wetlands, such as streams and lakes, that are also regulated under Section 404;

-- does not reflect impacts resulting from unauthorized discharges.

• The authors incorrectly assert that the Soil Conservation Service's "1991 Update of National Resources Inventory" (NRI) provides an accurate estimate of annual wetlands loss from 1987 to 1991. Similar to the authors' report sample, the NRI merely focused on a subset of wetland losses and was never designed or intended to provide national estimates of wetland loss rates. In fact, the NRI omits nearly 30% of the U.S. from its sample and fails to estimate the most significant coastal wetland losses in the U.S.

• Incredibly, the Report minimizes the wetland acreage impacts of this hand-picked sample by reporting only the median (a type of statistic) impacts of permit applications. A more appropriate statistic in this situation, which the Report conveniently neglects to mention, is that the average (mean) impact for the sample pool was approximately 9.8 acres, nearly 9 times as great as the median impact!

• The 11,600 acre figure fails to account for the thousands of wetland acres lost to general permit authorizations for which notification of the Corps is not required.

The Report over-estimates mitigation of wetlands losses.

• The Report is misleading because it implies that the 11,600 acres of reported wetland impacts were more than offset by compensatory mitigation. In fact, compensatory mitigation is frequently not required and permit applicants often fail to successfully compensate for wetland losses even when mitigation is required. For example:

-- an examination of randomly selected 1990 and 1991 Corps' Section 404 permits shows that 76% of the Section 404 permits do not require compensatory mitigation;

-- in Alaska, less than 1% of the Section 404 discharges in 1991 required compensatory mitigation to offset wetland losses;

-- a December 28, 1993, review of Florida's wetlands protection program conducted by Florida's Office of the Auditor General reported 33 to 55% noncompliance rates with mitigation requirements in wetlands permits;

-- a March 5, 1991, review of Florida's wetlands protection program conducted by Florida's Department of Environmental Regulation revealed in the instances in which mitigation was done, it was unsuccessful 73% of the time;

-- a recent 5-year EPA study of compensatory mitigation revealed that in Oregon, none of the mitigation sites surveyed were built to permit specifications.

• The Report points to wetlands restoration programs by the U.S. Fish and Wildlife Service and the U.S. Department of Agriculture that have restored thousands of acres of wetlands to imply that we may now be achieving a net gain of wetlands. While these programs should be commended, they are intended to redress massive wetland losses in the past (over 100 million acres) that have resulted in serious flooding and declines in water quality and waterfowl, and should not be considered as offsetting current or future losses. In addition, these programs are a long way from meeting the National Research Council's recommendation that this Nation restore 10 million acres of wetlands by the year 2010.

The Report implies that the Section 404 program primarily regulates isolated wetlands, which the authors wrongly imply shouldn't be regulated and aren't important.

- An examination of randomly selected 1990 and 1991 Corps' Section 404 permits reveals that only about 6% of Section 404 individual permits regulate activities impacting only isolated wetlands. The vast majority of Section 404 permits involve discharges of dredged or fill material into streams, lakes, bays and wetlands adjacent to them.

- Moreover, isolated wetlands, such as prairie potholes, serve many important functions. For example, they provide vital habitat for 50-80% of North America's waterfowl and help control flooding in the upper midwest.

The Report faults the Corps for its successes in administering the Section 404 program.

- The Report only focuses on the direct discharges that were ultimately authorized under the sampling of permits examined. This is misleading, however, because it ignores the success of the Section 404 program in reducing the much larger fills that are often proposed by permit applicants at the beginning of the permitting process. For example, Florida Power & Light recently proposed to fill 40 to 50 acres of valuable wetlands for construction of a utility transmission line. The direct fill which was ultimately authorized was only 0.07 acres.

The Report does not depict the real world for most permit applicants, including the majority of "mom and pop" applicants.

- The Report notes that the average processing time for the individual permits examined is 373 days. This does not reflect the experience of the vast majority of Section 404 permit applications. The Corps' 1991 regulatory statistics show that 75% of individual permits are processed in less than 120 days.

- Even the Report acknowledges, that the 373 day figure is not "representative of the Corps' regulatory program as a whole." The 373 day figure only applies to the 1% of applications picked for analysis and which involve development projects in wetlands. The Report itself acknowledges that the vast majority of permit applicants (91% for all Section 404 Activities authorized in fiscal years 1988 - 1993) are processed through Corps' General Permit authorizations and, when a Corps response is needed, require an average 19 days to process.

- The 1% of permits examined in the Report likely represent those developers that are unwilling or unable to modify their project plans to be eligible for a general permit authorization, and that will have major impacts on wetlands and other waters. As the Report acknowledges, these projects tend to be the most controversial and most difficult to process. The longer review process is necessary for those high impact projects, and a result of the Corps' willingness to work with permit applicants to minimize project impacts on wetlands and other waters and not to prohibit development.

The Report exaggerates individual permit processing times.

- The Report over-estimates average processing times by 32% because it includes delays caused by applicants who fail to file a complete application. Examining completed

application time to decision, the average processing time for permits examined in the Report is approximately 282 days, not 373 days.

• In examining permit processing times, the authors this time chose to report only the mean processing time. A closer look at the sample reveals that for completed application to decision, 50% of the permit applications were processed in less than 166 days.

• The Report improperly asserts that actual permitting times are longer because of pre-application meetings. Despite the claim that these negotiations represent "real time and money" to the applicant, these meetings are conducted by the Corps (at taxpayers expense) to guide applicants through the permitting process and to suggest project modifications that will actually reduce permitting delays.

The Report wrongly equates permit withdrawal with permit denial.

• The Report focuses on the large pool of permit applications that are withdrawn and then mischaracterizes them as "effective denials." Most permits are not withdrawn due to delays on the part of the Corps. Of 129 withdrawal actions identified in the Report from 1992, 53% were attributed to lack of information or inadequate response on the part of the applicant and another 9% were withdrawn because an individual permit was not required.

• An examination of 359 randomly selected Section 404 individual applications withdrawn in 1990 and 1991, revealed that only 17% were withdrawn either to address regulatory concerns or because the applicant refused to comply with recommended project modifications. The remainder were withdrawn either for reasons attributed to the fault of the applicant or non-Section 404 related issues, or because the project was determined to not require an individual permit.

We urge you not to be misled by this report. The Section 404 program has succeeded in stemming the loss of wetlands in this country without imposing an undue burden on the regulated community. We must continue to find ways to make the Section 404 program more efficient, but not at the expense of policies which minimize and prevent destruction of wetlands.

For more information contact:

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March 1994

The Honorable Norman Mineta, Chair
Public Works & Transportation Committee
U.S. House of Representatives
2165 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Mineta:

During the Clean Water Act reauthorization hearings on April 24, certain questions were asked of Administrator Browner regarding pollutants in intake waters. The National Wildlife Federation has been very much involved in this issue because it has been raised in the context of the Great Lakes Water Quality Initiative, which is currently under development by the U.S. Environmental Protection Agency.

As an expert testifying during the April 24 hearing, please accept for the record the attached comments by the National Wildlife Federation on the issue of pollutants in intake waters and on the "Shuster-Hayes" bill's language concerning the same issue.

Thank you very much for the invitation to participate in your recent hearings.

Sincerely,

Terry Schley
Counsel

enclosure

TS/cam

SUPPLEMENTAL TESTIMONY OF THE NATIONAL WILDLIFE FEDERATION REGARDING POLLUTANTS IN INTAKE WATERS

The current Clean Water Act system already authorizes the U.S. Environmental Protection Agency (EPA) and States in appropriate circumstances to relieve dischargers of the responsibility for treating pollutants in intake waters. EPA has carefully defined these appropriate circumstances by regulation, critical portions of which have withstood legal challenges by industry. Any changes to the Act regarding intake pollutants run the risk of undermining EPA's careful circumscription of these circumstances.

Contrary to assertions by some dischargers' groups, the EPA's proposed Great Lakes Water Quality Initiative does not change existing policy in this regard, except that EPA proposes to provide an additional mechanism by which Great Lakes dischargers could avoid being held responsible for treating intake water pollutants. Therefore, the National Wildlife Federation at this time opposes any language that would affect the U.S. EPA's or States' existing means of considering pollutants in intake waters.

Intake water pollutants have been considered in certain National Pollutant Discharge Elimination System (NPDES) permits for years under existing policy. For example, the Wisconsin Department of Natural Resources issued a permit to Fort Howard Paper in Green Bay with effluent limitations that do not require Fort Howard to treat or remove PCBs present in its intake waters. Likewise, Michigan issued a permit to the General Motors

Corporation facility in Bay City, with effluent limitations that do not require GM to treat or remove PCBs in its intake water.

However, not satisfied that agencies are already authorized to consider waters containing intake pollutants *when appropriate*, and that agencies have been doing so for years, some permittees would like Congress to make sweeping changes to existing policy. They would like an across-the-board guarantee that they can pass pollutants through their facilities regardless of their culpability in the conditions that caused pollution of intake waters and regardless of the impacts on the environment.

For example, dischargers should not be exempted from treating intake water pollutants where the permittee is responsible for causing or contributing to the presence of the pollutant in the intake waters. Similarly, if a permittee is using intake water from a different surface water or groundwater body than that to which the discharge is occurring, the discharger should be held accountable for the environmental impacts of the transfer of polluted water to a previously unpolluted stream. If a permittee is changing the concentration, time, or place of discharge of the intake pollutants such that environmental harm may result, the discharger should be also held responsible for averting the harm by treating or removing the pollutants as needed.

The Shuster-Hayes bill ignores these complexities by using a broad brush for addressing problems that require intricate examination: permittees "will not be required to remove or

reduce the level of pollutants in a discharge if such pollutants are present in or caused by the intake waters..." There are no caveats, no limitations, no conditions; simply a broad statement that does not consider the fish, wildlife, and people whose health depends the health of the mandate's receiving waters.

Still worse, the proposed legislation would create a large loophole in the existing NPDES permit scheme by eliminating water quality-based effluent limitations (WQBELs) for permittees when the mass of a pollutant in intake water is not "significantly greater" than the mass of the pollutant in the intake water. The language itself invites confusion, more regulatory wrangling, and possibly even litigation, due to its vagueness. As important, the provision would allow allegedly-insignificant loadings of pollutants for individual permittees without regard for the cumulative impact such policy might have on the Nation's waters. For example, the Shuster-Hayes proposal would write off lakes like Lake Michigan, which cannot adequately flush even insignificant loadings of bioaccumulative and persistent toxic chemicals. Perhaps most importantly, WQBELs are among the strongest tools water quality managers have to restore degraded lakes and rivers. Removing WQBELs from their toolbox, especially under the conditions prescribed by the proposal, would prolong water quality standards violations in many of our Nation's waterways.

Those advocating a statutory "intake credits" policy fail to recognize existing means by which intake water pollutants are acknowledged currently and have misrepresented the proposed Great Lakes Water Quality Initiative as somehow restricting previously-available

"intake credits." Adopting the extreme approach represented by the Shuster-Hayes bill would open a Pandora's Box that would undermine the Clean Water Act's goals and objectives, not achieve them, as Congress has attempted tenaciously to do for over two decades.

The National Wetlands Coalition

TESTIMONY

OF

ROBERT G. SZABO

COUNSEL, THE NATIONAL WETLANDS COALITION

BEFORE THE

SUBCOMMITTEE ON

WATER RESOURCES AND ENVIRONMENT

OF THE

HOUSE COMMITTEE ON

PUBLIC WORKS AND TRANSPORTATION

FEDERAL WETLANDS REGULATORY POLICY

MAY 24, 1994

1050 THOMAS JEFFERSON STREET, N W 7TH FLOOR WASHINGTON, D C 20007 (202) 298-1800

Mr. Chairman and Members of the Subcommittee, thank you for allowing The National Wetlands Coalition to testify before you today on the Federal wetlands regulatory program. My name is Robert G. Szabo. I am a member of the Washington, D.C. law firm of Van Ness Feldman and serve as Counsel to the Coalition.

The National Wetlands Coalition is an incorporated group of approximately 70 companies, Native American groups, associations and local governments that represent a cross-section of the community that is subject to regulation by the Section 404 permitting program. A list of the members of the Coalition and the Statement of Principles that we support are attached as Attachments 1 and 2. We recognize the importance of our nation's functioning wetlands base and support the goal of "no overall net loss of wetlands" when expressed in terms of functions and values rather than acres. We believe, based on recent information released by the Soil Conservation Service and the Corps of Engineers, that the nation is much closer to achieving the stated goal of "no overall net loss" rather than the purported continuing annual loss of 290,000 acres of wetlands, which we believe to be a totally erroneous figure.

Mr. Chairman, the major difficulty confronting the Section 404 program today is that it regulates, directly from the Federal government, 75 million acres of privately owned property. Indeed, this program has given rise to the private property rights concerns that are before this Congress. We believe that the Federal wetlands regulatory program is broken and will remain broken and highly controversial until Congress better focuses the program on wetlands that serve important ecological functions and provides policy guidance for the program that balances the nation's

environmental goals with the other important issues of the nation, including private property rights.

Mr. Chairman, the Coalition strongly supports, H.R. 1330, the Wetlands Conservation and Management Act of 1993, as the program that can achieve the nation's wetlands conservation goals consistent with our nation's tradition of respecting the property rights of individuals, our nation's need for continued economic growth and the maintenance of strong local tax bases. The Coalition, Mr. Chairman, supports several of the wetlands provisions of your amendment in the nature of a substitute to your bill, H.R. 3948. We strongly oppose other provisions of that legislation and feel that those provisions outweigh the positive aspects of your amendment. The Coalition strongly opposes H.R. 350, the Wetlands Reform Act of 1993. The Coalition supports many of the concepts contained in the President's Plan that was announced on August 24, 1993. However, we cannot express a position on most of the specifics of that program since those specifics have not yet been forthcoming.

Mr. Chairman, attached to this testimony are Attachments 3, 4 and 5 that contain the Coalition's positions on specific provisions contained in H.R. 350, the amendment to H.R. 3948, and the President's Plan. The body of our testimony will focus on the problems we see with the current Section 404 program and the important reforms that we believe are needed.

THE PROBLEM WITH THE SECTION 404 PROGRAM:

Evolution of the Program:

Mr. Chairman, we believe that the current Section 404 program evolved with the inattention or acquiescence of Congress rather than having been designed by Congress. Section 404 of the Federal Water Pollution Control Act of 1972 provided a permitting program for a very specific type of pollution: the discharge of "dredged or fill material" into the "navigable waters, at specified disposal sites." The Act defined "navigable waters" as the "waters of the United States, including the territorial seas." The word "wetlands" did not appear anywhere in the statute or legislative history and it is doubtful that Congress contemplated the current program in 1972. Instead, Federal court decisions in United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974) and Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975), began the expansion of the term "navigable waters" to extend "over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." Callaway, at 686.

The Callaway case triggered several years of effort by the Corps to arrive at an acceptable description of the term "waters of the United States" which included various categories of wetlands. The evolution of the program continued as Congress debated the Clean Water Act of 1977. As the debate unfolded over the Clean Water Act, efforts to curb the growing jurisdictional reach came close to succeeding in both the House and Senate. In the end, Congress reauthorized the Section 404 program

without taking decisive action on the jurisdictional reach of the program, but incorporated the concept of "general permits" to aid the Corps in its implementation of the program.

Congress has not fully returned to this debate since 1977. Meanwhile, in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), the Supreme Court upheld the expansive definition of "waters of the United States" to include infrequently flooded "adjacent wetlands." The Court noted that the Congress had rejected efforts to restrict the Corps' definition of "waters of the United States" during the Clean Water Act debate in 1977. Finally, the definition of Federal jurisdictional wetlands may have reached its apex with the release of the 1989 Federal Manual for Identifying and Delineating a Wetland.

While the reach of the program was evolving ever more broadly, access to Section 404 permits was becoming more restrictive. On December 24, 1980, as President Carter was leaving office, the Environmental Protection Agency issued the Section 404(b)(1) guidelines which established the current "avoidance" permitting methodology. In 1988, the U.S. Court of Appeals for the Second Circuit in Bersani v. Robichaud, 850 F.2d 36 (2d Cir. 1988), cert. denied 109 S.Ct. 1556 (1989) upheld EPA's interpretation of the "practical alternatives test," under which the permit applicant bears the burden of clearly demonstrating that practical alternatives to the proposed project having less environmental impact do not exist. On February 7, 1990, in a Memorandum of Agreement between the Corps of Engineers and the

Environmental Protection Agency, the Corps agreed to employ the strict "sequencing" methodology of the EPA in determining whether a Section 404 permit may be issued. Attached to this statement as Attachment 6 is a brief chronology of the history of the evolution of the Section 404 program into a "wetlands" regulatory program.

The Major Problem with the Section 404 Program:

The evolution of the Section 404 program into a very broad and rigid regulatory program has occurred over the last 17 years without policy guidance from the elected representatives of our nation. The result is the major problem that lies before the Congress today: approximately 75 million acres of privately owned land are being regulated as "wetlands" by two federal agencies, the Corps and the EPA, with the objective of "avoiding" all but the most minor alterations on that land. Some of that land is clearly identifiable by the public as wetlands, while other land can be identified as such by only the most discerning and highly trained wetlands scientists. The result is a major conflict between landowners and environmentalists and the private property rights backlash that materialized on the floor of the House during consideration of the National Biological Survey legislation in October, 1993 and more recently in the Senate during consideration of the Safe Drinking Water Act.

Mr. Chairman, the Coalition believes strongly that the Section 404 program must be reformed to reduce the conflict between our nation's environmental goals and economic and property ownership goals. We believe that this environmental program, like the Clean Air Act, must evolve away from primary reliance on the

"central command and control" model of regulation to a more incentives-based program. We believe that H.R. 1330, the Wetlands Conservation and Management Act of 1993, is the proper Federal Wetlands regulatory program for the nation.

SPECIFIC RECOMMENDATIONS OF THE NATIONAL WETLANDS COALITION:

The Federal Wetlands Regulatory Program Must Recognize the Legitimate Interests of Private Landowners.

The dominant reality of the Section 404 program is that 75% of the "wetlands" that are being regulated are privately owned. Congress must ensure that the program minimizes adverse impacts on the value, use and enjoyment of this privately owned property.

The Coalition believes strongly that the goals of the program should specify that the national goal of "no overall net loss of wetlands functions and values" must be achieved consistent with the national goals of continued economic growth, strong local tax bases and the security of our citizens in the ownership, use and enjoyment of their privately owned property. The Coalition believes that the Secretary of the Army and the Administrator of the EPA, if the EPA remains involved in the program, must be directed to implement the program in a manner that will have the least possible adverse impacts on the value, use and enjoyment of privately owned property, the local, state and national economies and local tax bases.

Finally, it is inevitable that the interests of some landowners will be required to give way to the overall national goal of wetlands conservation. Congress must make clear that when the value, use or enjoyment of privately owned property

is "substantially diminished" by operation of the Section 404 program, the Federal government will compensate the landowner for his or her land. Congress must either provide a workable non-judicial mechanism for obtaining this compensation or open the local Federal district courts, rather than the U.S. Claims Court alone, to these claims. Congress must also provide that if the citizen prevails against the government, the government must pay reasonable attorneys fees and the cost of the litigation.

Definition of Federal Jurisdictional Wetlands:

The Coalition believes that Congress, rather than the agencies, must define the wetlands that are to be regulated by the Federal government. With 75% of the nation's wetlands in private ownership, the reach of this program is too important a decision to be delegated to Federal judges and Federal bureaucrats that are not directly accountable to the people.

We believe that the definition of Federal jurisdictional wetlands must require water on the surface for at least 21 consecutive days a year. Water on the surface for a period of the year is the best indicator of the presence of wetlands to all but the most sophisticated landowners or land purchasers.

Activities to be Regulated:

The Coalition believes that Congress must designate the specific activities to be regulated and avoid broad, unspecific language, as contained in H.R. 350 and the amendment to H.R. 3948, that can be expanded by judicial decision and

agency interpretation. The Coalition supports amending the Section 404 program to regulate "drainage" and "excavation" of wetlands.

Single Agency Implementation:

The Coalition believes strongly that only one agency should be responsible for the implementation of the program. The Corps has the largest staff of field personnel trained in the implementation of this program. Consolidate the Section 404 program into the hands of the Corps, provide the resources it needs to do the job and hold it accountable. All other agencies, including the EPA, the Fish & Wildlife Service, and the National Marine Fisheries Service, should perform a consultation role only.

Distinguish Between Wetlands Based on Functions and Values:

The Coalition believes strongly that all wetlands are not of equal value, such that certain activities might be appropriate in some wetlands while inappropriate in others. Classify wetlands according to value: high, medium and low. Regulate activities in high value wetlands more rigorously than activities in medium and low value wetlands. Mr. Chairman, the Coalition is pleased that your amendment to H.R. 3948, while not adopting an actual classification system, does take a significant step toward recognizing the different functions and values among wetlands. Specifically, Mr. Chairman, we support Section 405(b) of your amendment which directs EPA to modify the Section 404(b)(1) guidelines to require that the review of the alternatives to the proposed activity during the application process:

- "be commensurate with the severity of the impact of the activity on the environment";
- consider the functions of the wetlands, to the extent practicable; and
- consider the relative importance of the wetlands in the watershed.

We believe that the Committee should go further, however, by applying the "sequencing" methodology, as modified by Section 405(b), to high value wetlands only and applying the more flexible "public interest" test of the Corps to medium and lower valued wetlands.

Incorporate Mitigation Banking as a Central Element of the Nation's Wetlands Program:

Compensatory mitigation works. Mitigation banking can be an important tool for the creation, preservation, enhancement and restoration of large areas of wetlands. Moreover, private mitigation banks can allow individuals and companies to profit from environmentally sound activities -- the best incentive for achieving the nation's environmental goals. Mr. Chairman, the mitigation banking provisions of your amendment to H.R. 3948 move in this direction by appearing to allow economic activities to be carried out contemporaneously with the mitigation activities. Other legislation, such as Senate bill, S. 2093, requires mitigation to be performed in advance of the economic activities. The private sector simply will not pursue a bank under such circumstances and the "up front" mitigation provision is not necessary to ensure that the mitigation will occur. The Florida Wetlandsbank, which is the second permitted private mitigation bank in the nation to transfer credits, could not operate

under this provision. The Coalition urges that express language be included in the reported bill that allows credits to be transferred before the mitigation is completed with appropriate binding protection and other safeguards.

Allow States and Local Governments to Implement Wetlands Permitting Programs that are Tailored to Their Situations:

Congress has intended, since at least the enactment of the Clean Water Act in 1977, for the Section 404 program to be delegated to the states. Under the rigid "delegation" rules that have been adopted by the EPA, only two states have qualified for the program: Michigan and, recently, New Jersey.

Congress should allow states and localities to more easily assume the Section 404 permitting program. Additionally, while the states have the program, no Federal agency should retain the power to veto a state permitting decision, as is allowed under current EPA rules. States and localities should also have the flexibility to develop programs that will achieve the national goal of "no overall net loss of wetlands" without requiring them to adopt exactly the same provisions and standards as the Section 404 program.

Maintain and Expand the Use of General Permits:

Routine, incidental and minor wetlands altering activities should continue to be covered by the current general permit and additional general permits should be developed where warranted.

Untangle Agricultural Activities from the Section 404 Program:

Agriculture is subject to both the Swampbuster program of the Food Security Act of 1985 and the Clean Water Act's Section 404 program, which has caused significant confusion and undue hardships. Congress should untangle agricultural activities from coverage under the Section 404 program and make the Soil Conservation Service the lead agency with respect to delineation of agricultural lands and the issuance of any necessary 404 permits on such land.

Mapping and Public Notice:

Congress must ensure that the nation's Federal jurisdictional wetlands are mapped and that these maps are posted in county and parish courthouses near the property records, when such maps are available. In the meantime, Congress must direct the Corps to post notices about the program in the court houses of every county and parish where Federal jurisdictional wetlands may exist.

Areas with Special Wetlands Problems:

At least two areas of our nation are dominated by Federal jurisdictional wetlands: Alaska and south Louisiana. Congress must recognize the realities of these areas and provide special rules that will allow continued human activity in these and similar areas while encouraging conservation, restoration and enhancement of overall wetlands functions and values.

Mr. Chairman, thank you for the opportunity to appear before you today. The members of the Coalition encourage the subcommittee, the full committee and

the Congress to seize the current opportunity to develop a wetlands program that can achieve the national goal of "no overall net loss" of wetlands functions and values while earning the support and cooperation of the regulated community.

ATTACHMENT 1

THE NATIONAL WETLANDS COALITION

MEMBERSHIP

May 23, 1994

ADAM'S RIB RECREATIONAL AREA
Eagle, Colorado
AKT DEVELOPMENT, INC.
Sacramento, California
ALASKA BUSSELL ELECTRIC INC.
Anchorage, Alaska
ALLEGHENY POWER SYSTEM, INC.
New York, New York
AMAX INC.
New York, New York
AMERICAN MINING CONGRESS
Washington, D.C.
AMERICAN FARM BUREAU FEDERATION
Washington, D.C.
AMERICAN ROAD & TRANS. BUILDERS ASSOC.
Washington, D.C.
ARCO ALASKA
Anchorage, Alaska
ARCTIC SLOPE REGIONAL CORPORATION
Barrow, Alaska
AUDUBON INSTITUTE
New Orleans, Louisiana
BADGER MINING CORPORATION
Fairwater, Wisconsin
BERRY BROS. GENERAL CONTRACTORS, INC.
Berwick, Louisiana
BP EXPLORATION (ALASKA) INC.
Anchorage, Alaska
CALMAT CO.
Los Angeles, California
CHEVRON U.S.A. INC.
San Francisco, California
CHINA CLAY PRODUCERS ASSOCIATION
Atlanta, Georgia
C-K ASSOCIATES, INC.
Baton Rouge, Louisiana
CONSOLIDATED NATURAL GAS CO.
Pittsburgh, Pennsylvania
DOMINGUE, SZABO & ASSOCIATES
Lafayette, Louisiana
ENTERGY CORPORATION
New Orleans, Louisiana
EXXON COMPANY, U.S.A.
Houston, Texas
FINA OIL & CHEMICAL COMPANY
Dallas, Texas
FIRST COMMERCE CORPORATION
New Orleans, Louisiana
FREEPORT-MCMORAN INC.
New Orleans, Louisiana
R. L. FIELD GREENHOUSES
Georgetown, Delaware
GEORGIA-PACIFIC CORPORATION
Atlanta, Georgia
HAMPTON BUSINESS PARK
Capital Heights, Maryland
HOUMA-TERREBONNE CHAMBER OF COMMERCE
Houma, Louisiana
HUNT OIL COMPANY
Dallas, Texas
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
Alexandria, Virginia
INTERSTATE NATURAL GAS ASSOCIATION
Washington, D.C.
KERR-MCGEE CORPORATION
Oklahoma City, Oklahoma
THE KOLL COMPANY
Huntington Beach, California
LAS CONCHAS PARTNERSHIPS
Slidell, Louisiana
THE LOUISIANA LAND & EXPLORATION COMPANY
New Orleans, Louisiana
LOUISIANA LANDOWNERS ASSOCIATION, INC.
Franklin, Louisiana
LOUISIANA NATURE AND SCIENCE CENTER
New Orleans, Louisiana
MISSISSIPPI GULF COAST WETLANDS COALITION
Pascagoula, Mississippi
MOBIL EXPLORATION & PRODUCING, U.S. INC.
Houston, Texas
THE MORGAN CITY HARBOR & TERMINAL DISTRICT
Morgan City, Louisiana
MURPHY EXPLORATION & PRODUCTION COMPANY
New Orleans, Louisiana
MUNICIPALITY OF ANCHORAGE
Anchorage, Alaska
NANA REGIONAL CORPORATION
Kotzebue, Alaska
NAT'L ASSN. OF HOMEBUILDERS
Washington, D.C.
NAT'L ASSN. OF STATE DEPARTMENTS OF AGRICULTURE
Washington, D.C.
NATIONAL COTTON COUNCIL
Memphis, Tennessee
NATIONAL STONE ASSOCIATION
Washington, D.C.
NATIONAL UTILITY CONTRACTORS ASSOCIATION
Arlington, Virginia
NATURAL GAS SUPPLY ASSOCIATION
Washington, D.C.
NORTH SLOPE BOROUGH
Barrow, Alaska
OCCIDENTAL OIL & GAS CORPORATION
Tulsa, Oklahoma
PANHANDLE EASTERN CORPORATION
Houston, Texas
PARKER DRILLING COMPANY
Tulsa, Oklahoma
PENNSYLVANIA LANDOWNERS ASSOCIATION
Harrisburg, Pennsylvania
PORT OF NEW ORLEANS
New Orleans, Louisiana
SHELL OIL COMPANY
Houston, Texas
SUN COMPANY, INC.
Wilmington, DE
T. BAKER SMITH & SON, INC.
Houma, Louisiana
TENNECO GAS
Houston, Texas
TERREBONNE PARISH CONSOLIDATED GOV'T
Houma, Louisiana
TEXACO U.S.A.
Houston, Texas
UNOCAL CORPORATION
Los Angeles, California
U. S. SILICA COMPANY
Berkley Springs, West Virginia
VIRGINIA PENINSULA CHAMBER OF COMMERCE
Hampton, Virginia
WALDEMAR S. NELSON & CO., INC.
New Orleans, Louisiana
WALK, HAYDEL AND ASSOCIATES, INC.
New Orleans, Louisiana
THE WILLIAMS COMPANIES, INC.
Tulsa, Oklahoma
THE ZAMIAS GROUP
Pittsburgh, Pennsylvania
MICHAEL ZUNICH & ASSOCIATES
North Ridgeville, Ohio

ATTACHMENT 2

STATEMENT OF PRINCIPLES
THE NATIONAL WETLANDS COALITION

The National Wetlands Coalition is a geographically and economically diverse group of public and private sector entities that have joined together to participate in the efforts of the Congress and the Administration to establish a comprehensive policy for effective conservation and management of the Nation's wetlands. The National Wetlands Coalition will support the adoption of the specific programs and policies that advance the objectives of wetlands conservation, consistent with the following principles:

1. THE CONGRESS OF THE UNITED STATES AND THE PRESIDENT SHOULD ESTABLISH A COMPREHENSIVE FEDERAL PROGRAM FOR MANAGING THE NATION'S WETLANDS RESOURCE BASE IN A MANNER THAT EFFECTIVELY AND SENSIBLY ACCOMMODATES THE COMPETING, LEGITIMATE DEMANDS FOR CONSERVATION AND USE OF WETLANDS RESOURCES.

2. GIVEN THE NUMBER AND DIVERSITY OF PEOPLE AFFECTED, AND THE ECONOMIC AND ENVIRONMENTAL IMPORTANCE OF THE WETLANDS RESOURCE BASE, A COMPREHENSIVE FEDERAL WETLANDS POLICY SHOULD BE THE PRODUCT OF A NATIONAL CONSENSUS-BUILDING PROCESS.

3. "NO OVERALL NET LOSS OF WETLANDS VALUES" IS AN APPROPRIATE GOAL FOR ACHIEVING THE EFFECTIVE CONSERVATION OF SIGNIFICANT WETLANDS VALUES AND FUNCTIONS. THIS GOAL SHOULD BE PURSUED BY IMPLEMENTATION OF A VARIETY OF THE REGULATORY AND NONREGULATORY PROGRAMS DESIGNED TO: CONSERVE THE HIGHEST VALUE WETLANDS; ENSURE THAT DEVELOPMENT ACTIVITIES IN WETLANDS CONSERVE WETLANDS VALUES AND FUNCTIONS TO THE MAXIMUM EXTENT PRACTICABLE; ELIMINATE OR STREAMLINE PROCEDURES FOR USE OF WETLANDS OF MARGINAL RESOURCE VALUE; AND, PROVIDE INCENTIVES FOR PRIVATE WETLANDS CONSERVATION EFFORTS.

4. PROTECTION OF THE NATION'S HIGH-VALUE WETLANDS, AND RESTORATION OF WETLANDS GENERALLY, WILL REQUIRE AGGRESSIVE NONREGULATORY PROGRAMS INCLUDING PUBLIC ACQUISITION AND INCENTIVES FOR SET-ASIDES AND FOR RESTORATION ACTIVITIES. FEDERAL FUNDING REQUIRED FOR SUCH PROGRAMS SHOULD BE FROM THE BROADEST SOURCES POSSIBLE WITH NO SINGLE INDUSTRY REQUIRED TO BEAR A DISPROPORTIONATE SHARE OF THE COST.

5. SUBSTANTIAL REFORM OF THE SECTION 404 PERMITTING PROCESS IS NECESSARY TO CONSOLIDATE AGENCY RESPONSIBILITY, TO EXPEDITE ROUTINE PERMITTING, TO INCREASE FLEXIBILITY IN THE PROGRAM, AND TO PROVIDE GREATER PREDICTABILITY IN ALL CASES. CRITICAL TO THE ESTABLISHMENT OF A SENSIBLE PERMITTING PROCESS IS THE RECOGNITION THAT ALL WETLANDS ARE NOT OF EQUAL VALUE AND THAT THE LEVEL OF REGULATION AND MITIGATION IMPOSED SHOULD VARY DEPENDING UPON FUNCTIONS AND VALUES OF AFFECTED WETLANDS, DEGREE AND DURATION OF IMPACT, AND THE SURROUNDING LAND USE.

07/19/90

ATTACHMENT 3

H.R. 350

"WETLANDS REFORM ACT OF 1993"

March 22, 1994

The Coalition strongly opposes the enactment of H.R. 350. The legislation contains some useful provisions, including certain provisions regarding activities exempt from regulation under Section 404, a training and certification program for wetlands delineators, funding assistance for delineations of wetlands by small landowners and a number of incentives for the conservation of privately owned wetlands. However, the negative aspects of the bill overwhelm these positive attributes. Among the negative aspects of H.R. 350 that the Coalition strongly opposes are the following:

H.R. 350 LEGISLATES THE "AVOIDANCE" TEST
AND APPLIES THAT TEST TO GENERAL PERMITS:

Much of the controversy surrounding the current program can be traced to the "avoidance" test which has proven to be particularly inflexible and troublesome in marginal wetlands. Section 108 of HR. 350 exacerbates this problem by legislating this test, which is not now required by statute, and applying the test for the first time to general permits.

H.R. 350 REDUCES THE USEFULNESS OF GENERAL PERMITS:

The primary reason that the Section 404 program has not collapsed is that 60,000 to 80,000 activities annually are handled by general permits rather than individual Section 404 permits. H.R. 350 significantly reduces the usefulness of general permits by:

- requiring in Section 105 the concurrence of the EPA Administrator in the issuance of such permits;
- requiring in Section 105 the biennial review of each general permit rather than allowing general permits to be issued for 5 years as under current law; and
- requiring in Section 106 the application of the "avoidance test" to general permits.

H.R. 350 BROADLY EXPANDS THE ACTIVITIES TO BE REGULATED UNDER THE SECTION 404 PROGRAM:

The Coalition supports expanding the 404 program legislatively to cover "drainage, excavation and channelization" of wetlands. However, H.R. 350, through Section 102 and 103, broadly expands the Section 404 program to cover flooding, any diversion of water, clearing of vegetation and the placement of any material that changes the bottom elevation of a water body. Such a broad expansion of the program will paralyze the Corps of Engineers and destroy the 404 program.

H.R. 350 AUTHORIZES CITIZEN SUITS FOR ALLEGED SECTION 404 VIOLATIONS:

The Coalition believes strongly that if there is one thing the system does not need more of it is lawsuits. Authorizing citizen suits for perceived violations of Section 404 would simply be a disaster for the Federal court system and the citizens of the nation.

H.R. 350 RUNS COUNTER TO THE INITIATIVE TO STREAMLINE AND REINVENT GOVERNMENT:

In addition to failing to reduce the number of Federal agencies involved in the 404 program, H.R. 350 actually exacerbates this problem. Section 105 increases the role of the EPA in the issuance of general permits. Section 104 increases the bureaucratic burden by requiring the Corps to either adopt the recommendations of the Fish and Wildlife Service and the National Marine Fisheries Service with respect to individual 404 permits or respond in detail to such recommendations in writing. This requirement is particularly troublesome since the USF&WS and NMFS can take exactly opposite views with respect to specific individual permits.

H.R. 350 PROPOSES AN UNREALISTIC AND UNACHIEVABLE NATIONAL GOAL:

Section 101 of H.R. 350 proposes that the national goal should be the preservation of all remaining wetlands. If preservation means that no alterations can occur in the remaining 75 million acres of privately owned wetlands, this goal is unrealistic and unachievable.

ATTACHMENT 4

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 3948

THE "WATER QUALITY ACT OF 1994"

RELEASED APRIL 21, 1994

While the Coalition supports certain elements of the amendment in the nature of a substitute to H.R. 3948, the Coalition cannot support the amendment in its entirety. The Coalition does, however, specifically support the following provisions:

THE AMENDMENT PROVIDES FLEXIBILITY TO THE ALTERNATIVES ANALYSIS:

In 1989, without public notice or opportunity for comment, the Corps and EPA issued a Memorandum of Agreement requiring the Corps to adopt a strict "sequencing" methodology in reviewing individual permit applications. The heart of the sequencing methodology, which effectively replaced the traditional public interest balancing test, is the alternatives analysis, under which applicants are made to prove a long list of negatives to demonstrate that there are no "practical alternatives" to the proposed activity. Section 405(b) of the amendment introduces flexibility into this process by directing EPA to modify the § 404(b)(1) guidelines to require that the review of the alternatives to the proposed activity: "be commensurate with the severity of the impact of the activity on the environment;"consider the functions of the wetlands, to the extent practicable; and consider the relative importance of the wetlands in the watershed.

THE AMENDMENT CONTAINS A WELL-DESIGNED ADMINISTRATIVE APPEALS PROCESS:

The members of the Coalition appreciate the inclusion in the amendment of an administrative appeals process for landowners and applicants for Section 404 permits. Coalition members support the amendment's provision of numerous grounds for appeal, including the accuracy of the determination that the area in question is a jurisdictional wetland, and the imposition of permit conditions and restoration orders. In addition, the Coalition supports the provision limiting the initiation of administrative appeals to permit applicants and landowners; the amendment allows those who have participated in the public comment process concerning the subject of the appeal to intervene in the appeal.

Other positive provisions contained in the amendment include assistance for small landowners, authorization of grants for state wetlands conservation plans, certain exemptions from the 404 program, a wetlands delineators training and certification program and a public education program.

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The inclusion of these provisions makes the amendment by no means as harmful as H.R. 350. However, this legislation contains provisions that the Coalition opposes and, ultimately, fails to provide the reform that the Coalition believes to be necessary. The Coalition specifically opposes the following provisions:

THE AMENDMENT UNDULY EXPANDS THE ACTIVITIES TO BE REGULATED UNDER SECTION 404:

The Coalition supports expanding the Section 404 program legislatively to cover drainage, excavation and channelization of wetlands. Section 405(d) of the amendment expands the 404 program much more broadly to cover the addition into the navigable waters of "any material that changes the bottom elevation or configuration of a water body" if it is "incidental" to "any activity" and has "or is likely to have the effect of destroying or degrading any area of the navigable waters." The Coalition strongly opposes such a broad and indeterminant expansion of the 404 permitting program.

THE "PROGRAMMATIC GENERAL PERMIT" PROVISION OF THE AMENDMENT IS INADEQUATE:

The idea of providing a programmatic general permit program to consolidate Federal, state, and local wetlands permitting is sound, but the amendment to H.R. 3948 fails in the execution. Section 405(d) provides a programmatic general permit program by allowing a Federal general permit to be issued for a state regulatory program, but the provision is inadequate because it: does not extend to regional and local governments; and allows four Federal agencies to review "proposed permit decisions of the state agency administering the state program." The provision allowing the state agency and the Corps to negotiate the appropriate level of Federal review for particular types of permit decisions, and to ensure that the review is directed primarily at permits that "may" have more than a minimal adverse impact on the environment, does not go far enough. The amendment should specify that compliance with a programmatic general permit is deemed compliance with the Federal program. The Corps and EPA should not be able to veto individual decisions within the limits of the approved state regulatory programs. Instead, Federal review should be at the "programmatic" level, whereby the role of the Federal agencies is to require modifications to the state program or revoke the program, after public notice and hearing opportunities, if it is not working properly.

THE AMENDMENT EXACERBATES THE PROBLEM OF MULTIPLE FEDERAL AGENCY INVOLVEMENT IN THE SECTION 404 PROGRAM:

The Coalition believes strongly that the Section 404 program should be implemented solely by one Federal agency and believes that the Corps of Engineers is the best agency for the job. The amendment to H.R. 3948 not only does not address the problem of multiple agency involvement, it exacerbates that problem. The amendment directs the Administrator of the EPA to issue most new regulations that are required by the bill. It allows fully four Federal agencies review of proposed permit decisions by state programs operating under a Federal general permit. Meanwhile, the Corps continues to have the responsibility to implement the 404 program.

THE AMENDMENT'S PROVISIONS CONCERNING MITIGATION BANKING DO NOT ENCOURAGE THE DEVELOPMENT OF PRIVATELY OWNED BANKS:

The amendment to H.R. 3948 restricts the use of mitigation banking to restoration and enhancement projects, where the President's plan allows mitigation banking projects for restoration, enhancement, creation and, in some circumstances, preservation of wetlands. The Coalition supports the broader application of the President's plan, although our members fully expect the majority of mitigation banking projects to be restoration and enhancement projects.

In addition, the initial private banking projects that have been permitted, including the Florida Wetlandsbank in Broward County, Florida, do not require the mitigation to be completed in advance of the transfer of credits. While the amendment does not expressly contain such a requirement, the Coalition supports the addition of a provision explicitly defining mitigation banking projects to include the transfer of credits before the mitigation is completed, with appropriate safeguards.

THE AMENDMENT FAILS TO ADEQUATELY ADDRESS THE CONCERNS OF THE AGRICULTURAL COMMUNITY:

The legislation does not adequately address the needs of agriculture, specifically, farmed wetlands, prior converted cropland, normal farming practices, and a role for the Soil Conservation Service.

THE AMENDMENT PERPETUATES THE CONFLICT OVER PRIVATE PROPERTY RIGHTS:

With 75 million acres of privately owned wetlands subject to this Federal regulatory program, the amendment does not establish a reasonable process for providing compensation to private citizens that have lost the use and value of their property under the Section 404 program.

ATTACHMENT 5

THE PRESIDENT'S PLAN "PROTECTING AMERICA'S WETLANDS: A FAIR, FLEXIBLE AND EFFECTIVE APPROACH" ISSUED AUGUST 24, 1993

March 22, 1994

The Coalition prefers the concepts offered in the President's Plan to either H.R. 350 or much of the amendment to H.R. 3948. However, it is difficult to comment on the specifics of the program since most of the promised Executive Branch actions that will provide the substance of the plan have not yet been taken. Nevertheless, the Coalition likes the administrative appeals process promised by the President; the fact that the Soil Conservation Service is to take the lead on the delineation of agricultural lands; the fact that the benefits of a broadly defined mitigation banking program are recognized; the recognition that all wetlands are not of equal value and that flexibility is needed in the Section 404 permitting methodology; and the fact that the benefits of "classification" of wetlands are recognized by incorporating "classification" in the proposed state wetlands and watershed management plans. The entire list of principles incorporated in the President's Plan is attached to this document.

The Coalition strongly opposes the expansion of the Section 404 permitting program through the adoption of the so-called Tulloch rule. The Coalition is also disappointed that the Administration has not submitted legislation to implement its plan and has not taken the promised action to implement the plan administratively.

Thomas N. Thompson

STATEMENT

OF THE

NATIONAL ASSOCIATION OF HOME BUILDERS

PREPARED FOR THE

HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE

REAUTHORIZATION OF THE CLEAN WATER ACT

MAY 24, 1994

INTRODUCTION

This statement is filed in conjunction with our oral statement and is presented on behalf of the National Association of Home Builders (NAHB). We appreciate the opportunity to comment on the ongoing Clean Water Act Reauthorization efforts, including the Substitute Amendment (the Substitute) to H.R. 3948, and the recently released bipartisan proposal (the Proposal).

This testimony focuses on the basic deficiencies of current wetlands policy, how NAHB believes that policy can be improved, and the provisions that NAHB feels should be included in the legislative reform. It also addresses our concerns with other elements of the Clean Water Act debate, including ground water, citizens monitoring and storm water discharge.

BACKGROUND

NAHB and its' 800 state and local affiliate builder associations, comprised of 170,000 members, have been heavily involved for many years in clean water policy debates at the federal, state and local levels. Many of our members have been leaders in wetland restoration and preservation projects, storm water discharge control and management, and pollution prevention for land development across the country.

NAHB is made up of small business people, with over half of our members building fewer than 10 homes per year and close to 75 percent of our members building 25 or fewer homes. These are truly small business people. However, collectively, they play a significant role in our nation's economy. The investment in fixed residential structures, in real dollars, is equal to 4.3 percent of our nation's GDP. When you include spending on new appliances, carpets and home furnishings, the gross housing output is greater than 7 percent of the GDP.

NAHB recognizes the importance of the quality of the nation's water resources and value of the nation's wetlands, and we want to protect wetlands and the environment. Whereas the current water quality programs are generally effective in meeting the goals of the Clean Water Act, the current system for protecting wetlands, however, does not work. The wetlands program lacks balance between needed protection of the environment, and needed economic development and jobs in our local communities. Furthermore, the current system is a bureaucratic nightmare full of overlapping jurisdictions, costly delays, burdensome confusion and inefficient regulations.

WETLANDS

To address the failures of the wetlands regulatory program, shift away from the status quo, and balance the needs of wetland protection and economic development in our local communities, NAHB recommends Congress adopt a comprehensive wetland reform package. Although the Substitute purports to put an end to the current inefficiencies, in fact, it will only serve to perpetuate the status quo. The Proposal, however, achieves meaningful reform of the nation's wetlands regulatory program by including the following important provisions:

1) A definition of a Federal jurisdictional wetland for purposes of Federal regulatory protection under the Clean Water Act, which excludes from regulation all land areas which fail to meet a strict three parameter definition of wetlands.

2) A focus on wetlands protection by expanding the scope of regulated activities, and by classifying all wetlands into three categories and providing regulatory protection based on function and value.

3) Streamlining provisions which would amend the current regulatory program by transferring all wetland permit authority to a single federal agency, improving efforts for state assumption of the permit program, establishing concrete, enforceable deadlines for permit decisions, implementing an administrative appeals program, instituting a wetland mapping program and requiring that all program regulations and guidelines be subject to public notice and comment.

4) An effective wetland mitigation banking system to help achieve the goal of no-overall-net loss of wetlands and, ultimately, to help increase the nation's wetlands resources.

5) A compensation plan for landowners whose property value is significantly diminished due to the existence of a jurisdictional wetland.

DEFINE WETLANDS

In 1972, when Congress passed the Federal Water Pollution Control Act, the word "wetland" was not used nor were such areas included under Federal jurisdiction. Instead, Congress defined jurisdictional waters as "waters of the United States." In 1977, in response to *NRDC v. Ruckelshaus*, Congress recognized that it had not provided clear direction regarding the definition of jurisdictional lands. In 1977 Clean Water Act amendments Congress simply reaffirmed that it did not intend to use the "navigability" definition from the 1899 Rivers and Harbors Act, yet no legislative definition of jurisdictional "wetlands" was included. Increasingly, the agencies began to expand jurisdiction under the Act for wetlands regulation. These jurisdictional claims have escalated to include even those areas that do not have standing water at any time during the year and do not exhibit wetlands characteristics. A national policy that defines what types of land should be considered wetlands needs to be established under the federal wetlands program.

By defining wetlands, we are not asking Congress to consider every specific criteria that must be met for hydrophytic vegetation, hydric soils and wetland hydrology. However, we believe it is necessary for Congress to establish the definition of what types of lands should be regulated under the Clean Water Act. In this regard, Congress needs to begin with how "wet" a wetland should be to be regulated under the Act.

Some argue that the determination of what is considered a wetland is not a policy decision, but rather is a decision that should be based purely on science. We believe the definition of a wetland cannot be legitimatized anywhere but Congress. Congress acknowledged that such policy must be backed by science when in 1993 it commissioned the National Academy of Sciences (the Academy) to perform a study of wetlands. That study called for the

identification and characterization in determining of the jurisdictional reach of the Clean Water Act as a means of defining risk, which is ultimately a policy decision. As the progress of the Academy has been monitored, it has become clear that it will offer no easy answer on the definition of wetlands. The Academy's report will only restate what is known and therefore will reiterate the need for Congress to decide the issue.

The issue of whether additional scientific or policy criteria are needed was addressed by the Supreme Court in the Avoyelles Sportsmen League v. Alexander case when the court stated, *"It is quite obvious from this history that the term 'waters of the United States' and 'wetlands' are not terms of pure science. They are not meant to be. "Wetlands" is a jurisdictional term, the product of the legislative process...Thus the 'wetlands' definition does not answer a scientific need, it satisfies a practical, a social, a political need, the need to define the scope of Section 404 jurisdiction."*

Congress made a policy decision in 1972 to exclude ground water from its definition of waters of the U.S. and recently reaffirmed its policy decision to exempt prior converted croplands from the federal wetlands regulatory process. The determination of a definition of jurisdictional wetlands is a policy decision that must be legitimatized by Congress, not scientists. Congress must decide what it wants to be the limits of federal regulatory jurisdiction.

The Substitute seeks to address the definitional problem by expanding and codifying the definition of wetlands that has been in use by both EPA and the Corps since 1977. The definition reads,

> *"those areas that are inundated or saturated by surface water or groundwater at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted to life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, fens, potholes, playa lakes, vernal pools and similar areas."*

Legislating this definition will not only codify the regulatory definition that has been in use for more than 15 years, but it will also effectively expand the scope of regulation to include areas that may be dry for as much as 95% of the growing season. This definition will not resolve the debate over what wetlands are deemed jurisdictional under the Section 404 program. Further, it does not specify a duration of saturation, require the presence of obligate wetland species, nor require on site verification of all three wetland parameters (wetland hydrology, hydrophytic vegetation and hydric soils). The lack of deference paid to these issues will further perpetuate the real-world confusion and return the status quo.

NAHB believes that a Congressionally-approved definition should require that all lands subject to Federal jurisdiction should have independent verification of all three parameters. It should also require the presence of surface water for 21 or more consecutive days during the growing season. These two changes would return the regulatory program to regulating the swamps, marshes and bogs which are vital to the environment.

PROTECT MOST VALUABLE WETLANDS THROUGH CLASSIFICATION

Historically, section 404 has regulated only one limited class of activities -- the discharge of dredged or fill materials from a point source. Activities associated with home construction generally are included in this class of activities, if undertaken on land considered a jurisdictional wetland.

The limited scope of the program can be explained by Congress' intention that the 1972 Clean Water Act be a pollution control program from point sources and not a land use control or wetland regulatory permit program. Furthermore, it is clear Congress did not mean to regulate activities in jurisdictional wetlands but rather the sources of pollution. In the legislative history of the Act, the Congressional Research Service wrote that Congress focused on the fact that the dredged soil resulting from the creation and maintenance of navigable waterways was often contaminated, and concluded that the common practice of disposing of dredged spoil in other areas of the navigable waters ought to be regulated.

While judicial decisions and citizen suits have attempted to increase the scope of the permit program, the clear statutory language and legislative history have restricted many such efforts. In August 1993, however, the Clinton Administration illegally expanded the scope of regulated activities through the issuance of the Tulloch Rule. Although not given Congressional authority to do so, EPA and the Corps usurped Congress' authority and published the final rule which added mechanized land clearing, ditching and channelization to the list of regulated activities.

The Substitute also provides such an expansion, as it redefines the discharge of dredged or fill material to mean,

> *"any addition of dredged or fill material into navigable waters. The term includes, without limitation the driving of pilings and the addition or redeposit into the navigable waters of dredged or fill materials, including excavated materials, and any material that changes the bottom elevation or configuration of a water body of such addition or redeposit is incidental to any activity, (including draining, mechanized land clearing, ditching, channelization, or other excavation) and has or is likely to have the effect of destroying or degrading any area of the navigable waters."*

Unfortunately, this expansion is not coupled with any balancing provisions, the most important being a method of classification that would provide the highest level of protection for the most valuable wetlands.

NAHB is not categorically opposed to the regulation of excavation and similar activities. In fact, we support it in the context of a more balanced approach. In this regard, NAHB supports provisions of the recently drafted Proposal, which would address this significant problem. The Proposal also includes initiatives which streamline the process and make wetlands regulations more predictable. Adding additional regulated activities alone will not protect our wetland resources. The expanded scope of activities must be part of a larger, comprehensive

reform of Section 404, whereby the program will evolve from a pollution control initiative into a wetland resource management act.

The next step is to classify wetlands by function and value. The current regulatory system treats all wetlands equally, even though different wetlands provide different functions and values. As currently constituted, pristine coastal wetlands and man-made drainage ditches are afforded equal protection under Section 404. Although the agencies have not yet agreed on a classification scheme for assessing the functions and values of wetlands, the permit program currently requires an evaluation by the Corps's District Engineer at the end of the process.

Classification should be the regulatory connection between the level of permit review and a wetland's functions and values. It can serve to streamline the permitting process, preserve valuable resource areas and help to legitimatize the 404 program by mandating sensible, understandable and reasonable compliance standards. Classification would change the attention from delineation of hydrophytes and hydric soils to habitat diversity, flood protection and pollution filtration.

This change in focus can only be achieved, however, if wetlands are considered a managed resource. Wetlands of exceptionally high function and value to a watershed may merit a management strategy of avoidance. A significantly different watershed management strategy is appropriate for abundant and marginally functional wetlands. This approach focuses on the net-environmental benefit to water resources as opposed to no-net loss of wetland permitting. The fact that classification systems are difficult to establish and administer does not change the fundamental reality that we are serious about resource management from an economic, as well as a watershed and environmental protection point-of-view.

NAHB strongly urges Congress to authorize a classification system for Section 404 wetland resource management. This system will increase regulatory efficiency by providing a framework for decisions and actions. The classification system should occur during an advance identification effort or early in the permit process. This will allow the agencies to focus permit, personnel and enforcement allocations on more critical water resources. It will also reduce uncertainty and inspire new public support and compliance in the permit program.

The Substitute makes no attempt to address wetlands by value and function. The Proposal, on the other hand, includes a classification system which the Committee should consider. It would establish a three-tier classification scheme for wetlands based on their functions and values. Type A -- those with the highest values -- would be those determined to be critically significant to the long term conservation of the ecosystem in which they are located. Type B wetlands would be those which provide habitat for a significant population of avian aquatic or wetlands dependent wildlife, or provide other wetlands functions including significant enhancement or protection of water quality, or natural flood control. Type C would be those which serve limited wetlands functions and are of least significant environmental value.

Classification as envisioned the three-tier system is a significant environmental benefit for wetland preservation. Under the existing regulatory system, all wetlands are treated as if equal and are given regulatory protection against the discharge of dredged or fill materials However, under a classification system it is possible to extend a higher level of wetland protection - one that is much closer to the preservation of the land - to the nation's most valuable

water resources.

Classification also improves and targets the regulatory system to the nation's most valuable wetlands. Less time would be spent issuing permits for activities in wetlands of marginal value (Type C) and more time spent assuring that the functions and values of higher quality wetlands are protected. Thus, classification would maximize Federal efficiency by focusing attention on wetlands which are the most valuable for protecting water quality.

NAHB believes that by expanding the scope of activities monitored by the Section 404 program, and by adopting a classification system, the protection of wetlands will be achieved more efficiently and thoroughly.

STREAMLINE PROGRAM ADMINISTRATION

Congress must address the burdensome, confusing, and inefficient overlapping jurisdictions of the program by the Corps and the Environmental Protection Agency.
Vice President Gore and President Clinton have called for "reinventing government" to make it more responsive, providing more efficiency and less red tape. The Section 404 program needs reform to meet these goals. If the Section 404 program is to be more efficient and effective, then it must be given to a single Federal agency to administer. This will not only bring efficiency to the program and reduce costs and confusion to applicants, but it will also place total responsibility and accountability with a single agency. No longer will one federal official be able to point to another and claim that it was not their responsibility to promote wetland protection, research new restoration techniques or undertake aggressive mitigation banking to increase the nation's wetland resources.

The problems of bifurcated agency administration go back to the beginning of the program. The Section 404 permit program originated with the 1972 Clean Water Act, a program intended to control pollution from point source discharges of dredged or fill material. During the debate, Congress avoided the decision of who should be responsible for the program by granting the Corps of Engineers permit issuance authority and the newly-created EPA a significant parallel authority to set permit standards and the power to veto specific permits. No agency was charged with the responsibility to educate the public about the importance of wetlands, research efforts to reduce losses, develop proposals to restore these valuable resources, or establish mitigation banks.

Not only has this bifurcated administrative structure lead to interagency disputes and costly inefficiencies, the requirements of the two agencies are often conflicting, and the results are unpredictable. The task of unraveling the conflicting policies and requirements of the two agencies fall upon the landowner.

NAHB believes the wetlands regulatory program would be greatly improved by Congress giving sole regulatory authority to a single Federal agency. In this regard, we urge Congress to vest not only the <u>authority</u> to regulate wetlands, but also the <u>mission</u> to protect this nation's wetland resources with the Army Corps of Engineers. To achieve such a goal, we support the Proposal, which would grant the Corps sole authority to administer the Section 404 program.

We support giving the Corps this mission because of their extensive network of District Offices and large field staff, two essential components necessary to run a regulatory program involved in thousands of local permit actions each year. In addition, approximately 40 percent of the permits the Corps processes are for Section 404 and Rivers and Harbors Act Section 10 activities. Because Section 10 authority rests with the Corps it makes additional sense to give sole authority for Section 404 to the Corps.

In stark contrast to single agency administration, the Substitute takes the opposite track and attempts to expand the number of agencies involved in the Section 404 program. Specifically, the Substitute allows virtually all federal agencies to get their hands in the permitting process, and grants responsibility to the Soil Conservation Service for all jurisdictional determinations made on agricultural lands. Although the Substitute purports to end the duplication and overlap of efforts, inconsistencies and permitting delays caused by the current structure, the proposed revisions will only serve to exacerbate these problems. The status quo will be maintained.

Another way to streamline and add fairness to the process would be to establish deadlines for permit reviews. NAHB specifically supports the legislative language as drafted in the Proposal, which mandates permit decisions to be made within 180 days from the date the application is filed. The Proposal also includes a method by which the mandate will be enforced. Conversely, processing of permits under the Substitute is designed to occur within 90 days of the date of public notice. Unfortunately, this deadline does not take into account the amount of time it takes for a permit to proceed to the public notice stage, nor the time for a jurisdictional determination to be made. In addition, this mandate is not enforceable as written. If this provision is to be supported, it must state that if a permit decision is not reached within the 90 day time frame, the permit is deemed granted.

Concern has been voiced over this "automatic" granting of permits after the deadline date has passed. The agency may, under the pressure of a deadline, make the decision to simply deny a greater number of permit applications than may otherwise occur under a less stringent time frame. However, from the landowner's perspective, it is preferable to receive a decision in a timely manner, then pursue an appeal if one so chooses. The less palatable alternative would be to have to wait the average of 373 days from the date of Federal Register notice to get a decision, good or bad, and perhaps then have to begin the appeals process. Expeditious permit processing is vital to the economic viability of a development project. Why should the activities of the private sector and of private property owners be held up, causing economic hardships, because of the inefficiencies of government?

It should also be noted that the current regulation sets a goal of permit decisions within 60 days, and since the Substitute provides for a number of exceptions to the 90 day deadline, permit processing could take as long as it does currently. The Substitute fundamentally ignores the procedural delays and uncertainty that already plague the permitting program.

Firm, enforceable deadlines must be established for both the 404 permit process and requests for jurisdictional determinations.

Another concern is that under the current interpretation of the Section 404(b)(1)

guidelines, the key standard in the permitting process is to avoid a regulated activity in a wetland. Permit applicants must provide evidence to convince the Corps that there are no practicable alternative sites available to the applicant and that the applicant has avoided impacts on site to the extent practicable. Unfortunately, neither the Corps nor EPA have issued comprehensive guidance on how to conduct and document an alternative analysis. When builders attempt to show they have considered all the alternatives, they are often forced to resubmit their applications several times in response to hypothetical alternatives that EPA and the Corps require them to consider.

The alternative analysis is the single most confusing, time consuming, and problematic aspect of the current 404 regulatory program. The Substitute does not propose a legislative solution that effectively addresses this problem. It is time to take a serious look at alternative methods of assuring minimal effects to wetlands from development activities, as the alternative analysis is clearly not working.

The best replacement for alternative analysis is to provide maps for use in identifying and classifying wetlands. NAHB supports the mapping provision included in the Proposal which requires the identification, classification and mapping of wetlands within ten years after enactment. The environment would also benefit as the identification of wetlands would, to the fullest extent practicable, become part of property records in the county, parish or borough in which such wetlands are located, and can be used to identify sites for the establishment of parks or nature preserves. Unfortunately, the Substitute contains no provisions for wetlands mapping.

The permitting process involves hundreds of decisions, and each and every decision impacts the cost and design of a project. Often these decisions are reached through consultation and cooperation. However, even with small, relatively simple projects, disagreements arise. Sometimes these disagreements can be resolved. Other times, the applicant is left with few options -- withdraw their application; modify the project and reapply; or if, and only if, your application has been formally acted upon, you have the right to bring suit against the Corps or EPA. **At no time does Section 404 provide an applicant the right to an administrative appeal.** Furthermore, the Clean Water Act precludes pre-enforcement judicial review.

On the other hand, however, if the Corps determines that a property is not a jurisdictional wetland under section 404, a third party may challenge that determination through judicial review. It is inequitable for property owners to have different rights than citizens' groups for challenging jurisdictional determinations - especially on their own property! The appeals process, while intended to protect the applicant, advertently exposes applicants to the scrutiny of all citizens.

NAHB strongly urges the Congress to correct this inefficient, inappropriate process by adopting the fair and equitable administrative appeals procedure contained in the Proposal.

A final means of streamlining the wetland permitting process is to encourage state assumption of the Section 404 program. Since wetland characteristics and functions vary from region to region, and water resources deviate from watershed to watershed, the regulatory permit program should be administered by the states. State assumption could deliver permits faster, offer one stop for state and Federal permits, provide more intimate knowledge of the resource, project and local land use planning, and administer greater long-term oversight. These merits

save time, money and confusion. However, despite the merits and the broad agreement on assumption, Michigan and New Jersey are the only states that have assumed the program.

The number of states assuming the Section 404 program is particularly disappointing when one considers that, while the Federal government is focused on regulatory gridlock, the states have lead in wetland planning, restoration and management. All coastal states provide wetland regulatory protection and management, and 18 inland states have adopted freshwater wetland regulatory statutes. In addition, an estimated 5,000 local governments have adopted wetland protection regulations. Many additional state and local governments are poised to take on larger wetland management roles, particularly if encouraged and provided incentives to do so.

Many suggest states have not assumed the program based on the lack of Federal financial assistance. While this is a significant problem, a number of factors actually contribute to the assumption failure.

High on the list of obstacles is the inflexibility of the EPA. Guidelines issued by EPA are too rigid to allow States adequate leeway to design a permit program tailored to their specific needs. EPA interprets the Clean Water Act program requirements for compatibility to mean that States must change their statutes and regulations so that they are identical to the rigorous Federal program. States should be allowed to design programs that are consistent with Federal program goals even if the program itself is not identical.

States have also objected to EPA's permit-by-permit review and veto. Most states prefer that the EPA defer to the state's expertise regarding state resources, and instead perform annual programmatic reviews. By replacing EPA's individual permit veto with annual reviews, states are better able to achieve their state resource management goals. States have also objected to the constant changes in program policy issues and the lack of state involvement in the regulatory decision-making process. States want a partnership role in consistent, stable program regulations. Unfortunately, the Substitute retains the EPA veto power.

NAHB urges Congress to make state assumption of the Section 404 program more attractive and is pleased that the Substitute seeks to move toward this goal. However, there is concern that it does not authorize specific financial incentives for states to take on the program. The lack of monies being made available coupled with the incremental changes proposed in the Substitute will simply perpetuate the current situation.

The Proposal, on the other hand, outlines provisions which not only encourage the establishment of state programs that address wetlands conservation on an ecosystem or watershed basis, but also establish more flexible criteria to encourage state assumption and give deference to local planning. Furthermore, it removes the authoritative EPA veto that has been such a discouragement to state involvement. NAHB supports this inclusion and urges Congressional support for state assumption.

MITIGATE WETLANDS IMPACTS

The current mitigation process, avoidance, minimization and compensation is inefficient, and, in some cases, counter-productive from an environmental standpoint. This "policy" forces

permit applicants to focus all their efforts and most of their resources on documenting why they cannot avoid the wetland. This may involve developing several different site development plans with varying levels of wetlands disturbance and a breakdown of the cost impacts of each development plan. However, to get to this point the applicant must spend considerable time and large sums of money preparing worthless, multiple site plans or searching for alternative sites even though the property may have been purchased years before the development is planned.

Because there is no formal, comprehensive Federal policy on mitigation, particularly on the role of compensatory mitigation in the Section 404 program, mitigation gets decided on an ad hoc basis. As a result, time and resources are squandered arguing over mitigation requirements. The current case-by-case, site-by-site approach to mitigation also leads to a series of small, unrelated mitigation projects scattered throughout a region. They are often too small and disjointed to maximize wetland benefits, and they sometimes suffer from inadequate monitoring and maintenance.

If this nation is to achieve the goal of no overall net loss of wetlands, or to reach beyond this goal to increasing the nation's wetland base, we must address mitigation efforts. Congress needs to provide the leadership for developing an appropriate mitigation policy that will return this nation to a course of wetland restoration. (See enclosed brochure.)

NAHB supports the mitigation policy included in the Proposal which recognizes that, for mitigation efforts to be successful, all interests must work together. Furthermore, we believe mitigation banking is an essential component of any successful mitigation policy. The Substitute, while recognizing the importance of mitigation, should go further by authorizing the development of mitigation banks in each state. If mitigating the harmful effects of necessary development activities on the nation's waters is, indeed, a central premise of the Federal wetland regulatory programs, the programs must embrace mitigation banking.

The idea of mitigation banking is not new. In fact, the Fish and Wildlife Service has used mitigation banking since the early 1980s to off-set the environmental impacts associated with development projects. However, mitigation banking has not been fully incorporated into the Section 404 program because of the lack of Congressional leadership and EPA's concerns over the scientific uncertainty of wetland creation. NAHB believes that regardless of whether or not wetlands can be created, there is significant opportunity for wetland restoration, enhancement and preservation efforts.

Mitigation banking offers numerous advantages that will increase our wetlands base and improve the values and functions of those wetlands. The chance that wetlands mitigation will succeed is increased by mitigation banking since mitigation must be provided in advance of the loss. Banks consolidate many small isolated mitigation projects into one larger parcel, thereby creating an area that is "more environmentally valuable area that is more efficient and more economical to develop and manage than several scattered sites." [FWS Mitigation Banking, July 1988, p. 2]. Mitigation banking provides an economic incentive for the bank to make the project succeed. In addition, mitigation banks can be strategically located within the local landscape to satisfy the wetlands needs of the affected region and, unlike on-site mitigation projects, bank sites can be selected on the basis of the likelihood of wetlands mitigation efforts actually being successful.

Although the Substitute calls for the development of regulations for the establishment, use, maintenance and oversight of mitigation banks, we believe that this language needs to be stronger in terms of authorizing the development of these banks.

NAHB supports the mitigation banking provisions provided in the Proposal. Its mandates would require the Corps to establish mitigation banks in each state for purposes of compensating the loss and degradation of wetlands functions and values under Section 404. The proposal recognizes that in order for mitigation banking to be embraced and workable, flexibility and discretion must be maintained. In addition, it recognizes that the mechanisms available for mitigation banking should include not only restoration, but also creation, enhancement, and in some cases preservation of wetlands. The development of these banks would be coordinated with the Fish and Wildlife Service and the Governor of each state, while private banks would also be encouraged.

COMPENSATE FOR TAKINGS

The Fifth Amendment to the United States Constitution prohibits the government from "taking" private property for public use without just compensation. In the context of the regulatory arena, the U.S. Supreme Court has defined a taking to be any situation in which a regulation deprives a property owner of all economically viable uses of his land and where the regulation was not substantially related to a legitimate public interest. In July 1992, the U.S. Supreme Court held that regulations denying a property owner of all economically viable use of his or her property require the payment of just compensation without an inquiry into the public interest supporting the regulation. In *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), a builder who purchased two vacant oceanfront lots was prohibited from constructing any permanent structure on them by the Beachfront Management Act. The Supreme Court upheld an award of $1.2 million in just compensation. Since *Lucas* was decided, dozens of cases challenging denial of permits to fill wetlands have been brought. As of January 1994, *Lucas* had been cited in 38 federal court opinions and 68 state court opinions.

The "takings" issue is central to the question of wetland regulation, especially since more than 75 percent of all wetlands are located on private property. Individuals have a right to expect that, if the government is going to severely restrict or prohibit development opportunities, and thus diminish all economic value of their land, they will be compensated for the fair market value of the land. Those arguing the value and importance of wetlands should see the fairness and importance of compensating for their protection.

Some claim this is an unreasonable request because of the government's current budget deficit. The Constitution does not say private property owners will be compensated "unless there is a deficit!" Indeed, how can a price be placed on the principles upon which this country was founded? The Administration "strongly supports private property rights," but their stance on the issue of compensation advocates the continuation of bad habits. Currently, the courts are clogged with suits regarding the regulation of private property. This system is extremely costly and allows only the wealthy to question an action or to protect their private property rights. NAHB strongly believes if private land owners have their land "taken" from them by the Federal government the principles of this government require that they be compensated. The benefits of the government's regulation of wetlands are benefits that all citizens enjoy and the costs of such benefits should be equally shared by all Americans.

Additional arguments are raised proclaiming compensation should not be required because land owners can always take an issue to court. The decision to provide for compensation, however, is a policy matter, not a procedural one. Private land owners whose property is regulated to the point of suffering a substantial diminution of value, although not a constitutional taking, should be compensated.

NAHB does not believe that all land owners of jurisdictional wetlands should be compensated for their property. Assuming a reasonable wetland permitting program, compensation should only be granted when the economic value of the land has been severely restricted due to the denial of a wetland permit or when they unknowingly purchased a "wetland" that could not be used for the purpose for which it was purchased. These are normally areas where the public protection of such wetlands is believed to be greater than the benefits of the proposed project.

The Proposal achieves this goal by allowing property owners whose land has been designated as containing the highest quality wetlands to apply for compensation within two years of their designation as Class A wetlands. Compensation would be provided at fair market value. NAHB supports this provision.

Finally, it is important to note that, regardless of whether a private land owner is able to prove a successful takings claim against the Federal government, the regulatory program is not without costs to the general public. When new schools, hospitals, residential neighborhoods or economic development projects are stopped because of Section 404, jobs are lost, growth is restricted, school and local property tax bases are reduced, and the value of local private property is diminished or totally lost. Although no funds are expended from the U.S. Treasury, many different people pay the price.

This is not to suggest that all proposed activities in wetlands should be approved. Instead, we believe the Federal government must recognize that wetland protection has a price. If private lands are to be taken through the Section 404 regulatory program, private land owners should be compensated. Unreasonable demands should not restrict responsible activities in and around wetlands. There is room for wetland protection and economic development to responsibly exist together.

Congress must rethink the impact of wetlands regulations on private property and who ultimately pays the price. Failure to act will only serve to sustain the static nature of today's regulatory scheme. While NAHB appreciates the reaffirmation of the Fifth Amendment contained in the substitute, we believe that the language should go further in codifying the landowner's right to obtain compensation if the value of his or her land has been significantly diminished.

GROUND WATER

NAHB has grave concerns over the intent of H.R. 3948 to extend Clean Water Act federal regulatory authority to the regulation of ground water. This action represents a major departure from the historic focus of the Clean Water Act, which is the protection of "navigable waters," and the traditional practice of State primacy over the Nation's ground water resources. Although there appears to be an attempt to limit federal authority over ground water, in reality, the bill provides the Environmental Protection Agency (EPA)

unfettered discretion to regulate ground water and/or activities which may discharge water onto the ground or into the ground water. This is a blatant reach to federal land use control. This new authority will extend federal control, through EPA, into the back yards of millions of single family homeowners. Any lot with a septic tank will have the potential of being regulated and controlled by EPA. This goes too far.

The regulation of ground water has traditionally been reserved for the States. The shift of this responsibility to the federal government is inappropriate. Source control programs, such as that proposed in H.R. 3948, tend to focus on sources that present significant risks on a national basis, but may not represent the most important threats at the local level. States are better equipped than the federal government to assess local needs and conditions and to establish programs to comprehensively address resource management issues. In addition, since at least 1984, EPA has provided financial assistance to states for groundwater protection. The redirection of ground water protection to the federal level will deem those expenditures wasteful.

The inclusion of ground water provisions within the Clean Water Act will overlap and conflict with existing ground water protection efforts. EPA has acknowledged in its Ground Water Protection Strategy, published August 1984, that many of its current regulations are inconsistent with regard to a number of issues relating to ground water, including defining the resource to be protected; prescribing the regulatory mechanism to be used; providing for some kind of waiver or variance; and stipulating the approach to monitoring and remedial action. Such additional regulation will only serve to exacerbate the confusion and duplication arising from these already conflicting laws and regulations. Most States already regulate ground water through general water quality standards, ground water classification, monitoring networks and discharge permit programs, and the federal government regulates ground water under several statutes, including the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and the Safe Drinking Water Act (SDWA).

Including the protection of ground water as a goal of the Clean Water Act provides EPA broad authority to develop an expansive national ground water protection program, whereby a host of ground water regulations may be enacted. H.R. 3948 will create a massive new federal regulatory program over ground water. In this manner, the attempt to restrict the regulation to ground water that has a direct hydrologic connection to surface waters will not limit this authority. Because the hydrologic cycle ostensibly connects all water resources to one another, EPA can argue that any discharge onto the ground or into ground water will ultimately impact some surface waters.

The bill attempts to restrict what ground water would be subject to such regulations by including language which limits the application to only discharges where 1) there is a direct hydrologic connection between the ground waters and surface waters in the proximity of the discharges; 2) the discharged pollutant appears in the surface waters in greater than a de minimis amount; 3) such pollutant is able to reach surface waters; and 4) no other federal law directly addresses the activity resulting in the discharge. However, the lack of clear definitions of terms such as "proximity" and "de minimis," coupled with EPA's retention of expansive discretion over what the agency may choose to regulate, deems the proposed limitations meaningless.

Additionally, the inclusion of provisions which apply to discharges onto the ground or into the ground water will create coordination problems throughout the existing regulatory program. Rather than streamlining the regulatory process, H.R. 3948 seeks to expand it. This expansion will serve to increase confusion and coordination among existing programs. For example, under the National Pollutant Discharge Elimination System (NPDES) program, EPA-approved Best Management Practices (BMPs) are employed to control the discharge of storm water runoff. Many of the commonly-used practices involve the discharge of storm water into retention/detention areas or infiltration basins. The premise is that the water within the basins will infiltrate into the ground and the earth will act as a natural filter. Under this bill, however, these practices will not be allowed unless permitted by both an NPDES permit and a ground water discharge permit.

Finally, NAHB is extremely concerned that these are the first hearings within the Clean Water Act reauthorization process to address the subject of ground water protection. The issue of ground water protection and its inclusion within the scope of the Clean Water Act authority is an awesome consideration that needs to be thoroughly analyzed. At this late date, NAHB believes there has not enough time to adequately examine and truly understand the ramifications of such an action.

The regulation of ground water within the Clean Water Act, a surface water statute, is duplicative and inappropriate. NAHB urges the Committee to revisit the implications of this inclusion and delete all references to ground water from the proposed legislation.

CITIZEN MONITORING

The enforcement provisions in the current Clean Water Act statute are adequate to monitor compliance with the CWA requirements. Expansion of these practices, as included in H.R. 3948, is unnecessary and will create a system driven by needless litigation, rather than a program focusing on the improvement of our nation's water quality. For the federal government to encourage neighbors to "monitor" and report on neighbors or for employees to "monitor" and report on employers is offensive, and should not be considered, let alone passed, by Congress.

Chairman Mineta's bill seeks to broaden the citizen suit provisions so that such suits may be brought for violations of not only section 404 permits, but also conditions thereof. Allowing the citizen suit provisions to specifically apply to any condition attached to a wetlands permit will only serve to flood the courts with unreasonable, frivolous litigation. Currently, under section 404, it is debatable whether a violation of a permit condition allows "standing" for a citizen to file suit, but this language will eliminate such questions. No growth advocates will undoubtedly utilize such a provision to halt development, citing technicalities that are not environmentally significant and do not need to be in court.

NAHB wholly supports the reasoning behind the citizen suit provision when Congress originally drafted the Federal Water Pollution Control Act (FWPCA). The primary responsibility of enforcement of the FWPCA and later the Clean Water Act should fall on the government. Citizen suits should only be allowed if the government fails to exercise its responsibility. To allow otherwise would permit citizens to interfere with the government's discretion in exercising its proper authority. This is most painfully evident if citizens are

allowed to file suits for past violations, a concept provided for in the bill and vehemently opposed by NAHB.

The late Justice Thurgood Marshall described it best in his landmark decision interpreting the citizen suit provision. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, [484 U.S. 49 (1987)], Justice Marshall wrote, "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." To support his point, Justice Marshall used an example.

> ...Suppose that the Administrator [of EPA] identified a violator of the Act and issued a compliance order under § 309(a). Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably.... We cannot agree that Congress intended such a result.

[Id. at 59-61.]

The ultimate goal of the CWA enforcement provisions is to eliminate the violations of the Act. If the violation no longer exists, NAHB believes that citizens should not be allowed to resurrect such issues through the court system.

Similarly, the bill creates a "bounty hunter" method of justice and practically provides the hunters. H.R. 3948 would allow portions of the fines assessed as criminal penalties to be shared with anyone who contributed information leading to the conviction. The bill also establishes "citizen water quality monitoring groups" to monitor water quality and identify problem areas. Unfortunately, the bill neither specifically restricts these groups from crossing onto private lands, nor does it restrict the use of the data collected by these groups. Such provisions will only serve as an incentive for private citizens, states and/or municipalities to search out violations. In addition, these actions could be potentially funded by federal or state money provided for the monitoring groups. This type of justice is contrary to the American way of life and poses a threat to private property rights.

Finally, due to the increasing regularity with which the federal government has been turning its administrative authority over to State and local entities, the National Association of Home Builders has a further interest in limiting legal challenges in cases where a State or locality has failed to comply with a federal mandate to enact or enforce a federal law. In those instances, the only legal recourse should be against the State or locality, not any individual who does not have the ability to comply with a nonexistent regulation.

The Proposal contains none of these questionable and offensive provisions to expand the enforcement provisions of the CWA, create citizen monitoring groups or create bounty hunters through fine-sharing programs. NAHB supports the approach of maintaining current enforcement practices and trying to avoid the creation of needless litigation opportunities

STORM WATER

Currently, permits are not required for storm water discharges from construction sites disturbing less than five acres. Based on the lack of statutory authority, the exemption was challenged in the courts and has been remanded back to the Environmental Protection Agency for further rulemaking. NAHB urges Congress to retain the under five acres exemption through statutory language.

Phase I of the NPDES program was designed to require permits for all discharges which contribute to a violation of a water quality standards or are a significant contributor of pollutants to waters of the United States. In promulgating the September 9, 1992 final general permit for construction activities, EPA exempted all discharges from construction sites where the total land disturbance was less than five acres, as the Agency determined such discharges to be insignificant. Further, in the 1990 National Water Quality Inventory Report (305(b) Report), the EPA notes that nationally, discharges from construction activities contribute less than 5% of the use impairment to lakes and rivers. Storm water sampling programs, including those carried out by NAHB and EPA, have shown that the only significant pollutant in construction site runoff is sediment, concentrations of which can be dramatically reduced through the use of BMPs.

Due to the minor impacts associated with storm water discharges from construction sites and the corrective nature of runoff from these sites, storm water discharges from construction sites which disturb less than five acres of land area should be exempt from the permitting requirement. This action would enable EPA and the State authorities to focus efforts on the bigger contributors of pollution, including small municipalities and non-point sources, and concentrate further on compliance issues. Further, EPA's designation as the expert on water quality must be given credence, and its determination of the insignificance of pollutants from small construction sites should be retained.

H.R. 3948 attempts to alleviate the duplicity between federal, state and local permitting requirements by exempting from federal requirements those construction sites under five acres which are already subject to state or local regulation. The Proposal, however, recognizes the nominal contribution of pollutants from these small construction sites. NAHB supports the Proposal's language to fully exempt under five acre construction sites from federal storm water discharge permitting requirements.

CONCLUSION

Over the past several years, there has been a growing concern over well-intentioned but inefficient and duplicative environmental legislation. The contents of H.R. 3948 and the Substitute Amendment continue the recent traditions of imposing more and more mandates on state and local governments without providing adequate funding for compliance. The burden of these "unfunded mandates" could be minimized by streamlining the procedures called for in every area from wetlands to storm water. Too often the cost of environmental compliance dictated to state and local governments from the federal government is passed on to the housing consumer. "Impact" fees are the end result. In some cases they exceed $20,000 per house. Not only is this wrong, it contributes to the housing affordability crisis in this country. Congress should be aware of these costs. Risk assessment and cost/benefit analysis

should be undertaken to determine the true cost and time benefits that environmental regulations have on our society.

To this end, the Proposal includes a provision to address the unfunded mandates issue. Under the Proposal, EPA is required, prior to issuing any proposed or final regulation, to provide an analysis of the costs of implementation, including an estimate of the adequacy of federal financial assistance. If estimated financial assistance needed to implement and comply with the federal mandates is less than 90% of estimated costs, EPA must report to Congress on the reasons for and the consequences of such shortfall.

The National Association of Home Builders strongly advocates the reauthorization of the Clean Water Act this year. However, that enactment must be contingent upon the development of sound, well-formulated policy decisions, a cost-effective administrative procedure, and the protection of private property rights.

The current implementation of the Clean Water Act is resulting in job loss, missed economic development opportunities, threatened tax assessments and rising housing costs. It is time Congress reform this Nation's Clean Water law so that the unacceptable status quo can come to an end, and an era of a more balanced, reasonable approach to protecting our natural resources can begin.

WETLAND REGULATION IN THE REAL WORLD

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WETLAND REGULATION IN THE REAL WORLD

February 1994

EXECUTIVE SUMMARY

Wetlands policy discussions in recent years have resounded with frequent incantations of two important "statistics" -- first, that the Nation is losing 290,000 acres of wetlands annually, and second, that only five percent of federal wetlands permit applications are ultimately denied. The wetlands loss figure has been invoked to justify the need for stringent wetlands regulation, while the five percent denial rate has been used to counter criticism by property owners that the permit process is slow and cumbersome. Because these "statistics" have been widely accepted, the consensus that seemed to emerge in the 1980's was that whatever inconvenience was suffered by permit applicants was more than justified by the environmental gains that resulted from rigorous federal wetlands regulation.

We initially undertook this study because, based on our years of laboring in the wetlands vineyards, working on wetlands matters all over the country, these numbers did not make sense. What we found was that for property owners who require individual permits (as opposed to nationwide permits) under Section 404 of the Clean Water Act for projects on typical construction sites that contain areas deemed to be wetlands, the federal regulatory program is not working. In reviewing Corps of Engineers records for 410 individual permit applications on which the Corps completed action in 1992 as well as five years of statistics compiled by Corps headquarters, we found, among other things, that:

- It took the average applicant 373 days to get through the individual permit process;
- 93 percent of the individual permit applications exceeded the 60-day standard for "evaluation time" specified in Corps regulations;

- 63 percent of the individual applications decided in 1992 and 56 percent of applications decided between 1988 and 1993 ended up being withdrawn by either the applicant or the Corps;
- One fourth of the 410 individual applications we reviewed from 1992 involved impacts to less than 1/4 acre of wetlands; just under half of the 1992 applications involved impacts of less than one acre; and
- During fiscal year 1993, the total acreage of wetlands impacts authorized through the Corps permitting program (including nationwide and regional general permits as well as individual permits) was 11,600 acres for which the Corps required 15,200 acres of mitigation.

We came away having learned three important lessons. First, those who criticize the 404 program for excessive delays in the permitting process are not just crying wolf; it takes the average applicant with a wetlands project a long time to get a permit decision. This fact tends to get minimized in the Corps' permitting statistics, which lump together a variety of different types of permits. Furthermore, the Corps' statistics focus on its own period of primary involvement in the permitting process, i.e., the Corps' "evaluation time," which runs from the date an application is considered "complete" (and permit processing theoretically begins) until the date of the permit decision or withdrawal of the application.

This study, on the other hand, examines processing times from the perspective of the applicant, for whom the formal process begins when the application is submitted and ends when the permit is denied, the application is withdrawn, or the applicant has in hand a signed permit and can move forward with the project. Thus, our study includes additional stretches of the permitting landscape that an applicant must traverse to obtain a permit -- in particular, the periods at the beginning of the process (trying to make the application "complete") and at the end (waiting for the signed permit and possibly negotiating over permit conditions).

Even so, our study still underestimates the time it takes to obtain a permit decision. Our study begins with the submission of a permit application. However, the process for the applicant typically begins well before that. The applicant must obtain a delineation of the wetlands on site

and prepare the permit application and supporting materials, which can be extensive. There are often "pre-application meetings" with the Corps. All of this represents real time (and money) devoted to obtaining a permit. However, this time period was impossible for us to quantify based on available data. The 373-day average therefore does not include this "pre-application" time period. Nonetheless, such pre-application activities can consume several months or even years.

The second lesson we learned is that it is misleading to minimize problems with the permitting program by saying that only five percent of permits are denied when well over half of all individual permit applications are withdrawn. The effective denial rate is obviously much higher than the formal denial rate, which demonstrates the truth of what every regulator and every applicant knows instinctively: delay is the moral equivalent of denial.

The third lesson concerns the assertions about 290,000 acres of annual wetlands loss. The figures presented in Appendix A demonstrate that this number is seriously outdated and no longer reliable; simply put, it is much too high. Moreover, the Section 404 program accounts for only a small portion of wetlands impacts and, based on the data we have reviewed, appears to require more by way of compensation than it authorizes as impacts.

Aside from these permitting and acreage trends, the study revealed some interesting individual cases. The largest permit in our 1992 sample went to the U.S. Fish and Wildlife Service to clear over 800 acres of pocosin wetland forest. Fish and Wildlife's permit -- which was, for 600 acres, an after-the-fact permit (meaning Fish and Wildlife had done the work before it applied for the permit) -- sailed through, requiring only 160 days from public notice to decision, and the Corps did not require any mitigation. In contrast, the second largest permit we reviewed was for the flooding of 319 acres of wetlands for a county water supply project. The county waited over a year after the public notice for its permit and the Corps required 764 acres of mitigation (177 acres of restoration, 515 acres of preservation, and 72 acres of enhancement) and a $175,000 contribution for a nature center and boardwalk. The smallest application involved 26 square feet of wetland impacts (about half the size of a ping-pong table) for residential construction; the application was withdrawn after 450 days. A town in Rhode Island waited almost two years for a permit to disturb 0.009 acres of wetlands for a mosquito control project.

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To be fair, it is important to note that these figures are not representative of the Corps' overall regulatory program. Under its various permitting authorities (primarily Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act), the Corps authorizes approximately 80,000 activities a year through its nationwide and regional general permit programs, apparently without much difficulty. In addition, individual applications for piers and docks and other water-dependent activities appear to be handled in due course. Overall, the Corps processes about 90 percent of all requests for regulatory authorization (85 percent of which are authorized under general permits) within 60 days of determining that the request for authorization is complete.

The troubles appear when an individual permit is required and the Corps has to apply a statute and implementing regulations that are designed for coastal waters, rivers, and lakes and their watery fringes to road projects and housing construction on routine development sites that happen to contain small areas that qualify as "wetlands" or "waters" under today's definitions of those terms. Further trouble looms when policies such as "mitigation sequencing" that are designed for nationally important aquatic areas are applied to such "wetlands." For example, the regulations require all applicants, regardless of the size or importance of the wetland, to establish that they have no "practicable alternatives" to locating their projects in waters of the United States. Under the "mitigation sequencing" policy, the applicant cannot offer full compensatory mitigation until the Corps is satisfied that the applicant has no "practicable alternatives." This makes sense when it is used to encourage houses, restaurants, and the like to move away from fragile shoreline sites and up the slope to upland sites. But it does not make sense or produce meaningful environmental benefits when applied to a 50-acre upland site that has scattered depressional areas and drainage swales totaling an acre of "waters of the United States."

The effects of this regulatory disconnect are compounded by statutory and regulatory policies requiring the Corps -- for each individual permit it evaluates -- to "consult" with the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, state wildlife agencies and water quality authorities, and, in many cases, with state and federal historic preservation and coastal management officials. The operative principle seems to be "why settle for one agency when you can get a dozen." The result is a lot of

process, with tremendous transaction costs for the government as well as the applicants. The question for policymakers is whether these costs, ultimately borne by all of us, are justified by the environmental results.

WETLAND REGULATION IN THE REAL WORLD

February 1994

1.0 BACKGROUND.

1.1 Administrative Agencies. Section 404(a) of the Clean Water Act, first enacted in 1972, authorizes the U.S. Army Corps of Engineers ("Corps") to issue permits for the discharge of dredged or fill material into "navigable waters at specified disposal sites." Section 404(b) requires the U.S. Environmental Protection Agency ("EPA"), "in conjunction with" the Corps, to promulgate environmental guidelines which control the Corps' permitting decisions. Section 404(c) authorizes EPA to veto a permit even if the Corps has found it to be in compliance with the guidelines. Under a 1979 Attorney General's opinion, EPA has the final authority on determining the extent of "navigable waters." Memoranda of Agreement adopted pursuant to Section 404(q) allow EPA, the U.S. Fish and Wildlife Service ("FWS"), and the National Marine Fisheries Service ("NMFS") to request elevation of certain permit decisions to higher authority within the Corps. Section 401 prohibits the Corps from issuing a Section 404 permit unless the state has issued a water quality certification or waived its right to do so.

1.2 Federal Jurisdiction. The Act defines "navigable waters" as "waters of the United States, including the territorial seas." Corps and EPA regulations define "waters of the United States" to include wetlands. The agencies claim jurisdiction over all areas that qualify as wetlands under the Corps' 1987 Wetlands Delineation Manual or that the agencies deem to be "other waters," as long as the wetlands or other waters have the potential to affect interstate commerce. Isolated wetlands are deemed to have the requisite potential to affect commerce because a migratory bird, traveling across state lines, could land on them. Under the 1987 manual an area may be deemed a wetland even if it never has water at the ground surface.[1]

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[1] See letter dated February 2, 1994, from Lt. Col. R.O. Buck, Asst. Dir. of Civil Works for the U.S. Army Corps of Engineers to Congressman Owen Pickett, responding to Mr. Pickett's inquiry concerning the Corps' wetland delineation methodology: "You are correct that [under the Corps' delineation methodology] an area may be considered 'saturated to the surface' even though 'the top plane of the soil' is dry."

There are no minimum size requirements for an area to be deemed a water of the United States; nor does the Act exempt man-made wetlands or waters. In sum, any area that meets the physical characteristics of the 1987 manual, no matter how small or how isolated, is regarded by the federal government as a "water of the United States." Except for limited exemptions, these areas may not be altered without first obtaining a permit from the Corps.

1.3 Corps Organizational Structure. The Corps' regulatory program is run through 38 district offices[2/], each of which is responsible for a specific geographical area. The districts report to 11 regional division offices which, in turn, report to Corps headquarters at the Chief of Engineers' office in Washington.

1.4 General Permits. The Act authorizes the Corps to issue two different types of permits -- general permits and individual permits. General permits are issued nationwide (or for specific districts or regions) for activities that have only minimal individual and cumulative environmental impacts (e.g., minor road crossings, utility line backfills, bank stabilization projects). The Corps has published 36 nationwide general permits (known as "NWPs") in the Federal Register. These permits authorize certain minor activities, provided that the person carrying out the activity complies with the conditions set forth in the Register. The district and division offices may also issue general permits covering all or a portion of their geographic areas; these are known as regional general permits. Many (but not all) general permits require advance notification to the Corps; all involving a Section 404 discharge require state water quality certification, meaning that the state must be satisfied that the activity will comply with the state's water quality standards. In addition, the Corps' district offices are authorized to require an individual permit for any activity that would otherwise qualify for a general permit if the district office finds that the proposed activity would have "more than minimal individual or cumulative adverse environmental effects." As discussed more fully in Section 5.4, more than 90 percent of Corps permitting actions under Section 404 involve activities covered by nationwide or regional general permits.

2/ This figure (38) includes the New England Division office, which, because it has no district offices, carries out the functions of a district office.

1.5 Individual Permits. Activities that involve more than minimal impacts or that are not covered by a general permit may only be authorized by individual permits. The individual permit process requires the Corps to evaluate an applicant's specific proposal. Most individual permits are issued through a "standard" process, which requires a public notice and very detailed scrutiny of the proposed project. A few individual permits are issued as "Letters of Permission" (known as "LOPs") which do not require a site-specific public notice.

1.6 The Section 404 Individual Permit Application Process. Before submitting an individual application for a permit to alter wetlands, a person is entitled, and for large projects is encouraged, to meet with the Corps for a "pre-application consultation." In addition, the applicant will generally have to delineate the wetlands on site. Once an application is prepared and formally submitted, the regulations require the Corps to notify the applicant of any deficiencies in the application within 15 days. After the applicant has supplied all required information, the Corps will determine that the application is "complete." Within 15 days of the Corps' determination that the application is complete, the Corps is required to issue a public notice of the application to interested governmental agencies (in particular, EPA, FWS, NMFS and the state environmental agencies (collectively "the resource agencies")) and members of the public. The public notice requests that any comments be provided within a specified period of time, usually 30 days. Members of the public may request a public hearing during the public comment period. After the comment period is closed, the applicant responds to agency and public comments, in writing and/or through meetings with the Corps and the resource agencies. In due course, the Corps issues a decision document and, finally, if the decision is to authorize a project, a signed permit. The Corps may attach conditions to the permit; such conditions are often the subject of discussions and negotiation between the applicant and the Corps before the applicant accepts the permit.

1.7 Time Requirements For Processing Individual Applications. There are no enforceable deadlines for the processing of an individual Section 404 application. Section 404(q) expresses the desire of Congress that the Corps render its decision on the permit application no more than 90 days after issuing the public notice. Corps regulations call for a decision 60 days after complete application (as opposed to public notice) unless precluded by such things as the

need for an Environmental Impact Statement ("EIS"), delay in obtaining state water quality certification, or endangered species consultation. The Clinton Administration's wetlands initiative of August 24, 1993 directs the Corps to adopt regulations prescribing a time limit of 90 days from public notice to decision unless precluded by the same factors.

1.8 Water Dependency. The applicable regulations categorize proposed activities as "water-dependent" and "nonwater-dependent." Water-dependent activities include the construction of docks and wharves and the like; nonwater-dependent activities include the construction of housing, roads, and industrial and commercial projects. The basic policy of the regulations is to steer nonwater-dependent activities away from wetlands whenever possible. Thus, the regulations have established a presumption that nonwater-dependent activities can be located on an upland site; a permit cannot be issued for a nonwater-dependent project unless the applicant can establish that it is not practicable for him to reconfigure his project to avoid on-site wetlands or carry out his project at an alternative upland site.

1.9 Substantive Standards For Individual Permits. The principal substantive issues that must be resolved before the Corps may make an individual permit decision are (1) whether the applicant has a practicable alternative that would allow him to avoid wetland impacts and whether he has minimized any unavoidable impacts, (2) whether the applicant's mitigation proposal adequately compensates for any adverse impacts of his project, (3) whether the project will contribute to significant degradation of the aquatic ecosystem, (4) whether the state is satisfied that the project is consistent with state water quality standards and any applicable coastal zone management plans, and (5) whether the project is contrary to the public interest. According to Corps and EPA policy, the practicable alternative and mitigation issues must be handled according to a process called "sequencing" in which the applicant must establish that he has taken all practicable steps to avoid and minimize adverse impacts before the Corps or the resource agencies will consider the mitigation proposal. Any unavoidable impacts to wetlands must generally be fully compensated for (i.e., no net loss). Applicants typically submit a significant amount of documentation to demonstrate that they have met these standards.

1.10 Possible Outcomes Of Individual Permit Applications. One of five things can happen to an individual Section 404 permit application. It can be:

- Issued as a standard permit (preceded by a site-specific public notice);
- Issued as a letter of permission (preceded by a generic public notice rather than a site-specific public notice);
- Denied with prejudice (meaning that the Corps has rejected the application on the merits);
- Denied without prejudice (meaning that the Corps has rejected the application because of a technicality and that the Corps has not considered the merits); or
- Withdrawn.

1.11 Withdrawals. Applications for individual Section 404 permits are considered "withdrawn" if the applicant formally requests withdrawal or the Corps deems the application withdrawn because the applicant has not responded to the Corps' requests for information. Applications will also be considered "withdrawn" if they are found to qualify for a regional or nationwide general permit or not to require a permit at all, or if the Corps needs to correct a recordkeeping error (e.g., an application counted more than once).

2.0 PURPOSE OF STUDY.

2.1 Controversy. The Section 404 program has engendered substantial controversy in recent years. Applicants complain that the regulations are complex and confusing, that the agencies administering the program make difficult and inconsistent demands, and that the length and cost of the permit process are out of all proportion to the environmental benefits achieved. Defenders of the program have suggested that complaints by applicants have been overblown. In support they often state that the vast majority of applications are granted. Because these claims seemed at odds with the authors' anecdotal experiences in the field, one of the authors undertook a study in 1991 which analyzed permitting statistics compiled at Corps headquarters. That study revealed that, although only 5 percent of individual applications were denied, 50 percent were withdrawn without the Corps reaching a decision. The withdrawal rate was far higher in some district offices -- for example, Seattle (86 percent) and New England (81 percent).[3]

2.2 Recent Claims. Since that study was released in 1991, program defenders have continued to cite statistics which purport to show that the program is not unduly burdensome. For example, a wetlands fact sheet issued by EPA in March 1993 stated that "Overall, more than 95 percent of all projects are authorized."[4] Likewise, an August 24, 1993 news release issued by the National Wildlife Federation stated that "Nationwide, more than 95 percent of the applications for Section 404 permits are granted." These figures are seriously misleading. They lump together the minimal impact projects covered by general permits which make up 90 percent of activities authorized under Section 404 -- including many activities which do not involve wetlands impacts -- with the few thousand individual permits that do involve wetlands. These figures thereby obscure the permitting experience at the more problematic end of the 404 spectrum -- projects involving individual applications (not general permits) for typical development projects on sites that include wetlands.

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[3] See, Goode, B., Section 404 Statistics from 10/1/88 to 3/31/91, June 17, 1991 (unpublished).

[4] Wetlands Fact Sheet #16 (EPA843-F-93-001p).

2.3 Rate Of Wetlands Loss. Defenders of the program also argue that whatever costs are imposed on applicants (and through them on society at large) are well worth it if the result is to halt the rapid loss of wetlands they claim is occurring. In support, they state that 290,000 acres of wetlands are lost each year, citing figures compiled by the Fish and Wildlife Service between the mid-1970's and the mid-1980's and reported in 1991.[5]

Our experience with the Section 404 regulatory program and other federal programs affecting wetlands suggested that these figures do not accurately reflect current wetlands losses or the impact of the Section 404 program on any such losses. In the first place, many wetland losses are attributable to natural changes -- for example, thousands of acres of Louisiana's coastal marshes disappear into the Gulf of Mexico each year. In addition, FWS' 1991 study reported that 54 percent of the wetlands loss during the mid-1970's to mid-1980's study period was attributable to agricultural conversions. Congress enacted the Swampbuster program in 1985, which has significantly reduced the rate of wetlands conversion to agricultural uses. Likewise, a study by the U.S. Soil Conservation Service based on 1987 and 1991 field data estimated the annual total loss of wetlands on nonfederal "rural" lands at 108,000 acres a year[6]. The SCS study did not calculate wetlands gains and therefore did not report a net loss or gain figure. Also much of the reported "loss" was actually change of ownership from non-federal to federal lands, not loss of wetlands per se.[7] With respect to wetlands gains, Federal agencies reported to the White House Task Force on Wetlands that their programs, during Fiscal Years 1989 through 1992, resulted in the restoration or enhancement of 834,405 acres of wetlands on federal and non-

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[5] Dahl, T.E. and C.E. Johnson, Status and Trends of Wetlands In the Conterminous United States, Mid-1970s to Mid-1980s, U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C., 1991.

[6] USDA SCS, 1991 Update of National Resources Inventory, Wetlands Data For Non Federal Rural Lands, Iowa State University Statistical Laboratory.

[7] Cabbage, F.W. and C.H. Flather, Forested Wetland Area and Distribution, Journal of Forestry, May 1993, p. 37.

federal land.[8] So even if the 290,000 acre figure was once accurate, it has been overtaken by changed circumstances. A more thorough discussion of the national statistics on wetland losses and gains is found in Appendix A.

2.4 Purpose. The purposes of this study, then, are (1) to follow up the 1991 study of Corps headquarters' statistics, (2) to expand it by examining Corps records on individual applications for projects on development sites that include areas that qualify as wetlands, and (3) to examine national figures on wetland losses and gains. In particular, our goal was to determine how long it takes for the Corps to act on an individual permit application (be it issuance, denial or withdrawal) for typical development projects involving wetland impacts; how many acres of wetlands are lost through activities permitted by the Corps and how many acres of mitigation are required as compensation; what proportion of individual permit actions end in permit issuance, denial and withdrawal; and the reasons for withdrawals.

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[8] A National Program for Wetlands Restoration and Creation, Report of the Interagency Committee on Wetlands Restoration and Creation to the Policy Coordinating Group, Interagency Task Force on Wetlands, August, 1992.

3.0 SOURCES OF INFORMATION.

3.1 Headquarters Consolidated Quarterly Reports. Each Corps district reports quarterly to Corps headquarters on its conduct of the Corps' regulatory programs. Corps headquarters then consolidates the 38 district reports into a single national report for the quarter. As a sample, the national report for the first quarter of Fiscal Year 1994 is shown at Appendix B.[9] As can be seen, the permitting actions are broken down by regulatory authority - Section 10 of the Rivers and Harbors Act of 1899, Section 103 of the Ocean Dumping Act, Section 404 of the Clean Water Act, and combinations of these authorities. In calendar year 1992, for example, the Corps authorized activities through individual permits as follows:

Table 1

Individual Permits Issued During 1992,
By Authorizing Statute

Authority	Number	Percent
Section 10 (Rivers and Harbors Act of 1899)	4323	50
Section 404	1997	23
Sections 10 and 404	2295	27
Sections 10 and 103 (Ocean Dumping Act)	16	---
Total	8631	100

Source: Corps Headquarters Consolidated Quarterly Reports.

Section 10 permits authorize such things as maintenance dredging or the construction of piers and bulkheads in traditional navigable waters. Section 103 permits likewise involve activities (ocean dumping of dredged material) in traditional navigable waters. Because we were concerned with the permitting experience of applicants whose projects occur outside traditional

[9] The first quarter, Fiscal Year 1994 report was received from Corps headquarters as our report was being finalized and has not been incorporated into any of the data computations. We have included it as Appendix B to both provide the latest quarterly data and to show a sample Corps quarterly report.

navigable waters, we excluded Section 10 and 103 applications from our study. Instead, this study focused on the "Section 404-only" applications because they are more likely to involve typical construction projects (commercial, residential, road construction) on typical development sites (i.e., sites that have areas deemed to be wetlands but which, taken as a whole, appear to the layman to be dry and therefore suitable for development). These are the kinds of sites that have been the source of controversy in the program. Because the quarterly reports do not break out the "target actions" we were interested in -- i.e., individual Section 404 permit applications for typical development activities in areas that include wetlands -- and because we wanted information that the quarterly reports do not provide, we reviewed Corps records of individual permit actions during 1992 that appeared to qualify as "target actions."

3.2 Monthly Lists. Corps regulations require the district offices to "publish monthly a list of permits issued or denied during the previous month."[10/] In addition, many districts report on permit applications that are withdrawn.

3.3. Individual Decision Documents. Corps regulations require the Corps to prepare an individual Statement of Findings/Environmental Assessment (or similar document) for each permit decision it makes. The regulations do not prescribe withdrawal procedures, nor do they require the Corps to prepare an explanation for withdrawals, but many district offices keep records of withdrawals.

3.4 Headquarters Data. Corps headquarters began in Fiscal Year 1993 (begins October 1, 1992) to gather data from the district offices to document the rate of and reason for application withdrawals and to quantify wetlands losses and mitigation requirements attributable to individual and general permit decisions. We obtained the data for the four quarters of FY 1993 (October 1, 1992 - September 30, 1993).

3.5 Other Federal Studies Of Wetlands Loss Rates. We analyzed wetlands studies conducted by the U.S. Fish and Wildlife Service, the Soil Conservation Service, and others. See Appendix A for additional detail.

10/ 33 C.F.R. Section 325.2(a)(8).

4.0 STUDY METHODS.

4.1 Study Period.

4.1.1 National Statistics. For the national statistics portion of the study, we obtained the consolidated quarterly reports from the first quarter of Fiscal Year 1989 (begins October 1, 1988) through the fourth quarter of FY 1993 (ends September 30, 1993), a total of five years.

4.1.2 Target Actions. For the application-specific portion of the study, calendar year 1992 was chosen. We felt that a full year was needed to account for seasonal variations in workload.

4.2 Data Gathering.

4.2.1 National Statistics. Data were gathered in two phases. The first phase was to obtain the consolidated quarterly reports from Corps headquarters covering the period from October 1, 1988 through September 30, 1993. The data taken directly from the consolidated quarterly reports are found in Exhibit 1.

4.2.2 Target Actions. The second phase was to obtain decision documents for specific individual wetland applications decided or withdrawn during 1992. By letter dated February 2, 1993, we requested the monthly lists for all of 1992 from all 38 districts. It took over five months to obtain the lists from all the districts. A number of districts did not provide public notice lists as the regulations call for but were able to provide some type of listing for actions completed during 1992. Many districts were unable to provide lists of withdrawal actions. As the lists came in, we reviewed the lists and attempted to identify "target actions" -- i.e., the cases that involved activities such as construction of roads and residential, commercial and industrial projects on development sites containing areas deemed to be wetlands. In a few instances it was very difficult to decode the lists to find "target actions."

4.3 Case Documents. With the exception of a few districts with a large number of 404 actions, we requested the decision documents for all target actions that could be identified from the lists. The "target actions" were selected based on site and project descriptions, regardless of outcome. In the large 404-load districts, randomly selected target cases were requested. Two districts had no identifiable target actions during 1992. Altogether, we requested a total of 590

action documents from the other 36 districts. Exhibit 2 is a breakdown of the cases requested from each district. The cases requested represented approximately 10 percent of all 404-only individual permit actions taken in 1992. It took over six months to obtain the action documents from 34 districts. Two districts never provided the requested documents. Some districts did not provide all of the cases requested; one provided only four of the 26 requested. A number of the cases turned out to not involve wetland impacts or to contain too little data to be of any use.

In the end, we received decision documents in 498 of the 590 cases we had requested; of these, 410 were determined to be target cases that provided enough data for analysis. The data extracted from these cases are arrayed on Exhibit 3. After we compiled the data, we sent each district a draft of the part of Exhibit 3 that contained the data from that district's decision documents and asked the district officials to review the data for accuracy and completeness. In addition, Corps headquarters sent a draft of Exhibit 3 to each district for verification. The corrections and additional data provided by the districts were incorporated into Exhibit 3 unless obviously incorrect.

5.0 FINDINGS.

5.1 Process Times.

5.1.1 Time Intervals. There are five important dates in the processing of a standard individual Section 404 permit application:

- Original application filed;
- Application deemed complete;
- Public notice issued;
- Decision made; and
- Permit signed.

For the purpose of this study, the first interval, from the original application to the complete application, is known as the lead-in time. The second interval is known as the complete application-to-notice time. The third interval is known as the public notice-to-decision time. The fourth interval, from the decision to the signed permit, is known as the lead-out time. This study examined all four intervals; Corps statistics, in contrast, do not include the lead-in time and the lead-out time because the Corps compiles its statistics for different purposes.

5.1.2 Average Process Times For All Permit Actions. For all target actions in 1992 that provided data for computing time intervals, the average time to process a permit from receipt of the original application to the signing of the decision document, regardless of size, outcome or type of project, was 373 days (does not include the 30-day average lead-out time applicable to issued permits). Average times, broken down by process interval, are shown below.

Table 2

Average Process Times During 1992

Processing Interval	No. of Cases Reporting Days	No. of Days
Lead-in time	59	91
Complete application-to-notice time*	182	30
Public notice-to-decision time*	263	252
Lead-out time	24	30

Source: Individual Decision Documents, 1992.

* A few of the denial actions and many of the withdrawal actions occurred without the Corps ever having issued a public notice.

It is important to emphasize that these process times are for applications for typical construction projects at sites that contain wetlands. They are not representative of the Corps' regulatory program as a whole. The Corps authorizes approximately 80,000 activities a year through its nationwide and regional permit programs under both Section 404 and Section 10. The Corps processes about 90 percent of all requests for authorization (85 percent of which are for projects covered by nationwide and regional general permits) within 60 days of receiving a complete authorization request. Nevertheless, Table 2 demonstrates that the experience is generally very different for applicants seeking individual permits to conduct typical development activities on sites containing wetlands.

Moreover, Table 2 actually understates the time it takes an applicant with a typical development site containing wetlands to obtain a permit decision because it does not reflect any pre-application activities. Before the application is ever filed, the applicant must identify and delineate the wetlands on the site, and prepare the permit application and supporting materials, which can be voluminous. In many cases, the applicant will also have one or more "pre-application meetings" with the Corps to get the Corps' preliminary views on site plans or other

aspects of the project. Thus, an applicant can spend a significant amount of time just getting to the point at which an application can be submitted. Corps records do not contain data that would allow us to calculate this "pre-application" time period and so we were unable to quantify it. Nevertheless, it is very much a fact of life for permit applicants.

5.1.3 Lead-In And Lead-Out Times. Because most decision documents did not include dates for determining lead-in and lead-out times and in order to improve readability, Exhibit 3 includes only the complete application-to-notice and the notice-to-decision times. However, all cases that reported lead-in and lead-out times are listed in Exhibits 4 and 5, respectively.

5.1.4 Complete Application-To-Notice Time. The average time from complete application to public notice was 30 days. This is the only interval that is subject to a statutory deadline. Section 404(a) provides: "Not later than the fifteenth day after the applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection." Of the 182 applications providing this time interval, 45 percent exceeded the 15-day limit.

5.1.5 Complete Application-To-Decision Time. Corps regulations call for a decision on individual permits 60 days after an application is deemed to be complete unless precluded by such things as the need for an EIS, delay in obtaining a state water quality certification, or endangered species consultation. Of the 173 cases that reported both a complete application-to-notice and notice-to-decision time, only 12, or 7 percent, met the 60-day limit. Although we did not review the actions to determine specific causes of delay, we did note that none of the 410 actions reviewed involved an EIS.

5.1.6 Average Process Times, By Outcome. As shown in Table 3 below, average processing times vary depending on outcome.

Table 3

Average Process Time, By Outcome,
Not Including Lead-In and Lead-Out

Outcome	No. of Actions Reporting Outcome	Average Days
Permit issued	220	256
Permit denied without prejudice	27	133
Permit denied with prejudice	27	483
Permit withdrawn	133	390

Source: Individual Decision Documents, 1992.

If the 91-day average lead-in time (from receipt of the original application to the time the application is deemed complete) and the 30-day average lead-out time for issued permits (from signing of the decision document to the signing of the permit) are added, average processing times are as follows.

Table 4

Average Process Times, By Outcome,
From Original Application to Final Corps Action
(Does Not Include Pre-Application Period)

Outcome	No. of Actions Reporting Outcome	Average Days
Permit issued	220	377
Permit denied without prejudice	27	224
Permit denied with prejudice	27	574
Application withdrawn	133	481

Source: Individual Decision Documents, 1992.

5.1.7 Average Process Times, By Size Of Impact. As shown in Table 5 below, average processing times tend to increase with the size of the impacts. Even the smallest impacts, however, take nine months.

Table 5

Average Process Times, By Impact Size, From
Original Application to Decision,
Not Including Lead-Out*

Acreage Impacts	No. of Applications	Average Days
Less than 0.1 acres	45	270
0.1 - 0.24 acres	29	270
0.25 - 0.99 acres	70	363
1.00 - 4.99 acres	80	408
5.00 - 9.99 acres	29	394
10.00 - 99.99 acres	47	499
Over 100 acres	3	373

Source: Individual Decision Documents, 1992.

* Average lead-out time, applicable only to issued permits, was 30 days.

5.1.8 Average Process Times, By Type Of Project. As shown in Table 6 below, average processing times vary depending on the type of project.

Table 6

Average Process Times, By Type of Project,
From Original Application to Decision,
Not Including Lead-out*

Type of Project	No. of Applications	Average Days
Agricultural	28	422
Commercial	57	495
Golf	8	463
Industrial	23	283
Municipal	30	448
Recreational	41	332
Residential	135	336
Road	54	312
Refuge (FWS)/Wildlife	9	286

Source: Individual Decision Documents, 1992.

* Average lead-out time, applicable only to issued permits, was 30 days.

5.2 Acreage of Impact And Mitigation.

5.2.1 Acreage Of Impacts. One of the more surprising findings of the study was the small size of the wetland impacts being subjected to the individual permitting process. For example, although Nationwide Permit 18 authorizes fills up to 0.1 acres of wetlands, 45 of the individual applications (15 percent of all the applications that provided an impact size) were for projects that affected less than 0.1 acres of wetlands. Of these 45 applications, 28 were issued, eight were denied, and nine were withdrawn. One application involving 0.009 acres of wetland impacts associated with a mosquito control project took 705 days from public notice to decision. Only three of the 303 applications reporting a size of impact involved wetland impacts of 100 acres or more. Exhibit 6 lists the 303 applications in increasing order of impact.

Table 7, below, shows the percent distribution by size of wetlands impacts for the 303 application documents that showed a size of fill or other wetland disturbance.

Table 7

Distribution of Applications,
By Size of Wetland Impact

Size of Wetlands Impact	No. of Applications	Percent of Applications
Less than 0.25 acres	74	24
0.25 - 1.0 acres	70	23
1.00 - 5.00 acres	80	26
5.00 - 10.00 acres	29	10
10.00 - 100.00 acres	47	16
Over 100	3	1
Total	303	100

Source: Individual Decision Documents, 1992.

5.2.2 Smallest Impact. The smallest application involved 0.0006 acre of wetlands impacts (26 square feet) associated with a residential project. Twenty-six square feet is about half the size of a ping-pong table. The original application was submitted October 23, 1990; it was withdrawn January 15, 1992, 450 days later.

5.2.3 Largest Impact. The largest application involved a permit issued to the U.S. Fish and Wildlife Service to clear 878 acres of pocosin wetlands for fire breaks on a wildlife refuge and to excavate five acres of wetlands for sand borrow. Six hundred and seventy-eight acres had already been cleared before the application was submitted. Fish and Wildlife's permit was processed from public notice to decision in 160 days. The Corps required no mitigation. The other large project involved a municipal water supply reservoir which would flood 319 acres of wetlands. That permit took 369 days from public notice to decision, and the Corps required as mitigation 177 acres of restoration, 515 acres of preservation, 72 acres of enhancement and a $175,000 contribution for a nature center and boardwalk.

5.2.4 Median Impacts. The median wetland impact size for all 303 applications that showed acres of wetland impacts was 1.1 acres.

5.2.5 Mitigation Requirements Reported In Calendar Year 1992 Individual Decision Documents. Not all the decision documents indicated the types and amounts of mitigation required, but those that did demonstrate that the Corps requires many different kinds of mitigation. Mitigation included creating, enhancing, preserving, restoring, buffering, and purchasing wetlands as well contributing money to conservation groups. Because of the variations in types of impacts and types of mitigation, it was not possible conclusively to compare loss against gain. However, for the 144 applications that provided both an impact acreage and a mitigation acreage, there were 2114 acres impacted and 3865 acres mitigated, or a mitigation-to-impact acreage ratio of 1.8 to 1. If the 1474 acres required as preservation are excluded from the mitigation acreage, the mitigation to impact ratio drops to 1.1 to 1. If the one large wetland clearing permit issued to the U.S. Fish and Wildlife Service -- where no mitigation was required -- is excluded from the total impact acreage and all preservation acreage is excluded from the total mitigation acreage, the mitigation to impact ratio increases to 1.9 to 1.

5.2.6 Mitigation Requirements Reported In Corps Headquarters Data For Fiscal Year 1993. Data gathered by Corps headquarters for the four quarters of FY 1993 (October 1, 1992 - September 30, 1993) indicate that mitigation requirements exceed impacts allowed. During the twelve-month period, applicants requested permits to impact about 14,600 acres of wetlands, and were granted permission to impact about 11,600 acres with about 15,200 acres required as mitigation, a mitigation-to-impact ratio of 1.31 to 1. These figures include individual permits as well as estimated impacts occurring under nationwide and regional general permits that are subject to notice requirements or otherwise come to the Corps' attention (e.g., through joint permitting arrangements with the states). About 1600 acres of wetlands were impacted by unpermitted activities with some 1400 acres restored under enforcement actions. Permitted and enforcement activities combined yield a mitigation-to-impact ratio of 1.26 to 1. The permit figures are summarized in Table 8, below.

Table 8

Acreages of Impacts and Mitigation

Source	Total Acreage of Wetland Impacts	Acreage of Wetland Mitigation	Mitigation-to-Impact Ratio
1992 decision documents for 144 individual applications	2114 acres	2391 acres	1.1:1
Corps data for all permits, FY 1993	11,600 acres	15,200 acres	1.3:1

Source: Individual Decision Documents, 1992; Corps Headquarters Consolidated Quarterly Reports.

5.3 Withdrawals.

5.3.1 Definition. A "withdrawal" is a term used by the Corps to indicate that the processing of an individual permit is terminated without a decision having been made to either issue or deny the permit. Withdrawals occur for a variety of reasons and may be prompted by either the Corps or the applicant.

5.3.2 Overall Withdrawal Rates For The Entire Study Period. Exhibit 1 shows the national figures for withdrawals, issuances, and denials for the study period from October 1, 1988 through September 30, 1993. During that period, Corps headquarters' statistics show that the Corps considered 26,761 individual applications for Section 404-only permits, with the following results:

Table 9

Outcome of Section 404-Only Applications
(October 1, 1988 - September 30, 1993)

Outcome	Number	Percent
Issued	10,499	39
Denied	1,312	5
Withdrawn	14,950	56

Source: Corps Headquarters Consolidated Quarterly Reports

5.3.3 Trend In Withdrawal Rates. Exhibit 7 shows the trend in the proportion of withdrawals to permits issued and denied. Withdrawals first began to exceed issuances in the fourth quarter of FY 1989 (July 1 - September 30, 1989). Since October 1990 (and continuing up to the present), withdrawals have exceeded issuances and denials combined. The timing of this increase in the withdrawal rate suggests that the high rate may be attributable to the formal adoption of "mitigation sequencing" by the Corps and EPA; that policy was adopted in February 1990 through a Memorandum of Agreement between the agencies.

For the last quarter of the study period, July 1 - September 30, 1993, the withdrawal rate was 58 percent (6 percent were denied and 36 percent were issued). The quarterly report for the first quarter of FY 1994 (October 1, 1993 - December 31, 1993), received as this report was being finalized and included as Appendix B, reveals a withdrawal rate of 66 percent (4 percent were denied and 29 percent were issued).

5.3.4 Outcome Of Individual Permit Applications During Calendar Year 1992. As shown in Exhibit 1, Corps headquarters statistics indicate that the outcome of all Section 404-only applications for which Corps processing was completed during calendar year 1992 was as follows:

Table 10

Outcome of Section 404-Only Applications, 1992

Action	Number	Percent
Standard permits issued	1855	30
LOPs issued	142	2
Denials with prejudice	70	1
Denials without prejudice	219	4
Withdrawn	3881	63
Total completed applications	6167	100

Source: Corps Headquarters Consolidated Quarterly Reports.

5.3.5 Reasons For Withdrawal As Reflected In 1992 Individual Application Documents. Exhibit 3 gives the reason for each withdrawal action as reflected in the decision documents obtained for 1992. The documents provided by the Corps districts did not reveal the reason for withdrawal in four of the 133 withdrawal actions reported. The other 129 attributed withdrawals to the following reasons:

Table 11

Reasons For Withdrawal

Reason for Withdrawal	Number	Percent
Withdrawn by Corps because of insufficient information or inadequate response to objections	68	53
Withdrawn by applicant	26	20
Qualified for general permit or exemption	12	9
Moved out of wetlands	9	7
Other*	14	11

Source: Individual Decision Documents, 1992.

* Other withdrawal reasons included: determined not to be wetlands (4); application was for use of a nationwide permit (4); applicant failed to accept permit (3); and enforcement action (3).

5.3.6 Information Requests. The type of information that was requested of applicants but not provided and that therefore led to the Corps' withdrawal of an application included requests for wetland delineation reports, need and alternatives studies, flood level increases and flood storage removal computations, archaeological surveys, mitigation plans, water need data and conservation measures, population growth estimates, and environmental impact studies. In some cases this type of information was requested before the Corps would consider the application to be complete even though Corps regulations do not require some of these types of information (e.g., need and alternative studies and mitigation plans) as part of a complete application.

5.3.7 Withdrawals As Reported In Headquarters Data For All Permitting Authorities. According to data compiled by Corps headquarters for all actions taken under all permitting authorities (i.e., a broader universe than the Section 404 target actions that are the focal point of this study) from October 1, 1992 through June 30, 1993, 4250 applications were withdrawn during the nine-month period. Of these withdrawals, 35 percent were withdrawn by

the applicant, 22 percent became a general permit, 4 percent did not require a permit, and 39 percent were withdrawn by the Corps to correct record-keeping errors.

5.4 Nationwide And Regional General Permits.

5.4.1 Definition. General permits are issued by the Corps for activities having minimal impacts. These permits are issued on a regional basis ("Regional General Permits") or on a national basis ("Nationwide General Permits"). Once issued, individual activities conforming with the terms and conditions of the general permit may proceed without the need to submit an individual application. However, many require advance notification to, and verification by, the Corps.

5.4.2 Proportion Of Activities Authorized By General Permits. General permit figures are only reported for those regional and nationwide permit actions that result in a letter or site visit for verification or other action. Telephone contacts are not included. Even so, as shown in Table 12, the vast majority of Section 404 activities authorized by the Corps between October 1, 1988 and September 30, 1993 were handled by general permits:

Table 12

All Section 404 Activities Authorized,
October 1, 1988 - September 30, 1993

Type of Permit	Number	Percent
Individual	10,499	9
Regional general permits	13,932	12
Nationwide permits	91,739	79

Source: Corps Headquarters Consolidated Quarterly Reports

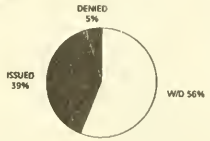
5.4.3 Times For General Permit Authorizations. The average time for the Corps to verify entitlement to a regional general permit (RGP) for the eight quarters where such information was reported was 15 days. The average time for the Corps to verify entitlement to or take other action necessary for use of a nationwide general permit (NWP) for the three quarters where such information was reported was 19 days.

EXHIBIT 1
CORPS HEADQUARTERS' COMPILATION OF DISTRICT OFFICE REPORTS ON SECTION 404-ONLY APPLICATIONS
OCTOBER 1, 1988 - SEPTEMBER 30, 1993

FY QUARTER	1Q89	2Q89	3Q89	4Q89	1Q90	2Q90	3Q90	4Q90	1Q91	2Q91	3Q91	4Q91	1Q92	2Q92	3Q92	4Q92	1Q93	2Q93	3Q93	4Q93	TOTALS
CARRYOVER	2367	2282	2404	2440	2287	2260	2408	2662	2743	2809	3061	3475	3960	3953	3888	3998	3431	3154	3416	2944	
REC'D	902	1140	1148	1099	1141	1314	1428	1487	1600	1540	1739	1859	1689	1492	1423	1383	1071	1363	1219	1388	27425
WITHDRAWN	380	479	478	606	576	564	577	699	856	743	710	761	1063	1046	703	1289	843	621	1196	760	14950
ISSUED (STD)	522	475	554	537	469	470	523	590	569	442	506	497	557	429	517	531	378	391	385	432	9774
ISSUED (LOP)	14	9	18	49	55	66	13	55	38	30	60	53	30	30	23	45	44	27	33	33	725
DEN W/P	71	55	62	60	68	66	61	62	71	73	49	34	18	22	9	23	16	13	16	22	871
DEN WO/P		ABOVE		NUMBERS		ARE		TOTAL		DENIALS		31	28	30	61	61	67	49	61	53	441
PENDING	2282	2404	2440	2287	2260	2408	2662	2743	2809	3061	3475	3958	3953	3888	3998	3431	3154	3416	2944	3032	
REG GP	715	457	395	1119	685	638	638	892	600	506	655	503	525	532	740	996	678	836	607	1217	13932
NWP	3992	3914	4220	4083	3739	3977	4900	4964	3875	4197	5020	4521	3897	3865	5490	5875	4504	4565	5738	6403	91739
DAYS* ISSUED (STD)													69684	52529	66657	98087	59154	63250	55581	53410	518352
AVG TIME	NO												125	122	129	185	156	162	144	124	143
DAYS ISSUED (LOP)			RECORDS										931	932	1256	1592	2921	929	800	1203	10564
AVG TIME					KEPT								31	31	55	35	66	34	24	36	39
DAYS DEN W/P							DURING						3895	4854	3386	4664	7495	3062	4507	6085	37948
AVG TIME									THIS				216	221	376	203	468	236	282	277	285
DAYS DEN WO/P											PERIOD		3305	5623	8219	7498	7145	9422	6427	9775	57414
AVG TIME													118	187	135	123	107	192	105	184	144
DAYS REG GP													6025	10262	12096	14954	11053	9455	11213	12897	87955
AVG TIME													11	19	16	15	16	11	18	11	15
DAYS NWP													71276	74611	NA	NA	NA	93369	NA	NA	239256
AVG TIME													18	19				20			19

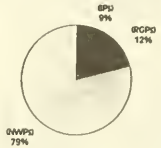
TOTALS FROM 10/1/88 - 9/30/93

WITHDRAWN	(W/D)	14950
ISSUED		10499
DENIED		1312



TOTALS FROM 10/1/88 - 9/30/93

INDIVIDUAL PERMITS	(IPs)	10499
REGIONAL GENERAL PERMITS	(RGPs)	13932
NATIONWIDE PERMITS	(NWPs)	91739



* THE "DAYS" FIGURES SHOWN ABOVE REPRESENT DAYS FROM THE DATE THE APPLICATION IS DEEMED COMPLETE TO THE DATE THE DECISION DOCUMENT IS SIGNED TO EITHER ISSUE OR DENY.

THE QUARTERLY REPORTS DO NOT SHOW THE "DAYS" FOR WITHDRAWN APPLICATIONS, NOR FOR LEAD-IN OR LEAD-OUT TIMES.

IN ADDITION, THE ACTIONS IN THIS EXHIBIT INCLUDE NONWETLAND AND WATER-DEPENDENT ACTIVITIES, WHICH GENERALLY DO NOT INVOLVE THE SAME LEVEL OF REGULATORY REVIEW AS THE "TARGET ACTIONS" SHOWN ON EXHIBITS 5-8.

Source Corps Headquarters Quarterly Reports

Beveridge & Diamond, P.C.

EXHIBIT 2
SECTION 404 PERMIT ACTION DOCUMENTS REQUESTED FROM CORPS DISTRICTS

CORPS DISTRICT	*ISSUED PERMITS*	*WITH-DRAWN*	*DENIED PERMITS*	*TOTAL REQUESTED*	*TOTAL RECEIVED*
ALASKA	10	3	1	14	14
ALBUQUERQUE	0	0	0	0	0
BALTIMORE	9	5	1	15	15
BUFFALO	6	20	0	26	4
CHARLESTON	22	5	0	27	22
CHICAGO	4	5	1	10	10
DETROIT	8	5	3	16	16
FORT WORTH	4	0	0	4	4
GALVESTON	2	5	0	7	7
HONOLULU	4	0	0	4	4
HUNTINGTON	1	0	1	2	2
JACKSONVILLE	17	7	0	24	16
KANSAS CITY	7	7	4	18	18
LITTLE ROCK	5	7	0	12	12
LOUISVILLE	10	2	2	14	13
LOS ANGELES	4	13	6	23	0
MEMPHIS	5	4	1	10	10
MOBILE	6	14	11	31	31
NASHVILLE	0	3	6	9	4
NEW ENGLAND	21	9	5	35	32
NEW ORLEANS	19	0	0	19	19
NEW YORK	0	13	0	13	9
NORFOLK	2	1	5	8	8
OMAHA	15	0	0	15	14
PHILADELPHIA	4	16	0	20	19
PITTSBURGH	8	5	1	14	14
PORTLAND	3	0	1	4	4
ROCK ISLAND	13	3	0	16	14
SACRAMENTO	4	7	1	12	12
SAN FRANCISCO	7	3	0	10	6
SAVANNAH	6	9	4	19	17
SEATTLE	4	41	0	45	40
ST LOUIS	6	0	0	6	0
ST PAUL	11	9	13	33	33
TULSA	0	0	0	0	0
VICKSBURG	6	3	0	9	9
WALLA WALLA	2	3	2	7	7
WILMINGTON	30	5	4	39	39
TOTALS	285	232	73	590	498

EXHIBIT 3

DATA ON 410 SEC. 404 PERMIT ACTIONS COMPLETED IN 1992

SEE FINAL PAGE FOR EXPLANATORY NOTES

STATE	APPLICANT	PROJECT	IMPACT IN ACRES	MITIGATION ACRES	COMPLETE APPLIC(CA)	PUBLIC NOTICE(PN)	DAYS CA-PN	DECISION DATE(D)	DECISION	DAYS PN-D	REMARKS
AK	ARLENE DARLING	INDUSTRIAL	27 FILL	NONE	1/21/92	2/11/92	21	5/18/92	W/D	88	AFTER DISC W/ CORPS ON NEED
AK	CATHERINE FEULNER	RESIDENTIAL	0.1 FILL	NONE	4/24/92	5/8/92	14	7/16/92	ISSUED	69	
AK	CHRIST EVAN LUTH CH	CHURCH PKG	0.55 FILL	NONE	10/18/91	12/19/91	62	3/11/92	ISSUED	83	
AK	CITY FAIRBANKS	MUNICIPAL	24 A/F; 29 NEW	2.1 CREATE	11/16/90	12/18/90	32	12/31/91	DENIED	378	FAILED GUIDELINES; CONTRARY TO PI
AK	CITY OF KOYUK	MUNICIPAL	22.6 FILL	NONE	6/2/92	6/10/92	8	11/3/92	DEN W/O P	146	DUE PROBLEMS GETTING 401 CERT
AK	CLIFFORD PULIS	RESIDENTIAL	0.6 FILL	NONE	5/21/92	7/24/92	64	11/24/92	ISSUED	123	
AK	ISLAND PROP INC	RESIDENTIAL	0.8 FILL (PART A/F)	NONE	8/17/90	10/25/90	38	5/4/92	DENIED	557	FAILED GUIDELINES; CONTRARY TO PI
AK	KEN BLAINE	RECREATIONAL	5.05 FILL	NONE	3/27/92	4/10/92	14	8/24/92	W/D	136	APPLIC WITHDREW DUE OPPOSITION
AK	NANA DEV CORP	COMMERCIAL	0.83 FILL (PART A/F)	NONE	4/8/92	4/23/92	15	7/29/92	ISSUED	97	WAREHOUSE
AK	OUNALASHKA CORP	RESIDENTIAL	0.9 FILL	NONE	4/29/92	5/22/92	23	9/22/92	W/D	123	HIST AND GUIDELINE PROBLEMS
AK	RUSSELL WELBORN	COMMERCIAL	2.56 FILL A/F	NONE	5/27/90	7/8/90	42	12/31/91	PAR DENIAL	541	
AK	UNIV ALASKA	MUNICIPAL	2.9 FILL A/F	NONE	12/13/90	3/29/91	106	3/26/92	ISSUED	363	SCHOOL PARKING
AL	AL DEPT IND REL	INDUSTRIAL				3/1/92		4/23/92	W/D	53	VIOLATION RESOLVED
AL	AL DEPT OF CORR	MUNICIPAL	4.66 FILL	?		9/27/91		8/10/92	ISSUED	318	PRISON
AL	AL HWY DEPT	ROAD	2.5 FILL	?		6/21/92		10/1/92	ISSUED	102	STATE ROAD IMPR
AL	CALHOUN CO ROAD DEPT	ROAD	0.24 FILL A/F	? CREATE		6/22/92		9/30/92	ISSUED	100	COUNTY ROAD
AL	GLENN PARKER	COMMERCIAL	0.18 FILL		11/18/91	12/13/91	25	5/11/92	DENIED	150	FAILED GUIDELINES
AL	JAMES ABERCROMBIE	RESIDENTIAL	0.12 FILL		11/15/91	12/5/91	20	2/14/92	DEN W/O P	71	FAILED TO GET 401. SOME A/F
AL	JIM POTTER & SONS	COMMERCIAL	0.05 FILL		11/27/90	12/11/90	14	12/19/91	W/D	373	BY APPLICANT - STRONG OPPOSITION
AL	L JAMES PARDEN	RESIDENTIAL	0.05 FILL A/F			1/28/92		4/15/92	DEN W/O P	78	HOME SITE. 401 & CZM DENIED
AL	MOBILE AIPORT AUTH	MUNICIPAL	87.8 FILL	143.2 CREATE	5/16/91	5/31/91	15	4/8/92	ISSUED	313	
AL	MOROW COX	RESIDENTIAL						3/11/92	W/D		THIS WAS A PON FOR NWP 18
AL	MULTIPLE (6)	COMMERCIAL	STREAM FILL		10/2/90	10/18/90	16	10/15/92	DENIED	728	NON-COMPL W/ 404 GUIDELINES
AL	QUAKER SO DEV CORP	RESIDENTIAL						9/22/92	W/D		THIS WAS A PON FOR NWP 26
AL	ROBERT BERRY	RESIDENTIAL	0.11 FILL			3/24/92		6/18/92	DEN W/O P	86	FAILED TO GET 401 & CZM
AL	ROMAR CO	COMMERCIAL	1.2 FILL			11/21/91		4/1/92	DEN W/O P	132	SHOPPING CENTER. 401 & CZM DENIED
AL	ROMAR CO	COMMERCIAL	0.33 FILL	0.9 CREATE		8/3/92		10/22/92	ISSUED	80	SHOPPING CENTER
AL	SPOONER PETROLEUM	INDUSTRIAL	0.52 FILL	?		11/10/91		5/27/92	W/D	199	NO REASON GIVEN FOR W/D
AL	STEVE GLOVER	COMMERCIAL	0.4 FILL			5/2/92		5/13/92	W/D	6	W/D BY APPLICANT
AR	DEARING FARMING	RECREATIONAL						4/30/92	W/D		WILDLIFE POND. ADDL INFO NOT PROV
AR	J B CALLOWAY	AGRICULTURAL	4.3 FILL +		7/26/91	8/7/91	12	7/27/92	DENIED	355	LEVEE, FAILED GUIDELINES
AR	JERRY SMITH	AGRICULTURAL						12/18/92	W/D		LTR OF INQUIRY (NO APPLIC); EXEMPT
AR	JOHNNIE STUBBS	AGRICULTURAL	67 FILL		8/28/91			4/10/92	W/D		CATFISH PONDS - MOVED OUT OF WTLNDS
AR	MAJOR MILLIGAN	RECREATIONAL	1.2 FILL; 4.1 FLOOD	5.3 CR; 13 ENH	4/30/91	5/24/91	24	11/22/91	ISSUED	182	25 ACRE LAKE
AR	MELVIN TAYLOR	RECREATIONAL	7 FILL/FLOOD		8/9/91	8/16/91	7	10/29/92	W/D	440	FISH POND. ADDL INFO NOT PROVIDED
AR	MICHAEL NELSON	AGRICULTURAL	3.9 FILL A/F	1.3 RE; 5.9 CR	4/24/91	5/21/91	27	5/29/92	ISSUED	374	LAND LEVELLING FOR CROPS
AR	MIKE FAUCHER	AGRICULTURAL	0.3 FILL A/F		7/20/92	7/22/92	2	3/9/93	DENIED	230	RESTORATION ORDERED
AR	WILBURN WISEMAN	AGRICULTURAL	2 FILL	NONE	11/2/90	8/23/91	294	2/7/92	W/D	168	FAILED TO ACCEPT PERMIT
CA	DELTA COVES	RESIO/COMM						4/6/92	W/D		FAILED TO SUBMIT ALTER AND MITIG INFO
CA	PIERSON HRDWR, W&W	COMMERCIAL	3.71 ALTER	6.65 CREATE +	9/14/87	1/14/88	122	1/21/92	ISSUED	1468	1.45 A/F.
CA	RSC DEVELOPMENT	INDUSTRIAL	0.34 (0.04 A/F)	0.5 CREATE	3/21/91	4/26/91	36	2/4/92	ISSUED	284	
CO	CO DOT	ROAD	5.17 FILL	18 CREATE		2/28/92		6/24/92	ISSUED	117	
CO	D. SAYRE HOYL TRUST	RANCHING	0.6 FILL/1.9 IMP		8/19/91	9/12/91	24	2/11/92	ISSUED	152	POND
CO	DENVER	RECREATIONAL	3.55 FILL	4.97 CRE/ENH	8/26/91	8/28/91	2	2/7/92	ISSUED	163	
CO	ERIC BERG	RESIDENTIAL	0.09 FILL A/F	$5000 TO NAT C	1/3/92	1/10/92	7	3/9/92	ISSUED	59	HOME SITE
CO	GLENN HARSH	RESIDENTIAL	0.06 FILL	TEN BIRD HSES	1/21/92	2/13/92	23	5/1/92	W/D	78	W/D FOLLOWING DISCUSSION WITH US FWS
CO	HALL-IRWIN CONST	MINING	1.45 A/F FILL	2.4 CREATE		3/13/91		3/4/92	ISSUED	357	
CO	INDIAN MEADOWS	GOLF/RESID	23.3 FILL	17 CR, 7 ENH	3/20/90	4/4/90	15	6/1/92	ISSUED	789	
CO	STEVEN MCCASHEN	ROAD	0.05 A/F FILL	0.1 CREATE		9/3/91		2/18/92	ISSUED	169	
CT	CT DOT	ROAD	0.76 FILL	NONE		3/14/91		3/19/92	ISSUED	371	US HIGHWAY WIDENING
CT	LYMAN FARMS	RECREATIONAL	13 FILL, 9 IMPACT	33 ENH;15DPRE	11/22/90	11/28/90	6	8/28/92	ISSUED	639	GOLF COURSE
CT	RONCARI INDUSTRIES	INDUSTRIAL	2.6 CLEAR	2CR,0 SREST	7/2/91	7/3/91	1	9/11/92	ISSUED	436	QUARRY EXPANSION
DE	BAY VISTA, INC	RESIDENTIAL	? CLEAR/FILL/FLOOD	1.1 CRE; 25 REST	5/6/92	5/6/92	0	10/7/92	ISSUED	154	WILDLIFE MGT IMP

Source. Individual Decision Documents, 1992.

Beveridge & Diamond, P.C.

EXHIBIT 3

DATA ON 410 SEC. 404 PERMIT ACTIONS COMPLETED IN 1992

SEE FINAL PAGE FOR EXPLANATORY NOTES

STATE	APPLICANT	PROJECT	IMPACT IN ACRES	MITIGATION ACRES	COMPLETE APPLIC(CA)	PUBLIC NOTICE(PN)	DAYS CA-PN	DECISION DATE(D)	DECISION	DAYS PN-D	REMARKS
DE	DEDOT	ROAD	7 FILL		3/2/92	3/13/92	11		ISSUED		ACCESS ROAD
DE	MARGARET SNOW	ROAD						1/15/93	W/D		FAILED TO PROVIDE INFO
DE	ROBERT MASTEN	RECREATIONAL	FILL AND CLEAR	?	4/23/92	5/6/92	13	8/11/92	ISSUED	97	WILDLIFE PRESERVE
DE	DEDOT	ROAD	10.4 FILL, 0.5 EXC	20 7				9/2/92	W/D		PENDING 401 & RESPONSE TO COMMENTS
FL	DAVID SMITH	RESIDENTIAL	0.15 FILL	NONE	9/5/91	9/12/91	7	4/6/92	ISSUED	207	DRIVEWAY; SEPTIC TANK
FL	DEER POINT COVE	RESIDENTIAL	3.31 FILL, CLEAR, EXC	1 5 CR; 75 PRE	12/18/91	12/24/91	6	11/30/92	ISSUED	342	RESIDENTIAL COMMUNITY
FL	FLDOT	ROAD	5.73 FILL	3 3 ENH	2/18/92	3/23/92	34	5/7/92	ISSUED	45	TOLL PLAZA ENL.
FL	CAIL & HARVEY LANG	RESIDENTIAL	0.46 FILL	0.003 ENHANCE	12/10/91	12/16/91	6	7/13/92	ISSUED	210	SHORELINE STABILIZATION
FL	HUXLEY WALTERS	COMMERCIAL	4.8 FILL	12 CREATE	1/6/92	1/10/92	4	2/24/92	ISSUED	45	COMMERCIAL DEVELOPMENT
FL	LARRY & SHIR BENEDICT	RESIDENTIAL	0.06 FILL	NONE	9/27/91	10/3/91	6	1/14/92	ISSUED	103	HOUSE SITE
FL	LLOYD WILSON	RESIDENTIAL	0 006 FILL	NONE	1/14/92	1/21/92	7	10/30/92	ISSUED	283	HOUSE SITE
FL	LYNNE & WM TAYLOR	RESIDENTIAL	0 46 FILL	0.88 CR; 108PRE	1/10/92	1/22/92	12	8/7/92	DENIED	198	LOT. PARTIAL A/F
FL	LYNNE & WM TAYLOR	RESIDENTIAL	0 25 FILL	1.29 CR, 108PRE	9/22/92	10/14/92	22	11/23/92	ISSUED	40	RESUBMITTAL OF ABOVE DENIAL
FL	MCDONALD PART.	RESIDENTIAL	1.7 FILL	3.5 ENHANCE	10/29/90	12/4/90	36	1/6/92	ISSUED	398	RESIDENTIAL/GOLF COURSE
FL	NEW COVENANT BAP CH	CHURCH	1 1 FILL	4 17 PRESERVE	3/5/92	3/9/92	4	8/3/92	DENIED	147	FAILED GUIDELINES; CONT TO PI
FL	PULTE HOME CORP	RESIDENTIAL	2.85 FILL	0.26 CR; 22.2ENH	6/11/91	6/14/91	3	3/2/92	ISSUED	262	RESIDENTIAL COMMUNITY
FL	VINAI & SAIPIN UJJIN	RESIDENTIAL	0 34 FILL	NONE	6/24/92	7/10/92	16	10/5/92	DENIED	87	FAILED GUIDELINES; CONT TO PI
FL	WALT DISNEY WORLD	RECREATIONAL	9.91 FILL	410 ENHANCE	9/19/91	9/25/91	6	8/17/92	ISSUED	327	ROADS, HOTEL
GA	C R THORNTON	GOLF/RESID						8/9/92	W/D		POND
GA	CHATHAM COUNTY	ROAD	16 FILL	1.6 RES,131 PRE	5/23/90	6/1/90	9	8/27/92	ISSUED	818	JIMMY DELOACH PARKWAY
GA	CITY OF FAYETTVILLE	MUNICIPAL						8/18/92	W/D		WATER SUPP RES. FAILED TO PROV INFO
GA	CITY OF RINCON	ROAD	0 27 FILL	NONE	10/17/90	11/2/90	16	7/20/92	DENIED	626	ACCESS FOR UTIL. LINE FAILED GUIDELINES
GA	COOPER, SUGRUE, ET AL	RESIDENTIAL	0.3 FILL, 28.5 FLOOD		1/9/88	1/25/88	16	8/11/92	DENIED	1660	DAM/LAKE FAILED GUIDELINES
GA	DIXIE RECYCLING	MUNICIPAL	10 FILL		9/18/92	9/18/92	0	11/30/92	DENIED W/O P	73	SAN LANDFILL, LACK OF STATE PERMIT
GA	SHERRY & DAVIDSON		0.83 FILL			2/2/90		9/18/92	W/D	959	FAILED TO PROV ADD'L INFO
GA	EARL MCMILLEN	RESIDENTIAL	3 FILL/FLOOD	3 CREATE	11/28/90	1/4/91	37	12/11/92	ISSUED	707	DRIVE/RESIDENCE/POND
GA	FAYETTE COUNTY	MUNICIPAL	319 FLOOD	177 RST;515PRE*	12/18/91	12/26/91	8	12/29/92	ISSUED	369	WATER SUPPLY RES. *PLUS 72 ENH,$175,000
GA	GADOT	ROAD	9.3 FILL	11.8 CREATE +	8/2/91	10/2/91	61	5/1/92	ISSUED	212	ROAD WIDENING WAYNESBORO BYPASS
GA	GILMER COUNTY	MUNICIPAL	41 FILL/FLOOD		12/28/87	1/19/88	22	10/14/92	W/D	1730	WATER SUPP RES. FAILED TO PROV INFO
GA	POLK COUNTY	MUNICIPAL	5 FILL/FLOOD			11/16/89		9/18/92	W/D	1037	FLOOD CON RES. FAILED TO PROV INFO
GA	STEVE DIXON	AGRICULTURAL	45 FLOOD					12/20/91	W/D		IRRIG POND. APPLICANT WITHDREW
GA	TILLMAN PROPERTIES	RESIDENTIAL	14.9 FILL/FLOOD	130 PRESERVE	4/3/90	6/14/90	72	6/11/92	ISSUED	728	RESID/GOLF
GA	W. E. T., INC	WTLND MIT BANK	INSIGNIFICANT	UP TO 350 REST	8/29/91	9/16/91	18	12/18/92	ISSUED	459	MITIGATION BANK
GA	WLM STEMWELL	RESIDENTIAL	0.15 FILL			6/27/90		7/8/92	W/D	742	ROAD XING, AUT BY NWP 14
GUAM	GUAM FIRST GREEN CORP	GOLF	1 5 FILL; 20 CLEAR/EXC	13.9 LAKES		1/14/91		8/19/91	ISSUED	217	GOLF COURSE. PREMIT ACTUALY ISSUED 2/20/92
HI	US FWS	REFUGE	2 FILL	18 ENHANCE	8/26/92	9/9/92	14	12/17/92	ISSUED	99	WILDLIFE ENHANCEMENT
IA	D. & S. ZELLER	RESIDENTIAL	0.02 FILL	0.07 RESTORE	3/18/92	3/31/92	13	5/20/92	ISSUED	50	DRIVEWAY; SOME UNAUTH WORK
IA	ARTHUR KRESHNER	RESIDENTIAL	0.23 FILL	NONE	8/6/92	8/18/92	12	10/15/92	ISSUED	58	RAISE LOW SPOTS IN LAWN
IA	BENTON & KRUKOW	RECREATIONAL	LEVEE	NONE	7/7/92	7/21/92	14	8/27/92	ISSUED	37	CREATE WETLAND RESERVE
IA	CITY OF DAVENPORT	RECREATIONAL	0.03 FILL	NONE	5/29/92	6/12/92	14	7/17/92	ISSUED	35	SLOPE FOR BIKE PATH
IA	CITY OF HUDSON	GOLF/REC	1 FILL	1 2 CREATE	9/18/91	10/2/91	14	12/27/91	ISSUED	86	SOME A/F
IA	KENNETH FIELDER	RECREATIONAL	APPROX 2 FILL	2 CRE/PRES	3/27/91	4/9/91	13	2/19/92	ISSUED	316	CAMPGROUND
IA	THOMPSON ET AL (4)	RESIDENTIAL	0.25 FILL	NONE	3/20/92	4/3/92	14	5/26/92	ISSUED	53	LAWN USED FOR TRACTOR PULLS
IA	WASHINGTON CO	ROAD	9.6 FILL	6 ENH; 2.5 CRE	7/22/91	8/1/91	10	1/27/92	ISSUED	179	
ID	CITY OF MCCALL	RESIDENTIAL	3 2 FILL, 3.1 EXCAVATE	11 CREATE	5/5/92	5/7/92	2	10/15/92	ISSUED	161	RESIDENTIAL/GOLF COURSE
ID	HANOVER CONST CO	RESIDENTIAL	0.0006 FILL	NONE				1/15/92	W/D		INFO NOT PROVIDED. ORIG APPLIC 10/23/90
ID	ID TRANSP DEPT	ROAD	.04 FILL	.08 CREATE	3/16/92	3/20/92	4	6/2/92	ISSUED	74	TURNOUT LANE
ID	KEITH ELKINGTON	RECREATIONAL	0.3 FILL; 10 5 FLOOD	0.02 CREATE	4/28/92	4/29/92	1	10/23/92	W/D	177	INFO NOT PROVIDED
ID	NICK MICKELSEN	AGRICULTURAL	100 FILL	NONE	4/18/91	4/19/91	1	1/15/92	DEN W/O P	271	STATE DENIED 401
ID	ORVILLE BAILEY	RESIDENTIAL	31,1 FILL; 8.7 EXC	NONE	4/30/92			5/1/92	DEN W/O P		STATE DENIED PERMIT
ID	RALPH CHAMBERS	RESIDENTIAL	2 FILL	NONE	10/30/90			3/17/92	W/D		DRIVE & HOUSE W/D BY APPLICANT
IL	1ST MIDWEST TRUST	COMMERCIAL	13.5 FILL	14 CREATE	11/16/90	11/30/90	14	2/5/92	ISSUED	432	0.9 ACRES CLEARED PRIOR TO AUTH
IL	BOB NEUMAN				2/7/92	2/19/92	12	10/1/92	W/D	225	FAILURE TO PROVIDE ADDL INFO
IL	CARLTON COURT	RESIDENTIAL	2.0 FILL		4/4/91			1/6/92	W/D		FAILURE TO PROV ADDL INFO

Source. Individual Decision Documents, 1992

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IL	DEERPOINT HOMES	RESIDENTIAL	5.3 FILL	6.36 CREATE	4/24/91	2/28/92	310	7/8/92	ISSUED	131	
IL	ENGEL CONST				8/12/91			3/11/82	W/D		FOLLOWING TELCON W/ CORPS
IL	IL DOT	ROAD	1 59 FILL	TBD		10/16/90		3/15/91	ISSUED	150	
IL	JACK MONCO	RESIDENTIAL	1.71 FILL	1.75 CREATE	8/2/90			11/5/92	W/D		SCALED BACK TO NWP 26
IL	JF&A PROP, LTD	GOLF/RESID	0.51 FILL	2 92 CREATE	4/1/91	6/1/92	427	11/2/92	ISSUED	154	
IL	K MART CORP	COMMERCIAL	0.07 FILL		4/23/91			8/28/91	W/D		STAYED OUT OF WETLANDS
IL	KLEIN CREEK CORP	RESIDENTIAL	2.1 DISTURB	3 2 CREATE	8/3/91			2/2/93	W/D		APPLIC WAS FOR NWP 26, AGREED
IL	LAKE FOREST HOSP	RECREATIONAL	0.85 FILL	1 25 CREATE	3/1/92			8/28/92	W/D		AUTH BY NWP 26
IL	SWAN LAKE CLUB	RECREATIONAL	LEVEE	NONE	3/12/92	3/30/92	18	8/10/92	ISSUED	133	WATERFOWL HUNTING ENH
IL	VLGE OF RAPIDS CITY	RECREATIONAL	0.7 FILL/EXC	1.4 CREATE	9/26/91	10/7/91	11	7/22/92	ISSUED	289	BIKE PATH
IL	WILL CO FOREST DIST	RECREATIONAL	0.5 FILL	0 5 CREATE	4/3/91	3/19/92	351	9/29/92	ISSUED	194	
IN	BLUE LAKE ASSOC	RESIDENTIAL	0.04 FILL A/F						DEN W/O P		STATE DENIED 401
IN	BROWN & DEDMAN	COMMERCIAL	0.84 FILL	1.74 CREATE	4/30/91	6/11/91	42		ISSUED		SHOPPING CENTER
IN	BROWNING-FERRIS	INDUSTRIAL	1.4 FILL	21.6 CREATE	6/22/91	7/8/91	16		ISSUED		LANDFILL EXPANSION
IN	IN DNR	RECREATIONAL	0.11 FILL	4.0 ENHANCE		10/8/91			ISSUED		PARKING LOT
IN	IN DOT	ROAD				5/7/92		4/26/92	W/D		W/D BY APPLICANT
IN	INDIANAPOLIS AP AUTH	MUNICIPAL	84 FILL; 6 7 CLEAR	400 REST, ENH	2/13/92	2/27/92	14		ISSUED		AIRPORT EXPANSION
IN	MARINA LTD PART	COMMERCIAL	0.27 FILL A/F	0.27 CREATE	2/28/91	3/26/91	28		ISSUED		BOAT CHANNEL
IN	SHAMROCK BUILDERS	RESIDENTIAL	0.95 FILL	14 CREATE	7/19/91	9/13/91	56		ISSUED		ACCESS ROAD
IN	STERLING CONST CO	RESIDENTIAL	1.7 FILL A/F	3 7 CREATE	7/24/91	8/23/91	30		ISSUED		APARTMENT COMPLEX
KS	BAKER UNIV	RESTORATION			11/25/91	12/13/91	18	1/27/92	ISSUED	45	
KS	CLARENCE LATTA	AGRICULTURAL	A/F IRRIG DAM		9/4/91	9/25/91	19	5/6/92	DENIED	226	HABITAT DEGRAD, SEC IMPACTS
KS	EDWIN STUCKY	MARICULTURE	A/F		6/29/92	7/16/92	17	11/2/92	DENIED	109	AQUATIC IMPACTS, ALTERNATIVES
KS	MAURICE WALKER	AGRICULTURAL	12 FILL A/F	18 VEG BUFFER	4/2/91	5/20/91	48	4/8/92	ISSUED	324	SOME RESTORATION
KY	CARDINAL ALUM CO							8/12/92	W/D		FAILED TO PROVIDE ARCHAEOLOG SUR
KY	HOME OTRS WAREHOUSE	COMMERCIAL	14.2 FILL	28 4 RESTORE	4/8/91	5/3/91	25		ISSUED		HOME IMPR STORE
KY	SCOTTY'S STONE	COMMERCIAL	2.75 FILL A/F	?		11/23/90			ISSUED		ACCESS ROAD
LA	C. J. ROUSSE	COMMERCIAL	1.68 FILL	5.0 ENHANCE	11/15/89	12/4/89	19	12/20/91	ISSUED	746	SHOOTING RANGE AND STORAGE
LA	E. T REICKE	RESIDENTIAL	42 CLEAR AND FILL	S 71,400 TO LNC	2/10/92	3/2/92	21	7/10/92	ISSUED	130	SUBDIVISION
LA	ELIZABETH BERNARD	RESIDENTIAL	0.24 FILL	S 367.50 TO LNC	12/18/91	12/30/91	12	8/22/92	ISSUED	236	TWO LOTS
LA	G & D. RASMUSSEN	RESIDENTIAL	0 42 FILL	S 630 TO LNC	2/24/92	3/6/92	11	4/24/92	ISSUED	49	HOME AND DRIVE
LA	J R HASKINS	RESIDENTIAL	0.39 FILL		9/19/88	10/10/88	21	12/13/91	ISSUED	1159	TRAILER HOME
LA	JAMES T ROBERTS	RESIDENTIAL	0.29 FILL	0 29 ENHANCE	1/7/92	2/10/92	34	4/20/92	ISSUED	70	HOME
LA	KRONOS LA INC	INDUSTRIAL	25.2 FILL	95 ENHANCE	8/29/91	5/2/92	247	7/20/92	ISSUED	29	SOLID WASTE LANDFILL
LA	LA PSYCHIATRIC CO	HOSPITAL	5.65 FILL A/F	S 9,609 TO LNC	11/22/89	12/11/89	19	9/16/92	ISSUED	1010	HOSPITAL
LA	LEISUREMONT VILLAS	RESIDENTIAL	7.3 FILL	5.3 CR; 2.0 ENH	4/7/92	4/16/92	9	9/8/92	ISSUED	145	
LA	MANDEVILLE ASSOC	COMMERCIAL	5.4 FILL	S 8,100 TO LNC	4/25/91	5/24/91	29	2/20/92	ISSUED	272	ELDERLY CARE FACILITY
LA	MILLET ENTERPR, INC	RESIDENTIAL	1.8 FILL	2 ENHANCE	11/12/91	12/16/91	34	7/13/92	ISSUED	210	SUBDIVISION; SOME A/F
LA	NANCY MATHERNE	RESIDENTIAL	0.92 FILL	0.64 ENHANCE	5/19/92	6/1/92	13	8/6/92	ISSUED	66	SEVEN LOTS
LA	R & C CILLY	RESIDENTIAL	0 28 FILL	0.28 ENHANCE	8/13/92	9/8/92	26	10/29/92	ISSUED	51	HOME
LA	RESERVE CHRISTIAN	RECREATIONAL	3 FILL A/F	3 ENHANCE	3/13/92	3/30/92	17	5/26/92	ISSUED	57	BALL FIELDS A/F
LA	STEVE NUCCIO	RESIDENTIAL	0.29 FILL	S 435 TO LNC	12/24/91	1/13/92	20	2/27/92	ISSUED	45	HOME AND DRIVE
LA	THOMAS STEWART	RESIDENTIAL	0.38 FILL	0 38 ENHANCE	9/8/92	9/25/92	17	10/29/92	ISSUED	34	HOME
LA	US FWS	REFUGE	4.8 CLEAR	120 ENHANCE	4/25/91	5/3/91	8	2/13/92	ISSUED	286	FACILITATE ROAD DRYING ON REFUGE
LA	WILLIAM M HALE	RESIDENTIAL	0.17 FILL	NONE	1/3/92	1/31/92	28	3/16/92	ISSUED	45	HOME
MA	BERKLEY ST DEV CORP	RESIDENTIAL	0.03 FILL			11/14/91		3/27/92	ISSUED	134	BACKYARD FILL
MA	DEAN ENTERPRISES	COMMERCIAL	1 04 FILL	1 5 CREATE		6/30/88		9/3/92	DENIED	1526	AMUSEMENT RIDE TESTING FACILITY
MA	SUDBURY PARK DEV	RESIDENTIAL						2/14/92	W/D		FAILED TO PROVIDE INFO
MA	WM & BEVERLY DREW	COMMERCIAL						4/24/92	W/D		FAILED TO PROVIDE INFO
MD	BLADES MATERIALS	MINING	15.35 EXCAVATE	7 CREATE	1991			4/15/92	W/D		SAND MINING, APPLIC W/D-ECON PROB
MD	DAVID BAMBRICK	RESIDENTIAL	0.07 FILL	0.14 ENH		5/25/92		6/19/92	ISSUED	25	INFILTRATION POND
MD	HILL MGT SERVICES	RESIDENTIAL	2.7 FILL	42 PRESERVE	1991			3/9/92	ISSUED		ROAD
MD	JAMES MIELKE	RESIDENTIAL	0.45 FILL	0 9 CREATE ?		11/2/90		2/5/92	ISSUED	460	HOUSE SITE
MD	JANET DENSMORE	COMMERCIAL	0 3 FILL		1991			2/6/92	W/D		NO RESP TO AGENCY OBJ, COMM. LOT

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MD	LEROY CARSON	RESIDENTIAL	2 6 FILL			1991		6/15/92	DENIED		FILL STAG DITCH. ALTERNATIVE AVAIL
MD	LISLE LIPSCOMB	RESIDENTIAL	0.39 FILL		2/5/92			8/23/92	W/D		4 LOTS. CZM AND 401 PROBLEMS
MD	MD SHA/MD	ROAD	26.2 FILL	47.7 CR, ETC				8/21/92	ISSUED		HIGHWAY
MD	SIGNTEX, INC	COMMERCIAL	0.24 FILL	0.48 CREATE 7		3/15/91		2/18/92	ISSUED	340	
MD	USX REALTY	RESIDENTIAL	0.77 FILL	0.77 CR;7.7PRE		12/3/91		8/4/92	ISSUED	245	ROAD CROSSINGS
MD	WARREN HUTTON	RESIDENTIAL	D S1 FILL	0 86 PRE		6/14/90		4/8/92	ISSUED	664	HOUSE LOT
ME	ANN HASTINGS	RESIDENTIAL	0.2 FILL		8/6/92	8/18/92	12	11/4/92	ISSUED	78	HOUSE PAD
ME	DOROTHY SCAMMON	RECREATIONAL	1.9 FILL	34 PRE;3ENH	3/13/91	3/14/91	1	6/11/92	ISSUED	455	HORSE TRACK
ME	DOUGLAS GOTT	INDUSTRIAL	0.14 FILL A/F		11/6/91	11/7/91	1	2/28/92	ISSUED	113	STORAGE YARD
MI	CHEBOYGAN CO RD C	ROAD	0.01 FILL		9/16/91	9/23/91	7	1/8/92	ISSUED	107	ROAD FILL
MI	CHUCK & LOUISE SOMES	RESIDENTIAL	0.05 FILL	0.3 PRESERVE	1/28/92	2/6/92	9	9/23/92	ISSUED	230	DRIVEWAY
MI	DELTA CO AIRPORT	RECREATIONAL	0.1 FILL	0.55 CREATE	3/30/92	4/7/92	8	8/12/92	ISSUED	66	CAMPGROUND
MI	ELLSWORTH LITTLER	RESIDENTIAL	0.5 FILL A/F	7 PRESERVE	8/12/91	8/19/91	7	11/19/91	ISSUED	92	ACCESS ROAD
MI	GARY HAYS	RESIDENTIAL	0.03 FILL		2/19/91	7/25/91	6	1/23/92	ISSUED	332	WETLAND/STREAM CROSSING
MI	JAS & PENNY STOCLIN	RESIDENTIAL	0.04 FILL		6/26/92	7/7/92	11	9/21/92	DENIED	76	FAILURE TO COMPLY W/ GUIDELINES
MI	MICHAEL PALAZZOLO	RESIDENTIAL			8/27/91	9/6/91	10	2/20/92	W/D	167	FAILED TO ACCEPT PERMIT
MI	ORLANDO DOYLE	RESIDENTIAL						7/3/92	W/D		FAILED TO ACCEPT PERMIT
MI	T & C HOMES	RESIDENTIAL	0.03 FILL			10/7/91		12/4/91	ISSUED	58	DRIVEWAY
MN	ANCHORAGE INN	COMMERCIAL	D 28 FILL	0.28 CREATE	4/23/92			6/17/92	ISSUED		PARKING LOT
MN	CITY OF NEW ULM	MUNICIPAL	1.15 FILL	TO BE DEV		7/25/91		10/11/91	ISSUED	78	MOUND FOR WELL PROTECTION
MN	CITY OF PLYMOUTH	RECREATIONAL	27 EXCAVATE	NONE	3/31/92			8/10/92	W/D		STATE WITHDREW. COMMUNITY LAKE
MN	CITY OF WINONA	ROAD	0.33 FILL	0.36 RESTORE	3/30/92	4/16/92	17	6/24/92	ISSUED	69	MALL ACCESS
MN	DARRIL PETERSON	COMMERCIAL	4 FILL	NONE	9/11/91	9/30/91	19	1/27/92	DENIED	119	FAILED GUIDELINES
MN	J & N. DANCKWART	RESIDENTIAL	0.51 FILL	0.51 CREATE	11/15/91	1/14/1988*		8/10/92	ISSUED		LNDSCPG. *1988 APPLIC FOR 0.6 AC DENIED
MN	MINNEISKA TOWNSHIP	ROAD	0 03 FILL	NONE	8/3/92	8/13/92	10	9/17/92	ISSUED	35	
MN	MN DOT	ROAD	15.3 FILL	14.5 CREATE		4/2/92		6/23/92	ISSUED	82	
MN	MN DOT	ROAD						7/1/92	W/D		REQUESTED BY APPLICANT
MN	ORRIS RODAHL	RECREATIONAL	0.03 FILL	0.03 CREATE		6/25/92		9/16/92	ISSUED	83	BOAT RAMP
MN	RICK STOCK	RESIDENTIAL						6/12/92	DEN W/O P		LOCAL DENIAL. ACCESS TO LAKE
MN	STEVE KIMINSKI	RESIDENTIAL			4/9/92				W/D		DUCK POND
MN	WADENA CO HWY DEPT	ROAD	2.86 FILL	5 14 REST/ENH	2/20/91	7/27/91	7	1/3/92	ISSUED	315	COUNTY HWY UPGRADE
MO	BERNARD KERTZ	AGRICULTURAL	A/F 8 CLEARING, FILL			1/25/90		11/23/92	DENIED	1033	FAILED GUIDELINES
MO	C P JOHNSON	AGRICULTURAL	3 8 FILL	5 9 CREATE	6/30/92	7/9/92	9	11/5/92	ISSUED	119	LAND LEVELLING
MO	CALVIN CHILDERS	AGRICULTURAL	0.5 FILL A/F-LEVEE		8/7/91	9/4/91	28	2/5/92	ISSUED	154	
MO	CHESTERFIELD INDUS	INDUSTRIAL	1.34 FILL	8 2 CREATE	2/11/92	2/28/92	17	7/28/92	ISSUED	151	
MO	DAN & RANDY VOGT	RECREATIONAL	A/F POND		2/25/91	4/1/91	35	12/19/91	ISSUED	262	
MO	EARL ENSMINGER	AGRICULTURAL	0.2 FILL	0 4 CREATE	10/25/91	11/6/91	12	2/10/92	ISSUED	96	
MO	FOREST YANKEE	RESIDENTIAL	SEWAGE LAGOON					8/20/92	W/D		MOVED TO UPLANDS
MO	HUCHEY INMAN	AGRICULTURAL	9.8 FILL A/F	14 7 CREATE	6/10/91	7/19/91	39	6/9/92	ISSUED	326	LAND LEVELLING; 8 AC ADD'L FILL W/D
MO	JERRY JEFFREY	COMMERCIAL	A/F FILL					2/11/92	W/D		DETERMINED NOT TO BE WETLANDS
MO	JDS & G FRISBIE	COMMERCIAL	0.43 FILL	0 36 CREATE	6/12/91	7/1/91	19	10/27/92	ISSUED	484	
MO	MATTIE HANDLEY	RESIDENTIAL			9/22/90			2/21/92	W/D		DETERMINED NOT TO BE WETLANDS
MO	MERVYN JENKINS	AGRICULTURAL	A/F 71 CLRG, LEVEES		8/20/91	11/27/91	99	6/9/92	DENIED	195	WETLAND LOSS
MO	SCOTT PRESLAR	AGRICULTURAL	0.04 FILL		5/2/91	10/2/91	153	6/15/92	W/D	257	FAILED TO SUBMIT ADD'L INFO
MO	ST JOS LT & POWER	INDUSTRIAL	S SOLID WSTE	10 CREATE	5/5/92	9/21/92	139	11/10/92	ISSUED	50	
MO	ST JOS LT & POWER	INDUSTRIAL	TRANSM TOWER					12/3/92	W/D		MOVED TO UPLANDS
MD	WATER UTIL SERV CO	COMMERCIAL	1.7 FILL					12/22/92	W/D		MOVED TO UPLANDS
MD	MARK CARTER	RECREATIONAL	GOLF CSE FILL		10/23/90			5/22/92	W/D		MOVED OUT OF WETLANDS
MS	BRENTON MORSE	RESIDENTIAL	0.05 FILL		1/16/91	1/23/91	7	5/7/92	ISSUED	470	HOME SITE
MS	BROOKS AYCOCK	AGRICULTURAL	3.1 FILL		8/11/91	6/26/91	15	2/14/92	W/D	233	FAILURE TO PROVIDE ADDL INFO
MS	CHEVRON, U S A	INDUSTRIAL	16 4 FILL	24 CREATE		12/5/91		4/20/92	ISSUED	137	
MS	FASTWAY SYSTEMS	CUMMERCIAL	4 CLEAR,FILL			10/17/91		3/20/92	DEN W/O P	155	FAILED TO GET 401. SOME A/F
MS	H.GORDON MYRICK	COMMERCIAL	26 FILL			5/6/92		6/22/92	DEN W/O P	47	APPLIC TO MODIFY PROPOSAL
MS	HIGHWAY 63 PROPERTIES	COMMERCIAL	5 FILL			7/24/92		11/12/92	DEN W/O P	111	FAILED TO GET 401 & CZM

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MS	JERRY PALMER	COMMERCIAL	12.7 FILL/FLOOD	13.3 CR/ENH	7/29/91	8/7/91	9	2/26/92	ISSUED	203	FISH POND IN FARMED WETLAND
MS	JOHN ELLIS	RECREATIONAL	2.8 FILL	?		9/11/91		8/20/92	DEN W/O P	344	PENDING MITIG PLAN & 401
MS	KLEIN&BENNETT	COMMERCIAL	17 FILL		6/2/92	6/10/92	8	9/16/92	DEN W/O P	98	FAILED TO GET 401 & CZM
MS	MSHD	ROAD	15.7 FILL	17.4 ENH +	8/9/91	8/21/91	12	1/23/92	ISSUED	155	HIGHWAY WIDENING
MS	PAUL STANFORD	RESIDENTIAL	0.06 FILL		4/20/92	5/4/92	14	6/22/92	DENIED	49	FAILED GUIDELINES
MS	ROY DEDEAUX	COMMERCIAL				1/29/91		6/30/92	W/D	518	W/D BY APPLICANT
MS	SAIN ASSOC							6/1/92	W/D		W/D BY APPLICANT
MS	TOMMY BUFORD	AGRICULTURAL	0.3 LEVEL			11/15/91		12/23/91	ISSUED	38	
MS	W H. STEELE	INDUSTRIAL	29 FILL	29 CREATE	4/17/92	5/1/92	14	11/30/92	ISSUED	213	
MS	WARREN CO BD OF SUP	INDUSTRIAL	8 FILL	20 PRESERVE	2/13/92	2/20/92	7	12/1/92	ISSUED	285	
MS	WILLIE LETT	RESIDENTIAL			2/27/92			3/26/92	W/D		THIS WAS A PDN FOR NWP 14
MT	DOUBLE ARROW LODGE	GOLF/REC	0.7 CLR/FILL	7 PRESERVE	5/29/92	6/8/92	10	7/24/92	ISSUED	46	
NC	ABINTO CORP	COMMERCIAL	0.34 FILL					10/14/92	ISSUED		BUILDING
NC	BURGESS PATTON	RECREATIONAL	0.12 EXCAVATE					1/7/92	ISSUED		LAKE BOAT SLIP
NC	CASCO CRAFTERS	RESIDENTIAL	0.15 FILL					9/1/92	DENIED		2 LOTS. FAILED GUIDELINES
NC	CITY WINSTON-SALEM	ROAD	1.2 FILL (.03 WTLNDS)					4/1/92	ISSUED		PARKWAY
NC	COVINGTON CORP	RDAD	1.5 FILL					6/29/92	W/D		AGENCY OBJECTIONS
NC	DAVID BLAND							7/24/91	W/D		ADDL INFO NOT PROVIDED
NC	EARL BUTLER	AGRICULTURAL						5/5/92	DEN W/OP		PASTURE WORK. 401 DENIED
NC	JAMES SWINSON	ROAD	0.2 FILL					9/23/92	ISSUED		
NC	JOE HUSBANDS	RESIDENTIAL	0.25 FILL					6/16/92	ISSUED		DRIVEWAY
NC	MECKLENBERG COUNTY	RECREATIONAL						9/3/92	ISSUED		TRAIL
NC	NCDOT	RECREATIONAL	0.3 FILL					9/22/92	ISSUED		BIKE TRAIL
NC	NCDOT	ROAD	1.53 FILL	?					ISSUED		ROAD WIDENING
NC	NCDOT	ROAD	2.64 FILL	6.47 CR/REST				8/4/92	ISSUED		HIGHWAY
NC	NCDOT	ROAD	10.5 FILL	10 5 CR/REST		11/14/91		5/19/92	ISSUED	187	HIGHWAY
NC	NCDOT	RDAD	0.17 FILL					6/29/92	W/D		QUALIFIED FOR REG GENERAL PERMIT
NC	RAY MCCOTTER	RESIDENTIAL	0.03 FILL			4/18/91		2/24/92	ISSUED	312	DRIVEWAY
NC	RICHARD MCALLISTER	RESIDENTIAL	3 FILL			7/5/90		4/5/92	DENIED	638	HOME SITES. FAILED GUIDELINES
NC	USFWS	REFUGE	878 CLEAR; 5 EXC	NONE		9/19/91		2/26/92	ISSUED	160	FIREBRKS, SOME A/F. BDRROW FOR RDS
NC	WHITE HILL BAPT CH	CHURCH	0.5 FILL	2 PURCH				12/2/92	ISSUED		PARKING
NE	JAMES WEBER	RECREATIONAL	? FILL/EXCAV		8/7/91	9/25/91	49	1/29/92	ISSUED	126	WATERFOWL NESTING ISLANDS
NE	LARRY STROMER	AGRICULTURAL	0.06 FILL		7/16/91	10/7/91	83	2/26/92	ISSUED	142	
NE	NE DEPT OF ROADS	ROAD	12.78 FILL	18 RESTORE	12/8/91	12/19/91	10	4/8/92	ISSUED	109	
NE	RICHARD STEINHOFF	RANCHING			10/30/91	1/10/92	72	4/24/92	W/D	105	LIVESTOCK PIT = 404(F) EXEMPTION
NE	UNION PACIFIC RR	INDUSTRIAL	1.25 FILL	2.5 + CREATE	5/26/92	6/9/92	14	9/21/92	ISSUED	104	
NH	ALOSA TRANSPORT	COMMERCIAL	0.83 FILL (.59A/F)	0.69 CR; 0.79ENH	7/31/91	8/15/91	15	3/20/92	ISSUED	218	AUTO/TRUCK YARD
NH	ASIA RESTAURANT	COMMERCIAL	0.06 FILL (0.02 A/F)	NONE	11/14/91	12/5/91	21	2/11/92	ISSUED	68	ACCESS LANES
NH	BRETWOOD GOLF CSE	RECREATIONAL	0.15 FILL;0.64 EXC	POND, ETC.	11/20/91	11/21/91	1	7/2/92	ISSUED	224	0.01 A/F GOLF COURSE
NH	FDIC	COMMERCIAL	0.39 FILL (.05 A/F)					4/29/92	ISSUED		RETAIL BLDG
NH	KONOVER DEV CO	COMMERCIAL	?	?	8/10/88	8/11/98	1	10/30/92	DENIED	1541	SHOPPING MALL
NH	PENACOOK BOSCAWEN	MUNICIPAL	0.3 FILL	NONE	11/20/91	12/5/91	15	2/25/92	ISSUED	82	WATER TRTMT FACILITY
NJ	BROOKSIDE IV	RESIDENTIAL						3/5/92	W/D		FAILED TO PROVIDE INFO
NJ	FRANK ANTANASIO		0.97 FILL					3/25/92	W/D		QUALIFIED FOR NWP 28
NJ	HOWARD HECK	RESIDENTIAL						1/8/93	W/D		LACK OF STATE PERMIT
NJ	KETTLE CREEK ASSOC	RECREATIONAL						11/17/92	W/D		PENDING STATE PERMIT & RESP TO CMTS
NJ	NORTHEAST BUS CEN	COMMERCIAL	0.92 FILL	?	1/9/92	1/27/92	18	4/24/92	ISSUED	88	RAIL SPUR
NJ	ROBERT HERDELIN	RESIDENTIAL						5/19/92	W/D		QUALIFIED FOR NWP 18
NY	ALPINE MEADDWS	RESIDENTIAL			6/30/90			4/2/92	W/D		JURISD REO. INFO NOT PROVIDED
NY	AM CONTINENTAL	COMMERCIAL						4/2/92	W/D		JURISD REO. W/D BY APPLIC
NY	AXIMM REALTY	COMMERCIAL			5/31/91			4/2/92	W/D		NWP VERIF. INFO NOT PROVIDED
NY	FRANK GUARNIERI	RESIDENTIAL			6/14/91			12/22/92	W/D		BANK STABILIZ. INFO NOT PROVIDED
NY	GENTILE CONST	COMMERCIAL			1/10/92			11/2/92	W/D		STRM RELOC. INFO NOT PROVIDED
NY	GIPSY FIELDS	RESIDENTIAL			7/31/90			4/2/92	W/D		JURISD REO. INFO NOT PROVIDED

Source: Individual Decision Documents, 1992

EXHIBIT 3

DATA ON 410 SEC. 404 PERMIT ACTIONS COMPLETED IN 1992

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STATE	APPLICANT	PROJECT	IMPACT IN ACRES	MITIGATION ACRES	COMPLETE APPLIC(CA)	PUBLIC NOTICE(PN)	DAYS CA-PN	DECISION DATE(D)	DECISION	DAYS PN-D	REMARKS
NY	HAXTUN HILL SUBDIV	RESIDENTIAL			4/13/91			11/2/92	W/D		JURISD REQ. INFO NOT PROVIDED
NY	KIM KIDD	COMMERCIAL	0.9 FILL	0.9 CREATE		3/1/91		8/4/92	ISSUED	553	BOAT & CAR WASH; REPAIR SHOP
NY	NY DOT	ROAD	3.08 FILL	4.1 CRE; 3 2 PRE		5/1/92		7/7/92	ISSUED	67	STATE HWY RELOC
NY	PLYMOUTH HILL FARM	RESIDENTIAL			2/22/91			11/6/92	W/D		11 LOT SUBDIV. W/D BY APPLICANT
NY	TOWN OF DEWITT	MUNICIPAL	0.94 FILL	? REST.				9/21/92	ISSUED		LANDFILL CLOSURE
NY	VECTOR REAL ESTATE	COMMERCIAL			6/30/90			4/2/92	W/D		JURISD REQ. INFO NOT PROVIDED
NY	WAL-MART STORES	COMMERCIAL	6.11 FILL/EXCAVATE	16.8 ?		9/21/92		12/17/92	ISSUED	87	SAM'S CLUB OUTLET
OH	BENJAMIN SUAREZ	RESID/LAKE	2.31 FILL	2.44 CREATE		3/18/92		8/24/92	DEN W/O P	159	STATE DENIED 401 CERT
OH	CHAMPIONS DEV CORP	GOLF/RESID	8.9 FILL	13.5 CREATE		7/17/91		3/11/92	ISSUED	238	PUBLIC HEARING 10/29/91
OH	ODOT	ROAD	14 FILL; 7.6 EXC	7 CR; 20-30ENH	6/27/90	10/2/90	97	7/6/92	ISSUED	643	PARKWAY
OH	RICHARD LAMBERT	RECREATIONAL	2 FILL; 20.2 FLDOD	16.8 CREATE				1/27/92	ISSUED		LAKE/WILDLIFE PRESERVE
OH	RICHARD NATTERER	RESIDENTIAL						2/4/92	W/D		LOCAL APPROVAL PROBLEMS
OH	TRUMBALL COUNTY	ROAD	0.6 FILL			6/5/92		8/24/92	DEN W/OP	80	ACCESS ROAD. 401 CERT DENIED
OR	CRAVEN FARMS, INC	AGRICULTURAL	3.0 LEVEL	BUFFER		9/26/91		4/24/92	ISSUED	211	PLANT FEED GRASS
OR	EARL LOGAN	RESIDENTIAL	1.08 FILL		1/9/92	1/14/92	6	4/28/92	DEN W/O P	105	401 CERT & CZM DENIED. GARDEN
OR	PACIFIC REGION DEV	COMMERCIAL	0.85 FILL	0.74 CR; 0.75RE	7/2/91	7/10/91	8	1/10/92	ISSUED	184	SUPERMARKET
OR	ROSS INVESMENTS,INC	INDUSTRIAL	3.28 FILL	7.04 RESTORE +		1/27/92		8/24/92	ISSUED	210	WAREHOUSES
PA	CHARLES ZIMMERMAN	RESIDENTIAL	0.06 FILL		9/9/81			1/21/92	W/D		LAWN. W/D FOLLOWING TELCON W/ CORPS
PA	CITY OF DUBOIS	COMM/INDUS	39.51 FILL	42.5 CREATE		4/28/89		10/30/92	ISSUED	1281	INDUSTRIAL PARK
PA	G.R.O.W.S.,INC	INDUSTRIAL	6.1 FILL/CLEAR		4/9/92	4/22/92	14	5/29/92	ISSUED	37	MINING
PA	GEORGE YERKES	ROAD	0.08 FILL					11/9/92	W/D		QUALIFIED FOR NWP
PA	GROVE CITY CNTRY CLB	RECREATIONAL	6.4 FILL	6.7 CREATE		9/16/91		4/7/92	W/D	204	CDLF. FAILED TO DO ARCHAELOG SURV
PA	J J.GUMBERG CO	COMMERCIAL	2.45 FILL	2.5 CREATE		1/31/91		4/7/92	W/D	432	SHOPPING CENTER. QUAL FOR NWP 26
PA	JEFFERSON CO FAIR AU	MUNICIPAL	1.6 FILL	1.6 CREATE		11/29/91		3/9/92	ISSUED	101	FAIRGROUND CONSOLIDATION
PA	PA ANC	MUNICIPAL	2.3 FILL	2.3 CREATE		11/26/91		2/26/92	ISSUED	92	APRON EXTENSION
PA	PADOT	ROAD	0.41 FILL	0.41 CREATE		11/6/91		1/24/92	ISSUED	79	BRIDGE APPROACH
PA	PADOT	ROAD	6.46 FILL	6.46 CREATE		2/18/92		3/11/92	ISSUED	22	HIGHWAY
PA	PADOT	ROAD			10/23/91	11/6/91	14	12/23/92	ISSUED	413	BYPASS
PA	PAMAY DEV CO	RESIDENTIAL	0.88 FILL	0.88 CREATE	3/3/92	4/17/92	45	9/10/92	ISSUED	146	SEWER LINES
PA	TREES DEV CO	RESIDENTIAL	3.57 DISTURB	1:1 ON SITE		4/8/91		12/16/92	ISSUED	618	RESID/RECR COMPLEX
PA	WAL-MART STORES	COMMERCIAL	1.6 FILL/EXCAVATE	2.0 CREATE		12/26/91		10/30/92	ISSUED	309	WAL-MART STORE
PA	WENDY LEYDIG	RESIDENTIAL	0.25 FILL	0.56 CREATE		8/12/91		4/30/92	ISSUED	262	PARKING
PALAU	NGIWAL STATE GOVT	ROAD	4.1 FILL CAUSEWAY			12/4/90		4/18/92	ISSUED	501	
RI	RI DOT	ROAD	4.8 FILL			11/29/90					STATE HIGHWAY
RI	TOWN OF TIVERTON	MUNICIPAL	0.009 FILL/EXCAVATE		3/14/90	3/15/90	1	2/18/92	ISSUED	705	MOSQUITO CONTROL
SAIPAN	CNMI DEPT PW	ROAD	0.23 FILL			8/9/92		9/8/92	ISSUED	91	
SC	BEAUFORT COUNTY	MUNICIPAL	3.1 FILL	ENH		5/15/92		11/2/92	ISSUED	171	AIRPORT TAXIWAY
SC	BERKELEY COUNTY	MUNICIPAL	7 CLEAR			3/6/92		4/30/92	ISSUED	55	WATERLINE
SC	BUCK HALL CORP	RECREATIONAL	0.19 FILL			5/15/92		8/31/92	ISSUED	108	WILDLIFE MGT
SC	CITY OF ORANGEBURG	MUNICIPAL	28.4 FILL	29CR; 87 PRES		5/8/92		8/10/92	ISSUED	94	AIRPORT EXP
SC	EAST SEABROOK LTD		0.09 FILL	ENH		1/3/92		8/24/92	ISSUED	234	
SC	ELEANOR OSBORNE	RESIDENTIAL	0.02 FILL	0.03 CREATE		10/18/91		1/30/92	ISSUED	104	SEPTIC FIELD
SC	FORT HILL NAT GAS CO	MUNICIPAL	7 CLEAR A/F			10/4/91		1/10/92	ISSUED	98	GASLINE
SC	GRAND STRAND W&SA	MUNICIPAL	7 CLEAR			11/29/91		3/11/92	ISSUED	103	SEWERLINE
SC	HORRY COUNTY	MUNICIPAL	9.55 FILL; 3.69 EXC	69 CR; 65 PRES		7/12/91		8/3/92	ISSUED	388	LANDFILL EXP
SC	JIMMY & ANN PYE	RESIDENTIAL	0.03 FILL			2/14/92		4/22/92	ISSUED	68	RECREATION
SC	LISTON WILLIAMS	RESIDENTIAL	0.6 FILL; 2 FLOOD	MGT, PLANT		11/1/91		2/25/92	ISSUED	116	FISH & DUCK POND
SC	MAGNOLIA PLANTATION	AGRICULTURAL	1 FLOOD	NONE		11/22/91		3/2/92	ISSUED	101	RICE PADDY
SC	NAVY	WILDLIFE ENH	1.81 FILL			2/28/92		5/27/92	ISSUED	89	WATERFOWL MGT PONDS
SC	ODELL WILLIAMSON		7 FILL					10/2/92	DEN W/OP		CZM DENIED BY STATE
SC	SC DHPT	ROAD	0.06 FILL			6/19/92		9/3/92	ISSUED	76	BRIDGE APPROACH
SC	SC DHPT	ROAD				3/13/92		8/11/92	ISSUED	151	STATE HWY WIDENING
SC	SC DHPT	ROAD	4.12 FILL	7		3/1/91		3/2/92	ISSUED	367	US HWY WIDENING
SC	SC PORTS AUTHORITY	INDUSTRIAL	24.53 FILL	33 REST + +		8/14/92		10/9/92	ISSUED	56	BMW AUTO PLANT

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SC	SCDHPT	ROAD	0.39 FILL	0.75 CRE/REST		8/16/91		9/28/92	ISSUED	408	STATE HWY WIDENING
SC	TIP TOP PARTNERSHIP	RESIDENTIAL	7 FILL; 0.02 EXC			1/18/92		4/28/92	ISSUED	101	ROAD ACCESS
SC	TOM CORLEY	RESIDENTIAL	0 8 ALTER			10/4/91		2/14/92	ISSUED	133	RECREATION IMPOUNDMENT
SC	USDA FOREST SERV	WILDLIFE ENH	7 FILL			11/29/91		4/3/92	ISSUEO	126	WATERFOWL IMPOUNDMENT
SD	CITY OF FLANDREAU	RECREATIONAL	0.11 FILL		3/25/91	6/17/91	84	4/10/92	ISSUED	298	TRAIL
TN	1ST AM NAT BANK	COMMERCIAL	7 FILL	3 ENHANCE		3/3/92		6/18/92	ISSUED	105	
TN	JIM ETHRIOGE	RESIDENTIAL	7.9 FILL	14 ENH	10/28/91	11/1/91	4	3/31/92	W/D	151	WITHDRAWN BY APPLICANT
TN	RUSSELL KOSTKA	RESIDENTIAL	4.25 FILL	20 REST/ENH	9/4/91	9/10/91	6	2/21/92	ISSUED	184	SOME PRE-PERMIT CLEARINO
TN	TDOT	RDAD	9 6 FILL	14 4 CR/REST +	8/2/91	8/14/91	12	2/12/92	ISSUED	182	HIGHWAY WIDENING
TN	TOOT	ROAD	5.6 FILL	10 8 REST/PRE	8/22/91	8/28/91	6	2/7/92	ISSUED	163	PARKWAY
TN	TIM & KIM HAMMOND	RESIDENTIAL	STREAM RELOC	NEW STREAM	5/20/92	5/27/92	7	7/7/92	ISSUED	41	
TX	BRANCH TRUST DEV	RESIDENTIAL	0.05 FILL		4/15/92	5/4/92	19	8/17/92	ISSUED	44	PERMIT SIGNED 7/21/92
TX	CITY OF CARROLLTON	RDAO	0.5 FILL; 1 4 DRAIN	1.9 + CREATE	7/2/92	7/9/92	7	8/27/92	ISSUED	49	
TX	COASTAL PROP INC	WTLND MIT BANK		225 CREATE				6/9/92	W/D		ADDL INFO NOT PROV
TX	GORDON PHILLIPS	RESIDENTIAL	(70 CUBIC YARDS)					1/24/92	W/D		ADDL INFO NOT PROV
TX	JAIME SAENZ	RESIDENTIAL	0.04 FILL		8/23/91	8/23/91	31	2/20/92	ISSUED	150	PERMIT SIGNED 3/9/92
TX	REFINERY TERM FIRE	MUNICIPAL			4/6/92			7/2/92	W/D		FIRE TRNG BLDG; MOVED TO UPLANDS
TX	STEPHEN RECKNER	RESIDENTIAL	(210 CY)		3/19/92			5/30/92	W/D		CORPS DETERMINED UPLANDS
TX	TX DOT 2 PERMITS	ROAD	17.5 FILL; 7.2 TEMP	100 PURCH(1)	4/1/92	4/3/92	2	5/22/92	ISSUED	49	(1) INCLUDES MITIG FOR 2 OTHER PERMITS
VA	CHESAPEAKE IND DEV	INDUSTRIAL	7 FILL					7/23/92	W/D		AVOIDED WETLANDS
VA	NORFOLK SOUTHERN	INDUSTRIAL	CREEK RELO		2/21/92			4/23/92	W/D		PROBLEMS W/ LOCAL APPROVAL
VA	ROCK CHURCH	RECREATIONAL	20 FILL		10/16/92			11/16/92	W/D		CORPS ENC-LOW APPROVAL CHANCE
VA	TOWN OF ABINGDON	MUNICIPAL	SEWER LINE		4/1/92			6/5/92	W/D		QUALIFIED FOR RGP
VA	TOWN OF GATE CITY	MUNICIPAL	SEWER LINE		4/11/92			6/5/92	W/D		QUALIFIED FOR NWP 26
VA	WAREHOUSE LNDG	RESID/ROAD	1.5 FILL A/F	3.0 CREATE		10/16/91		1/10/92	ISSUED	86	
VT	CITY OF BARRE	MUNICIPAL	2.3 FILL					3/3/92	W/D		FAILED TO PROVIDE INFO
VT	HINESBURG ELEM SCH	MUNICIPAL	0.19 FILL								SOME A/F
VT	PAUL ARNOT	RESIDENTIAL	0.72 FILL	0.32CR;2.84PR		-5/15/91		5/15/92	ISSUED	365	ACCESS ROAD
WA	A G.CROOK CD							9/24/92	W/D		APP FOR W/L VERIF. FAILED TO PROV INFO
WA	ARNOLD FREUND	COMMERCIAL	2.5 FILL	2.5 CREATE				9/16/92	W/D		FAILED TO PROVIDE INFO
WA	BALFDUR CD		0.93 FILL					8/11/92	W/D		FAILED TO PROVIDE INFO
WA	BRUCE JOHNSON	RESIDENTIAL						12/15/92	W/D		FAILED TO PROVIDE INFO
WA	CANAMER PACIFIC							2/3/92	W/D		FAILED TO PROVIOE INFO
WA	CHARLES EMERICK	AGRICULTURAL						8/11/92	W/D		FAILED TO PROVIDE INFO
WA	CITY OF MOUNT VERNON	MUNICIPAL						6/17/92	W/D		WITHDRAWN BY APPLICANT
WA	CREST CONST	COMMERCIAL			10/10/91			12/22/92	W/D		FAILED TO PROVIDE INFO
WA	FRANK CASSIDY							6/17/92	W/D		FAILED TO PROVIDE INFO
WA	GERHARO WAECHTER	RESIDENTIAL						10/27/92	W/D		APPLIC FOR WETLAND VERIF
WA	GREAT WESTERN BANK	COMMERCIAL	0.22 FILL	0.35 CREATE		5/13/92		6/24/92	ISSUED	42	DFFICE PARK
WA	HARBORVIEW DEV CO	RESIDENTIAL						6/17/92	W/D		FAILEO TO PROVIDE INFO
WA	HARBOUR VLGE APTMTS	RESIDENTIAL	0.47 FILL	0.94 CREATE				2/21/92	W/D		FAILED TO PROVIDE INFO
WA	HARVEY POTTLE	RESIDENTIAL						11/30/92	W/D		FAILED TO PROVIDE INFO
WA	HOLLANDER INVEST.	RESIDENTIAL						8/26/92	W/D		FAILED TO PROVIDE INFO
WA	JOHN KELLEY	AGRICULTURAL						9/8/92	W/D		CRANBERRY BOG. FAILED TO PRDV. INFO
WA	KAHLER GLEN GDLF CSE	RECREATIONAL	0.23 FILL					5/22/92	W/D		FAILED TO PROVIDE INFO
WA	MARYSVILLE F.O. MOOSE	RECREATIONAL	0.1 FILL					4/24/92	W/D		LODGE. FAILED TO PROVIDE INFO
WA	MAK KAMINOFF	RESIDENTIAL	0.57 FILL	2 9 ODNATE				9/3/92	W/D		FAILED TO PROVIDE INFO
WA	POINTS ROBERTS MARINA	GDLF/RESORT						10/27/92	W/D		FAILED TO PROVIDE INFO
WA	PRIMARK CDRP	ROAD	0.05 FILL					10/27/92	W/D		ENFORCEMENT ACTION INITIATEO
WA	QUADRANT CORP							8/8/92	W/D		NO WETLANDS ON SITE
WA	RADOVICH-FELTUS	COMMERCIAL						3/12/92	W/D		FAILED TO PROVIDE INFO
WA	RS PARTNERS	RESIDENTIAL						11/18/92	W/D		FAILED TO PROVIDE INFO
WA	S. DRAY INVEST, LTD	WETLAND ENH						10/13/92	W/D		ASSOC W/ CASE UNDER ENF ACTION
WA	SCHNEIDER HOMES	RESIDENTIAL						11/13/92	W/D		FAILEO TO PROVIDE INFO

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WA	SCIMITAR RIDGE RANCH	RESIDENTIAL						6/9/92	W/D		MOVED OUT OF WETLANDS
WA	TERRY SLATTEN	RESIDENTIAL						8/25/92	W/D		FAILED TO PROVIDE INFO
WA	THREE TWNSHP NORTH	RESIDENTIAL						7/21/92	W/D		FAILED TO PROVIDE INFO
WA	TOVAH CORP	COMMERCIAL	0.05 FILL	7		5/18/92		10/8/92	ISSUED	143	RETAIL CENTER
WA	TRADECO INC	COMMERCIAL	0.99 FILL					4/3/92	W/D		FAILED TO PROVIDE INFO
WA	TRISH MCLAMORE	RESIDENTIAL						4/3/92	W/D		FAILED TO PROVIDE INFO
WA	UNION PAC REALTY	INDUSTRIAL						8/26/92	W/D		LACK OF SPECIFIC SITE PLAN
WA	VINTAGE CORP	RECREATIONAL						5/27/92	W/D		FAILED TO PROVIDE INFO
WA	WA DOT	ROAD	1.06 FILL	1.14 CR 1.5 ENH +		5/8/92		10/7/92	ISSUED	152	ROAD WIDENING
WA	WESTERN ENTERPRISES	COMMERCIAL	0.34 FILL					9/29/92	W/D		FAILED TO PROVIDE INFO
WA	WOODLAND RIDGE	RESIDENTIAL +						6/25/92	W/D		FAILED TO PROVIDE INFO
WA	CHAKORN PHISUTHIKUL	RESIDENTIAL	0.005 FILL					10/15/92	W/D		NEW OWNER. PLANNED TO DENY DUE 401
WI	BROADCAST COMM	INDUSTRIAL						11/16/92	W/D		INFO NOT PROVIDED
WI	CARL PATZKE	RESIDENTIAL	0.08 FILL	NONE	10/28/91	11/18/91	21	7/17/92	DENIED	242	HOME SITE. FAILED GUIDELINES, CON TO PI
WI	DANA MONTANA	RESIDENTIAL			12/16/91	12/31/91	15	8/11/92	DENIED	224	WILDLIFE PONDS. REST. ORDERED
WI	DAVID DONNER	RESIDENTIAL	0.12 FILL		1/16/92	1/23/92	7	11/5/92	DEN W/O P	287	401 CERT DENIED. POND AND ACCESS
WI	G & M SMITH	RESIDENTIAL	0.06 FILL		2/13/92	2/18/92	5	4/13/92	DEN W/O P	55	401 CERT DENIED. ACCESS TO LAKE
WI	GERALD GRASSMAN	RESIDENTIAL	0.19 FILL		9/8/92	9/18/92	10	12/17/92	DEN W/O P	90	401 CERT DENIED. ACCESS DRIVE
WI	KEITH MEYER	RESIDENTIAL			2/26/92	3/30/92	33	4/30/92	DEN W/O P	31	401 CERT DENIED. GARAGE
WI	KURT BOSSHARD	AGRICULTURAL	15 FLOOD					12/1/92	W/D		ADD'L INFO NOT PROVIDED. CRANBRY RES
WI	MARVIN KRUSE	ROAD	1.1 FILL		2/14/92			4/8/92	DEN W/O P		401 CERT DENIED. FARM ROAD
WI	ORRIS RODAHL	RECREATIONAL	0.02 FILL	0.03 CREATE				9/10/92	ISSUED		FILL SILTED-IN BOAT SLIP
WI	PLAZA CRANBERRY FAR	AGRICULTURAL	13 ALTER	34.3 CR/RES/EN	3/25/91	4/12/91	18	8/20/92	ISSUED	496	CRANBERRY BOG EXPANSION
WI	RICHLAND BAPTIST TEM	RECREATIONAL	1 FILL		6/29/92	7/13/92	14	8/26/92	W/D	44	PLAYGROUND. LOCAL PROBLEMS & ALT
WI	ROGERS & SWANSON	RESIDENTIAL	0.09 FILL		3/30/92	4/9/92	10	7/10/92	DEN W/O P	92	HOME. 401 CERT DENIED
WI	RUSSELL JACOBS	RESIDENTIAL	0.03 FILL	NONE	10/29/91	11/18/91	20	7/17/92	DENIED	242	HOME SITE. FAILED GUIDELINES; CON TO PI
WI	SALZWEDEL CRANB CO	AGRICULTURAL	1.29 FILL	1.1 CREATE	4/15/91	4/24/91	9	10/16/92	ISSUED	541	CRANBERRY BOG
WI	VICTOR ERWIN	RESIDENTIAL	1 FILL	NONE	10/28/91	11/18/91	21	7/17/92	DENIED	242	HOME. WETLAND DEGRADATION
WI	VILLAGE OF CAMBRIDGE	MUNICIPAL						3/26/91	W/D		APPLIC NEVER SUBMITTED AN APPLIC
WI	WILLIAM SMITH	INDUSTRIAL	13.27 FILL		1/16/92	2/5/92	20	3/20/92	DEN W/O P	44	401 CERT DENIED. SALVAGE YARD
WI	WISC DOT	ROAD	9.07 FILL	25 RESTORE				3/5/93	ISSUED		ROAD
7	MEJIA (PHILAD. DISTRICT)							6/30/92	W/D		FAILED TO PROVIDE INFO
7	SMITH (PHILAD. DISTRICT)							8/17/92	W/D		FAILED TO PROVIDE INFO
				AVERAGE DAYS			30			252	
				NUMBER REPORTING			182			263	

NOTES

1. THE "TARGET" ACTIONS ARE APPLICATIONS FOR A STANDARD, INDIVIDUAL SECTION 404 PERMIT INVOLVING WETLAND IMPACTS FOR NONWATER-DEPENDENT ACTIVITIES
2. ALL DATA WERE TAKEN DIRECTLY OR CALCULATED FROM DOCUMENTS COLLECTED FROM CORPS OF ENGINEERS DISTRICT OFFICES
3. A BLANK CELL INDICATES THE INFORMATION WAS NOT CONTAINED IN THE AVAILABLE DOCUMENTS
4. "NONE" UNDER THE MITIGATION ACRES COLUMN INDICATES NO COMPENSATORY WETLAND MITIGATION WAS OFFERED OR REQUIRED
5. A QUESTION MARK IN THE MITIGATION ACRES COLUMN INDICATES THAT COMPENSATORY MITIGATION WAS REQUIRED BUT THE ACREAGE OR TYPE COULD NOT BE DETERMINED.
6. FIGURES FOR DAYS DO NOT INCLUDE LEAD-IN OR LEAD-OUT TIMES; THE AVERAGE LEAD-IN TIME IS 91 DAYS (SEE EXHIBIT 4); THE AVERAGE LEAD OUT TIME IS 30 DAYS (SEE EXHIBIT 5)

EXHIBIT 4

SEC.404 PERMIT ACTIONS REPORTING LEAD-IN TIMES

STATE	APPLICANT	ORIGINAL APPLIC. (OA)	COMPLETE APPLIC. (CA)	DAYS OA-CA
AL	GLENN PARKER	11/18/91	11/18/91	0
AL	JAMES ABERCROMBIE	10/28/91	11/15/91	18
AL	MOBILE AIPORT AUTH	5/9/91	5/16/91	7
DE	BAY VISTA, INC	1/13/92	5/6/92	114
DE	DEDOT	12/6/91	3/2/92	87
DE	ROBERT MASTEN	1/23/92	4/23/92	91
FL	DAVID SMITH	9/3/91	9/5/91	2
FL	DEER POINT COVE	10/16/91	12/18/91	63
FL	FLDOT	1/21/92	2/18/92	28
FL	GAIL & HARVEY LANG	9/19/91	12/10/91	82
FL	HUXLEY WALTERS	11/21/91	1/6/92	46
FL	LARRY & SHIR BENEDICT	9/25/91	9/27/91	2
FL	LLOYD WILSON	1/10/92	1/14/92	4
FL	LYNNE & WM TAYLOR	9/17/92	9/22/92	5
FL	MCDONALD PART.	10/29/90	10/29/90	0
FL	NEW COVENANT BAP CH	12/19/91	3/5/92	77
FL	PULTE HOME CORP	1/22/90	6/11/91	505
FL	VINAI & SAIPIN UJJIN	4/6/92	6/24/92	79
FL	WALT DISNEY WORLD	8/23/91	9/19/91	27
GA	CITY OF RINCON	8/31/90	10/17/90	47
GA	COOPER, SUGRUE, ET AL	11/23/87	1/9/88	47
GA	DIXIE RECYCLING	7/31/90	9/18/92	780
GA	EARL MCMILLEN	9/14/90	11/28/90	75
GA	GADOT	7/2/91	8/2/91	31
ID	CITY OF MCCALL	3/17/92	5/5/92	49
ID	ID TRANSP DEPT	7/18/91	3/16/92	242
ID	KEITH ELKINGTON	2/26/91	4/28/92	427
ID	NICK MICKELSEN	12/7/90	4/18/91	132
ID	ORVILLE BAILEY	6/26/91	4/30/92	309
ID	RALPH CHAMBERS	10/30/90	10/30/90	0
IN	BROWN & DEDMAN	3/27/91	4/30/91	34
IN	BROWNING-FERRIS	3/25/91	6/22/91	89
IN	INDIANAPOLIS AP AUTH	2/7/92	2/13/92	6
IN	MARINA LTD PART	9/21/89	2/26/91	523
IN	SHAMROCK BUILDERS	6/25/91	7/19/91	24
IN	STERLING CONST CO	4/25/91	7/24/91	90
KY	HOME OTRS WAREHOUSE	2/28/91	4/8/91	39
LA	C. J. ROUSSE	10/19/89	11/15/89	27
LA	J. R. HASKINS	9/1/88	9/19/88	18
LA	JAMES T. ROBERTS	12/5/91	1/7/92	33
LA	KRONOS LA INC	8/15/91	8/29/91	14
LA	LA PSYCHIATRIC CO	6/2/89	11/22/89	173
LA	MILLET ENTERPR, INC	8/22/91	11/12/91	82
LA	R. & C. GILLY	5/26/92	8/13/92	79
LA	RESERVE CHRISTIAN	12/12/91	3/13/92	92
LA	STEVE NUCCIO	10/15/91	12/24/91	70
LA	WILLIAM M. HALE	11/26/91	1/3/92	38
MD	LISLE LIPSCOMB	11/6/91	2/5/92	91
MS	BRENTON MORSE	12/19/90	1/16/91	28
MS	KLEIN&BENNETT	4/20/92	6/2/92	43
MS	PAUL STANFORD	4/20/92	4/20/92	0
MS	WILLIE LETT	12/12/91	2/27/92	77
NJ	NORTHEAST BUS CEN	12/16/91	1/9/92	24
PA	G.R.O.W.S.,INC	2/19/92	4/8/92	49
PA	PADOT	10/2/91	10/23/91	21
PA	PAMAY DEV CO	10/10/91	3/3/92	145
TX	CITY OF CARROLLTON	6/25/92	7/2/92	7
TX	TX DOT 2 PERMITS	2/19/92	4/1/92	42
WA	CREST CONST	10/2/91	10/10/91	8
		AVERAGE DAYS		91
		NUMBER REPORTING		59

Source Individual Decision Documents, 1992 Beveridge & Diamond, P C

EXHIBIT 5

SEC. 404 PERMIT ACTIONS REPORTING LEAD-OUT TIMES

STATE	APPLICANT	DECISION DATE(D)	PERMIT ISSUED (PI)	DAYS D-PI
AK	CHRIST EVAN LUTH CH	3/11/92	4/1/92	21
GUAM	GUAM FIRST GREEN CORP	8/19/91	2/20/92	185
ID	ID TRANSP DEPT	6/2/92	6/8/92	6
ID	CITY OF MCCALL	10/15/92	10/29/92	14
IL	DEERPOINT HOMES	7/8/92	8/10/92	33
LA	E. T. REICKE	7/10/92	7/15/92	5
LA	THOMAS STEWART	10/29/92	11/3/92	5
LA	STEVE NUCCIO	2/27/92	3/4/92	6
LA	RESERVE CHRISTIAN	5/26/92	6/3/92	8
LA	KRONOS LA INC	7/20/92	7/29/92	9
LA	JAMES T. ROBERTS	4/20/92	5/4/92	14
LA	MANDEVILLE ASSOC	2/20/92	3/6/92	15
LA	NANCY MATHERNE	8/6/92	8/21/92	15
LA	WILLIAM M. HALE	3/16/92	4/1/92	16
LA	MILLET ENTERPR, INC	7/13/92	8/4/92	22
LA	C. J. ROUSSE	12/20/91	1/13/92	24
LA	R. & C. GILLY	10/29/92	11/23/92	25
LA	J. R. HASKINS	12/13/91	1/8/92	26
LA	LA PSYCHIATRIC CO	9/16/92	10/14/92	28
LA	ELIZABETH BERNARD	8/22/92	9/30/92	39
LA	G. & D. RASMUSSEN	4/24/92	6/17/92	54
MN	CITY OF NEW ULM	10/11/91	1/23/92	104
TX	JAIME SAENZ	2/20/92	3/9/92	18
TX	BRANCH TRUST DEV	6/17/92	7/21/92	34
		AVERAGE DAYS		30
		NUMBER REPORTING		24

Source: Individual Decision Documents, 1992. Beveridge & Diamond, P.C.

EXHIBIT 6

ACREAGE SORT FOR 303 SEC. 404 PERMIT ACTIONS COMPLETED IN 1992

SEE FINAL PAGE FOR EXPLANATORY NOTES

IMPACT ACRES	STATE	APPLICANT	PROJECT	MITIGATION ACRES	COMPLETE APPLIC. (CA)	PUBLIC NOTICE (PN)	DAYS CA-PN	DECISION DATE(D)	DECISION	DAYS PN-D	REMARKS
0 0006	IO	HANOVER CONST CO	RESIDENTIAL	NONE				1/15/92	W/D		INFO NOT PROVIDED. ORIG APPLIC 10/23/90
0.005	WA	CHAKORN PHISUTHIKUL	RESIDENTIAL					10/15/92	W/D		NEW OWNER. PLANNED TO DENY DUE 401
0 006	FL	LLOYD WILSON	RESIDENTIAL	NONE	1/14/92	1/21/92	7	10/30/92	ISSUED	283	HOUSE SITE
0 009	RI	TOWN OF TIVERTON	MUNICIPAL		3/14/90	3/15/90	1	2/18/92	ISSUED	705	MOSQUITO CONTROL
0.01	MI	CHEBOYGAN CO RD C	ROAD		9/16/91	9/23/91	7	1/8/92	ISSUED	107	ROAD FILL
0 02	IA	D & S ZELLER	RESIDENTIAL	0 07 RESTORE	3/18/92	3/31/92	13	5/20/92	ISSUED	50	DRIVEWAY; SOME UNAUTH WORK
0 02	SC	ELEANOR OSBORNE	RESIDENTIAL	0 03 CREATE		10/18/91		1/30/92	ISSUED	104	SEPTIC FIELD
0.02	WI	ORRIS RODAHL	RECREATIONAL	0.03 CREATE				9/10/92	ISSUED		FILL SILTED-IN BOAT SLIP
0 03	IA	CITY OF DAVENPORT	RECREATIONAL	NONE	5/29/92	6/12/92	14	7/17/92	ISSUED	35	SLOPE FOR BIKE PATH
0 03	MA	BERKLEY ST DEV CORP	RESIDENTIAL			11/14/91		3/27/92	ISSUED	134	BACKYARD FILL
0.03	MI	GARY HAYS	RESIDENTIAL		2/19/91	2/25/91	6	1/23/92	ISSUED	332	WETLAND/STREAM CROSSING
0 03	MI	T & C HOMES	RESIDENTIAL			10/7/91		12/4/91	ISSUED	58	DRIVEWAY
0.03	MN	MINNEISKA TOWNSHIP	ROAD	NONE	6/3/92	8/13/92	10	9/17/92	ISSUED	35	
0 03	MN	ORRIS RODAHL	RECREATIONAL	0.03 CREATE		6/25/92		9/16/92	ISSUED	83	BOAT RAMP
0 03	NC	RAY MCCOTTER	RESIDENTIAL			4/18/91		2/24/92	ISSUED	312	DRIVEWAY
0.03	SC	JIMMY & ANN PYE	RESIDENTIAL			2/14/92		4/22/92	ISSUED	68	RECREATION
0.03	TX	BRANCH TRUST DEV	RESIDENTIAL		4/15/92	5/4/92	19	6/17/92	ISSUED	44	PERMIT SIGNED 7/21/92
0.03	WI	RUSSELL JACOBS	RESIDENTIAL	NONE	10/29/91	11/18/91	20	7/17/92	DENIED	242	HOME SITE FAILED GUIDELINES; CON TO PI
0 04	IO	IO TRANSP DEPT	ROAD	08 CREATE	3/16/92	3/20/92	4	6/2/92	ISSUED	74	TURNOUT LANE
0 04	IN	BLUE LAKE ASSOC	RESIDENTIAL						DEN W/O P		STATE DENIED 401
0 04	MI	JAS & PENNY STOGLIN	RESIDENTIAL		6/26/92	7/7/92	11	9/21/92	DENIED	76	FAILURE TO COMPLY W/ GUIDELINES
0.04	MO	SCOTT PRESLAR	AGRICULTURAL		5/2/91	10/2/91	153	6/15/92	W/D	25	FAILED TO SUBMIT ADD'L INFO
0 04	TX	JAIME SAENZ	RESIDENTIAL		8/23/91	9/23/91	31	2/20/92	ISSUED	150	PERMIT SIGNED 3/8/92
0.05	AL	JIM POTTER & SONS	COMMERCIAL		11/27/90	12/11/90	14	12/19/91	W/D	373	BY APPLICANT - STRONG OPPOSITION
0.05	AL	L JAMES PARDEN	RESIDENTIAL			1/28/92		4/15/92	DEN W/O P	78	HOME SITE. 401 & CZM DENIED
0 05	CO	STEVEN MCCASHEN	ROAD	0.1 CREATE		9/3/91		2/19/92	ISSUED	169	
0.05	MI	CHUCK & LOUISE SOMES	RESIDENTIAL	0 3 PRESERVE	1/28/92	2/6/92	9	9/23/92	ISSUED	230	DRIVEWAY
0.05	MS	BRENTON MORSE	RESIDENTIAL		1/18/91	1/23/91	7	5/7/92	ISSUED	470	HOME SITE
0.05	WA	PRIMARK CORP	ROAD					10/27/92	W/D		ENFORCEMENT ACTION INITIATED
0.05	WA	TOVAH CORP	COMMERCIAL	?		5/18/92		10/8/92	ISSUED	143	RETAIL CENTER
0 06	CO	GLENN HARSH	RESIDENTIAL	TEN BIRD HSES	1/21/92	2/13/92	23	5/1/92	W/D	78	W/D FOLLOWING DISCUSSION WITH US FWS
0.06	FL	LARRY & SHIR BENEDICT	RESIDENTIAL	NONE	9/27/91	10/3/91	6	1/14/92	ISSUED	103	HOUSE SITE
0 06	MS	PAUL STANFORD	RESIDENTIAL		4/20/92	5/4/92	14	6/22/92	DENIED	49	FAILED GUIDELINES
0.06	NE	LARRY STROMER	AGRICULTURAL		7/16/91	10/7/91	83	2/26/92	ISSUED	142	
0 06	NH	ASIA RESTAURANT	COMMERCIAL	NONE	11/14/91	12/5/91	21	2/11/92	ISSUED	68	ACCESS LANES
0.06	PA	CHARLES ZIMMERMAN	RESIDENTIAL		9/9/91			1/21/92	W/D		LAWN. W/D FOLLOWING TELCON W/ CORPS
0 06	SC	SC DHPT	ROAD			6/19/92		9/3/92	ISSUED	76	BRIDGE APPROACH
0 06	WI	G & M SMITH	RESIDENTIAL		2/13/92	2/18/92	5	4/13/92	DEN W/O P	55	401 CERT DENIED. ACCESS TO LAKE
0 07	IL	K MART CORP	COMMERCIAL		4/23/91			8/28/91	W/D		STAYED OUT OF WETLANDS
0.07	MD	DAVID BAMBRICK	RESIDENTIAL	0 14 ENH		5/25/92		6/19/92	ISSUED	25	INFILTRATION POND
0.08	PA	GEORGE YERKES	ROAD					11/9/92	W/D		QUALIFIED FOR NWP
0 08	WI	CARL PATZKE	RESIDENTIAL	NONE	10/28/91	11/18/91	21	7/17/92	DENIED	242	HOME SITE. FAILED GUIDELINES; CON TO PI
0 09	CO	ERIC BERG	RESIDENTIAL	$5000 TO NAT C	1/3/92	1/10/92	7	3/9/92	ISSUED	59	HOME SITE
0 09	SC	EAST SEABROOK LTD		ENH		1/3/92		8/24/92	ISSUED	234	
0 09	WI	ROGERS & SWANSON	RESIDENTIAL		3/30/92	4/9/92	10	7/10/92	DEN W/O P	92	HOME 401 CERT DENIED
				AVERAGE DAYS			21			158	
45				NUMBER REPORTING			25			37	

Source Individual Decision Documents, 1992

Beveridge & Diamond, P C

EXHIBIT 6

ACREAGE SORT FOR 303 SEC. 404 PERMIT ACTIONS COMPLETED IN 1992

SEE FINAL PAGE FOR EXPLANATORY NOTES

IMPACT ACRES	STATE	APPLICANT	PROJECT	MITIGATION ACRES	COMPLETE APPLIC. (CA)	PUBLIC NOTICE (PN)	DAYS CA-PN	DECISION DATE(D)	DECISION	DAYS PN-D	REMARKS
0 1	MI	DELTA CO AIRPORT	RECREATIONAL	0 55 CREATE	3/30/92	4/7/92	8	6/12/92	ISSUED	66	CAMPGROUND
0.1	WA	MARYSVILLE F.O MOOSE	RECREATIONAL					4/24/92	W/D		LODGE. FAILED TO PROVIDE INFO
0.1	AK	CATHERINE FEULNER	RESIDENTIAL	NONE	4/24/92	5/8/92	14	7/16/92	ISSUED	69	
0.11	AL	ROBERT BERRY	RESIDENTIAL			3/24/92		6/18/92	DEN W/O P	88	FAILED TO GET 401 & CZM
0.11	IN	IN DNR	RECREATIONAL	4 0 ENHANCE		10/8/91			ISSUED		PARKING LOT
0.11	SD	CITY OF FLANDREAU	RECREATIONAL		3/25/91	6/17/91	84	4/10/92	ISSUED	298	TRAIL
0 12	AL	JAMES ABERCROMBIE	RESIDENTIAL		11/15/91	12/5/91	20	2/14/92	DEN W/O P	71	FAILED TO GET 401. SDME A/F
0 12	NC	BURGESS PATTON	RECREATIONAL					1/7/92	ISSUED		LAKE BOAT SLIP
0.12	WI	DAVID DONNER	RESIDENTIAL		1/16/92	1/23/92	7	11/5/92	DEN W/O P	287	401 CERT DENIED. PONO AND ACCESS
0.14	ME	DOUGLAS GOTT	INDUSTRIAL		11/8/91	11/7/91	1	2/28/92	ISSUED	113	STORAGE YARD
0 15	FL	DAVID SMITH	RESIDENTIAL	NONE	9/5/91	9/12/91	7	4/6/92	ISSUED	207	DRIVEWAY, SEPTIC TANK
0.15	GA	WLM STEMWELL	RESIDENTIAL			6/27/90		7/8/92	W/D	742	ROAD XING, AUT BY NWP 14
0.15	NC	CASCO CRAFTERS	RESIDENTIAL					9/1/92	DENIED		2 LOTS. FAILED GUIDELINES
0.17	LA	WILLIAM M HALE	RESIDENTIAL	NONE	1/3/92	1/31/92	28	3/16/92	ISSUED	45	HOME
0.17	NC	NCDOT	ROAD					6/29/92	W/D		QUALIFIED FOR REG GENERAL PERMIT
0.18	AL	GLENN PARKER	COMMERCIAL		11/18/91	12/13/91	25	5/11/92	DENIED	150	FAILED GUIDELINES
0 19	SC	BUCK HALL CORP	RECREATIONAL			5/15/92		8/31/92	ISSUED	108	WILDLIFE MGT
0 19	VT	HINESBURG ELEM SCH	MUNICIPAL								SOME A/F
0.19	WI	GERALD GRASSMAN	RESIDENTIAL		9/8/92	9/18/92	10	12/17/92	DEN W/O P	90	401 CERT DENIED. ACCESS DRIVE
0.2	ME	ANN HASTINGS	RESIDENTIAL		8/8/92	8/18/92	12	11/4/92	ISSUED	78	HOUSE PAD
0.2	MO	EARL ENSMINGER	AGRICULTURAL	0.4 CREATE	10/25/91	11/6/91	12	2/10/92	ISSUED	96	
0.2	NC	JAMES SWINSON	ROAD					9/23/92	ISSUED		
0 22	WA	GREAT WESTERN BANK	COMMERCIAL	0.35 CREATE		5/13/92		6/24/92	ISSUED	42	OFFICE PARK
0 23	IA	ARTHUR KRESHNER	RESIDENTIAL	NONE	8/6/92	8/18/92	12	10/15/92	ISSUED	58	RAISE LOW SPOTS IN LAWN
0 23	SAIPAN	CNMI DEPT PW	ROAD			6/9/92		9/8/92	ISSUED	91	
0.23	WA	KAHLER GLEN GOLF CSE	RECREATIONAL					5/22/92	W/D		FAILED TO PROVIDE INFO
0.24	AL	CALHOUN CO ROAD DEPT	ROAD	7 CREATE		6/22/92		9/30/92	ISSUED	100	COUNTY ROAD
0.24	LA	ELIZABETH BERNARD	RESIDENTIAL	$ 367.50 TO LNC	12/18/91	12/30/91	12	8/22/92	ISSUED	236	TWO LOTS
0 24	MD	SIGNTEX, INC	COMMERCIAL	0 48 CREATE ?		3/15/91		2/18/92	ISSUED	340	
29				AVERAGE DAYS			18			161	
				NUMBER REPORTING			14			21	
0 25	FL	LYNNE & WM TAYLOR	RESIDENTIAL	1 29 CR; 108PRE	9/22/92	10/14/92	22	11/23/92	ISSUED	40	RESUBMITTAL OF ABOVE DENIAL
0.25	IA	THOMPSON ET AL (4)	RESIDENTIAL	NONE	3/20/92	4/3/92	14	5/26/92	ISSUED	53	LAWN USED FOR TRACTOR PULLS
0.25	NC	JOE HUSBANDS	RESIDENTIAL					6/16/92	ISSUED		DRIVEWAY
0.25	PA	WENDY LEYDIG	RESIDENTIAL	0 58 CREATE		8/12/91		4/30/92	ISSUED	262	PARKING
0.27	GA	CITY OF RINCON	ROAD	NONE	10/17/90	11/2/90	16	7/20/92	DENIED	626	ACCESS FOR UTIL. LINE FAILED GUIDELINES
0.27	IN	MARINA LTD PART	COMMERCIAL	0.27 CREATE	2/28/91	3/26/91	28		ISSUED		BOAT CHANNEL
0.28	LA	R & C. GILLY	RESIDENTIAL	0.28 ENHANCE	8/13/92	9/8/92	26	10/29/92	ISSUED	51	HOME
0.28	MN	ANCHORAGE INN	COMMERCIAL	0.28 CREATE	4/23/92			6/17/92	ISSUED		PARKING LOT
0 29	LA	JAMES T ROBERTS	RESIDENTIAL	0 29 ENHANCE	1/7/92	2/10/92	34	4/20/92	ISSUED	70	HOME
0.29	LA	STEVE NUCCIO	RESIDENTIAL	$ 435 TO LNC	12/24/91	1/13/92	20	2/22/92	ISSUED	45	HOME AND DRIVE
0.3	MD	JANET DENSMORE	COMMERCIAL		1991			2/6/92	W/D		NO RESP TO AGENCY OBJ COMM LOT
0 3	AR	MIKE FAUCHER	AGRICULTURAL		7/20/92	7/22/92	2	3/9/93	DENIED	230	RESTORATION ORDERED
0 3	MS	TOMMY BUFORD	AGRICULTURAL			11/15/91		12/23/91	ISSUED	38	
0 3	NC	NCDOT	RECREATIONAL					9/22/92	ISSUED		BIKE TRAIL
0 3	NH	PENACOOK BOSCAWEN	MUNICIPAL	NONE	11/20/91	12/5/91	15	2/25/92	ISSUED	82	WATER TRTMT FACILITY
0.33	AL	ROMAR CO	COMMERCIAL	0.9 CREATE		8/3/92		10/22/92	ISSUED	80	SHOPPING CENTER
0.33	MN	CITY OF WINDNA	ROAD	0 36 RESTORE	3/30/92	4/16/92	17	6/24/92	ISSUED	69	MALL ACCESS

Source: Individual Decision Documents, 1992

EXHIBIT 6

ACREAGE SORT FOR 303 SEC. 404 PERMIT ACTIONS COMPLETED IN 1992

SEE FINAL PAGE FOR EXPLANATORY NOTES

IMPACT ACRES	STATE	APPLICANT	PROJECT	MITIGATION ACRES	COMPLETE APPLIC. (CA)	PUBLIC NOTICE (PN)	DAYS CA-PN	DECISION DATE(D)	DECISION	DAYS PN-D	REMARKS
0.34	CA	RSC DEVELOPMENT	INDUSTRIAL	0.5 CREATE	3/21/91	4/26/91	56	2/4/92	ISSUED	284	
0.34	FL	VINAI & SAIPIN UJJIN	RESIDENTIAL	NONE	6/24/92	7/10/92	16	10/5/92	DENIED	87	FAILED GUIDELINES; CONT TO PI
0.34	NC	ABINTO CORP	COMMERCIAL					10/14/92	ISSUED		BUILDING
0.34	WA	WESTERN ENTERPRISES	COMMERCIAL					9/29/92	W/D		FAILED TO PROVIDE INFO
0.38	LA	THOMAS STEWART	RESIDENTIAL	0.38 ENHANCE	9/8/92	9/25/92	17	10/29/92	ISSUED	34	HOME
0.39	LA	J. R. HASKINS	RESIDENTIAL		9/19/88	10/10/88	21	12/13/91	ISSUED	1159	TRAILER HOME
0.39	MD	LISLE LIPSCOMB	RESIDENTIAL		2/5/92			6/23/92	W/D		4 LOTS. CZM AND 401 PROBLEMS
0.39	NH	FDIC	COMMERCIAL					4/29/92	ISSUED		RETAIL BLDG
0.39	SC	SCDHPT	ROAD	0.75 CRE/REST		8/16/91		9/28/92	ISSUED	409	STATE HWY WIDENING
0.4	AL	STEVE GLOVER	COMMERCIAL			5/2/92		5/15/92	W/D	6	W/D BY APPLICANT
0.41	PA	PADOT	ROAD	0.41 CREATE		11/6/91		1/24/92	ISSUED	79	BRIDGE APPROACH
0.42	LA	C. & D. RASMUSSEN	RESIDENTIAL	5 630 TO LNC	2/24/92	3/6/92	11	4/24/92	ISSUED	49	HOME AND DRIVE
0.43	MO	JDS & G. FRISBIE	COMMERCIAL	0.38 CREATE	6/12/91	7/1/91	19	10/27/92	ISSUED	484	
0.45	MD	JAMES MIELKE	RESIDENTIAL	0 9 CREATE 7		11/2/90		2/5/92	ISSUED	460	HOUSE SITE
0.46	FL	GAIL & HARVEY LANG	RESIDENTIAL	0.003 ENHANCE	12/10/91	12/18/91	8	7/13/92	ISSUED	210	SHORELINE STABILIZATION
0.46	FL	LYNNE & WM TAYLOR	RESIDENTIAL	0.88 CR; 108PRE	1/10/92	1/22/92	12	8/2/92	DENIED	198	LOT. PARTIAL A/F
0.47	WA	HARBOUR VLGE APTMTS	RESIDENTIAL	0.94 CREATE				2/21/92	W/D		FAILED TO PROVIDE INFO
0.5	IL	WILL CO FOREST DIST	RECREATIONAL	0.5 CREATE	4/3/91	3/19/92	351	9/29/92	ISSUED	194	
0.5	MI	ELLSWORTH LITTLER	RESIDENTIAL	7 PRESERVE	8/12/91	8/19/91	7	11/19/91	ISSUED	92	ACCESS ROAD
0.5	MO	CALVIN CHILDERS	AGRICULTURAL		8/7/91	9/4/91	28	2/5/92	ISSUED	154	
0.5	NC	WHITE HILL BAPT CH	CHURCH	2 PURCH				12/2/92	ISSUED		PARKING
0.51	IL	JF&A PROP, LTD	GOLF/RESID	2 92 CREATE	4/1/91	6/1/92	427	11/2/92	ISSUED	154	
0.51	MO	WARREN HUTTON	RESIDENTIAL	0 86 PRE		8/14/90		4/8/92	ISSUED	664	HOUSE LOT
0.51	MN	J. & N. DANCKWART	RESIDENTIAL	0.51 CREATE	11/15/91	1/14/1988*		8/10/92	ISSUED		LNDSCPG. *1988 APPLIC FOR 0.6 AC DENIED
0.52	AL	SPOONER PETROLEUM	INDUSTRIAL	7		11/10/91		5/27/92	W/D	199	NO REASON GIVEN FOR W/D
0.55	AK	CHRIST EVAN LUTH CH	CHURCH PKG	NONE	10/18/91	12/19/91	62	3/11/92	ISSUED	83	
0.57	WA	MAX KAMINOFF	RESIDENTIAL	2.9 DONATE				9/3/92	W/D		FAILED TO PROVIDE INFO
0.6	AK	CLIFFORD PULIS	RESIDENTIAL	NONE	5/21/92	7/24/92	64	11/24/92	ISSUED	123	
0.6	OH	TRUMBALL COUNTY	ROAD			6/5/92		8/24/92	DEN W/OP	80	ACCESS ROAD. 401 CERT DENIED
0.7	IL	VLGE OF RAPIDS CITY	RECREATIONAL	1 4 CREATE	9/26/91	10/7/91	11	7/22/92	ISSUED	289	BIKE PATH
0.7	MT	DOUBLE ARROW LODGE	GOLF/REC	7 PRESERVE	5/29/92	8/8/92	10	7/24/92	ISSUED	46	
0.72	VT	PAUL ARNOT	RESIDENTIAL	0.32CR;2 84PR		~5/15/91		5/15/92	ISSUED	365	ACCESS ROAD
0.76	CT	CT DOT	ROAD	NONE		3/14/91		3/19/92	ISSUED	571	US HIGHWAY WIDENING
0.77	MO	USX REALTY	RESIDENTIAL	0.77 CR;7 7PRE		12/3/91		8/4/92	ISSUED	245	ROAD CROSSINGS
0.79	NH	BRETWOOD GOLF CSE	RECREATIONAL	POND, ETC.	11/20/91	11/21/91	1	7/2/92	ISSUED	224	0.01 A/F. GOLF COURSE
0.8	SC	TOM CORLEY	RESIDENTIAL			10/4/91		2/14/92	ISSUED	133	RECREATION IMPOUNDMENT
0.8	AK	ISLAND PROP INC	RESIDENTIAL	NONE	9/17/90	10/25/90	38	5/4/92	DENIED	557	FAILED GUIDELINES; CONTRARY TO PI
0.83	AK	NANA DEV CORP	COMMERCIAL	NONE	4/8/92	4/23/92	15	7/29/92	ISSUED	97	WAREHOUSE
0.83	GA	SHERRY & DAVIDSON				2/2/90		9/18/92	W/D	959	FAILED TO PROV ADD'L INFO
0.83	NH	ALOSA TRANSPORT	COMMERCIAL	0 69 CR; 0.79ENH	7/31/91	8/15/91	15	3/20/92	ISSUED	218	AUTO/TRUCK YARD
0.84	IN	BROWN & DEDMAN	COMMERCIAL	1.74 CREATE	4/30/91	6/11/91	42		ISSUED		SHOPPING CENTER
0.85	IL	LAKE FOREST HOSP	RECREATIONAL	1.25 CREATE	3/1/92			8/28/92	W/D		AUTH BY NWP 26
0.85	OR	PACIFIC REGION DEV	COMMERCIAL	0.74 CR; 0.75RE	7/2/91	7/10/91	8	1/10/92	ISSUED	184	SUPERMARKET
0.88	PA	PAMAY DEV CO	RESIDENTIAL	0.88 CREATE	3/3/92	4/17/92	45	9/10/92	ISSUED	146	SEWER LINES
0 9	AK	OUNALASHKA CORP	RESIDENTIAL	NONE	4/29/92	5/22/92	23	9/22/92	W/D	123	HIST AND GUIDELINE PROBLEMS
0 9	NY	KIM KIDD	COMMERCIAL	0 9 CREATE		3/1/91		9/4/92	ISSUED	553	BOAT & CAR WASH, REPAIR SHOP
0.92	LA	NANCY MATHERNE	RESIDENTIAL	0.64 ENHANCE	5/19/92	6/1/92	13	8/6/92	ISSUED	66	SEVEN LOTS
0.92	NJ	NORTHEAST BUS CEN	COMMERCIAL	?	1/9/92	1/27/92	18	4/24/92	ISSUED	88	RAIL SPUR
0.93	WA	BALFOUR CO						8/11/92	W/D		FAILED TO PROVIDE INFO
0.94	NY	TOWN OF DEWITT	MUNICIPAL	7 REST.				9/21/92	ISSUED		LANDFILL CLOSURE

Source: Individual Decision Documents, 1992.

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0.95	IN	SHAMROCK BUILDERS	RESIDENTIAL	14 CREATE	7/19/91	9/13/91	56		ISSUED		ACCESS ROAD
0.97	NJ	FRANK ANTANASID						3/25/92	W/D		QUALIFIED FOR NWP 26
0.99	WA	TRADECO INC	COMMERCIAL					4/3/92	W/D		FAILED TO PROVIDE INFO
				AVERAGE DAYS			42			230	
70				NUMBER REPORTING			37			50	
1	IA	CITY OF HUDSON	GOLF/REC	1.2 CREATE	9/18/91	10/2/91	14	12/27/91	ISSUED	86	SDME A/F
1	SC	MAGNOLIA PLANTATION	AGRICULTURAL	NONE		11/22/91		3/2/92	ISSUED	101	RICE PADDY
1	WI	RICHLAND BAPTIST TEM	RECREATIDNAL		6/29/92	7/13/92	14	8/26/92	W/D	44	PLAYGROUND. LOCAL PROBLEMS & ALT
1	WI	VICTOR ERWIN	RESIDENTIAL	NONE	10/28/91	11/18/91	21	7/17/92	DENIED	242	HOME. WETLAND DEGRADATION
1.04	MA	DEAN ENTERPRISES	COMMERCIAL	1.5 CREATE		6/30/88		9/3/92	DENIED	1526	AMUSEMENT RIDE TESTING FACILITY
1.06	WA	WA DOT	ROAD	1.14 CR; 1.5 ENH +		5/8/92		10/7/92	ISSUED	152	ROAD WIDENING
1.08	OR	EARL LOGAN	RESIDENTIAL		1/8/92	1/14/92	6	4/28/92	DEN W/O P	105	401 CERT & CZM DENIED. GARDEN
1.1	FL	NEW COVENANT BAP CH	CHURCH	4.17 PRESERVE	3/5/92	3/9/92	4	8/3/92	DENIED	147	FAILED GUIDELINES; CONT TO PI
1.1	WI	MARVIN KRUSE	ROAD		2/14/92			4/8/92	DEN W/O P		401 CERT DENIED FARM RDAD
1.15	MN	CITY OF NEW ULM	MUNICIPAL	TO BE DEV		7/25/91		10/11/91	ISSUED	78	MOUND FOR WELL PROTECTION
1.2	AL	ROMAR CO	COMMERCIAL			11/21/91		4/1/92	DEN W/O P	132	SHOPPING CENTER. 401 & CZM DENIED
1.2	NC	CITY WINSTON-SALEM	ROAD					4/1/92	ISSUED		PARKWAY
1.2	MO	WATER UTIL SERV CO	COMMERCIAL					12/22/92	W/D		MOVED TO UPLANDS
1.25	NE	UNION PACIFIC RR	INDUSTRIAL	2.5 + CREATE	5/26/92	6/9/92	14	9/21/92	ISSUED	104	
1.29	WI	SALZWEDEL CRANB CO	AGRICULTURAL	1.1 CREATE	4/15/91	4/24/91	9	10/16/92	ISSUED	541	CRANBERRY BOG
1.34	MO	CHESTERFIELD INDUS	INDUSTRIAL	8 2 CREATE	2/11/92	2/28/92	17	7/28/92	ISSUED	151	
1.4	IN	BROWNING-FERRIS	INDUSTRIAL	21.6 CREATE	6/22/91	7/8/91	16		ISSUED		LANDFILL EXPANSION
1.45	CO	HALL-IRWIN CONST	MINING	2.4 CREATE		3/13/91		3/4/92	ISSUED	357	
1.5	VA	WAREHOUSE LNDG	RESID/ROAD	3.0 CREATE		10/16/91		1/10/92	ISSUED	86	
1.5	NC	COVINGTON CORP	ROAD					6/29/92	W/D		AGENCY OBJECTIONS
1.53	NC	NCDOT	ROAD	7					ISSUED		ROAD WIDENING
1.59	IL	IL DOT	ROAD	TBD		10/16/90		3/15/91	ISSUED	150	
1.6	PA	JEFFERSON CO FAIR AU	MUNICIPAL	1.6 CREATE		11/29/91		3/9/92	ISSUED	101	FAIRGROUND CONSOLIDATION
1.6	PA	WAL-MART STORES	COMMERCIAL	2.0 CREATE		12/28/91		10/30/92	ISSUED	309	WAL-MART STORE
1.68	LA	C. J. ROUSSE	COMMERCIAL	5.0 ENHANCE	11/15/89	12/4/89	19	12/20/91	ISSUED	746	SHOOTING RANGE AND STORAGE
1.7	FL	MCDONALD PART.	RESIDENTIAL	5.5 ENHANCE	10/29/90	12/4/90	36	1/6/92	ISSUED	398	RESIDENTIAL/GOLF COURSE
1.7	IN	STERLING CONST CO	RESIDENTIAL	3.7 CREATE	7/24/91	8/23/91	30		ISSUED		APARTMENT COMPLEX
1.71	IL	JACK MONCO	RESIDENTIAL	1.75 CREATE	8/2/90			11/5/92	W/D		SCALED BACK TO NWP 26
1.8	LA	MILLET ENTERPR, INC	RESIDENTIAL	2 ENHANCE	11/12/91	12/16/91	34	7/13/92	ISSUED	210	SUBDIVISION; SDME A/F
1.81	SC	NAVY	WILDLIFE ENH			2/28/92		5/27/92	ISSUED	88	WATERFOWL MGT PONDS
1.9	ME	DOROTHY SCAMMON	RECREATIONAL	34 PRE;5ENH	3/15/91	5/14/91	1	6/11/92	ISSUED	455	HORSE TRACK
1.9	TX	CITY OF CARROLLTON	ROAD	1.9 + CREATE	7/2/92	7/9/92	7	8/27/92	ISSUED	49	
2	AR	WILBURN WISEMAN	AGRICULTURAL	NONE	11/2/90	8/23/91	294	2/7/92	W/D	168	FAILED TO ACCEPT PERMIT
2	HI	US FWS	REFUGE	18 ENHANCE	8/26/92	9/9/92	14	12/17/92	ISSUED	99	WILDLIFE ENHANCEMENT
2	IA	KENNETH FIELDER	RECREATIONAL	2 CRE/PRES	3/27/91	4/9/91	13	2/19/92	ISSUED	316	CAMPGROUND
2	ID	RALPH CHAMBERS	RESIDENTIAL	NONE	10/30/90			3/17/92	W/D		DRIVE & HOUSE. W/D BY APPLICANT
2	IL	CARLTON COURT	RESIDENTIAL		4/4/91			1/6/92	W/D		FAILURE TO PROV ADDL INFO
2.1	IL	KLEIN CREEK CORP	RESIDENTIAL	3 2 CREATE	8/3/91			2/2/93	W/D		APPLIC WAS FOR NWP 26; AGREED
2.3	PA	PA ANG	MUNICIPAL	2.3 CREATE		11/26/91		2/26/92	ISSUED	92	APRON EXTENSION
2.3	VT	CITY OF BARRE	MUNICIPAL					3/3/92	W/D		FAILED TO PROVIDE INFO
2.31	OH	BENJAMIN SUAREZ	RESID/LAKE	2.44 CREATE		3/18/92		8/24/92	DEN W/O P	159	STATE DENIED 401 CERT
2.45	PA	J.J.GUMBERG CO	COMMERCIAL	2.5 CREATE		1/31/91		4/7/92	W/D	432	SHOPPING CENTER. QUAL FOR NWP 26
2.5	CO	D. SAYRE HOYL TRUST	RANCHING		8/19/91	9/12/91	24	2/11/92	ISSUED	152	POND

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2.5	AL	AL HWY DEPT	ROAD	7		6/21/92		10/1/92	ISSUED	102	STATE ROAD IMPR
2.5	WA	ARNOLD FREUND	COMMERCIAL	2 5 CREATE				9/16/92	W/D		FAILED TO PROVIDE INFO
2.56	AK	RUSSELL WELBORN	COMMERCIAL	NONE	5/27/90	7/8/90	42	12/31/91	PAR DENIAL	541	
2 6	CT	RONCARI INDUSTRIES	INDUSTRIAL	2CR;0.5REST	7/2/91	7/3/91	1	9/11/92	ISSUED	436	QUARRY EXPANSION
2.6	MD	LEROY CARSON	RESIDENTIAL			1991		8/15/92	DENIED		FILL STAC DITCH. ALTERNATIVE AVAIL
2.6	SC	LISTON WILLIAMS	RESIDENTIAL	MGT, PLANT		11/1/91		2/25/92	ISSUED	116	FISH & DUCK POND
2.64	NC	NCDOT	ROAD	6.47 CR/REST				8/4/92	ISSUED		HIGHWA /
2.7	MD	HILL MGT SERVICES	RESIDENTIAL	42 PRESERVE	1991			3/9/92	ISSUED		ROAD
2.75	KY	SCOTTY'S STONE	COMMERCIAL	7		11/23/90			ISSUED		ACCESS ROAD
2.8	MS	JOHN ELLIS	RECREATIONAL	7		9/11/91		8/20/92	DEN W/O P	344	PENDING MITIG PLAN & 401
2 85	FL	PULTE HOME CORP	RESIDENTIAL	0.26 CR; 22.2ENH	6/11/91	6/14/91	3	3/2/92	ISSUED	262	RESIDENTIAL COMMUNITY
2.86	MN	WADENA CO HWY DEPT	ROAD	5.14 REST/ENH	2/20/91	2/22/91	2	1/3/92	ISSUED	315	COUNTY HWY UPGRADE
2.9	AK	UNIV ALASKA	MUNICIPAL	NONE	12/13/90	3/28/91	106	5/26/92	ISSUED	363	SCHOOL PARKING
3	GA	EARL MCMILLEN	RESIDENTIAL	3 CREATE	11/28/90	1/4/91	37	12/11/92	ISSUED	707	DRIVE/RESIDENCE/POND
3	LA	RESERVE CHRISTIAN	RECREATIONAL	3 ENHANCE	3/13/92	3/30/92	17	5/26/92	ISSUED	57	BALL FIELDS. A/F
3	NC	RICHARD MCALLISTER	RESIDENTIAL			7/5/90		4/3/92	DENIED	638	HOME SITES. FAILED GUIDELINES
3	OR	CRAVEN FARMS, INC	AGRICULTURAL	BUFFER		9/26/91		4/24/92	ISSUED	211	PLANT FEED GRASS
3.08	NY	NY DOT	ROAD	4.1 CRE; 3 2 PRE		5/1/92		7/7/92	ISSUED	67	STATE HWY RELOC
3.1	SC	BEAUFORT COUNTY	MUNICIPAL	ENH		5/15/92		11/2/92	ISSUED	171	AIRPORT TAXIWAY
3.1	MS	BROOKS AYCOCK	AGRICULTURAL		6/11/91	6/26/91	15	2/14/92	W/D	233	FAILURE TO PROVIDE ADDL INFO
3.28	OR	ROSS INVESMENTS,INC	INDUSTRIAL	7.04 RESTORE +		1/27/82		8/24/92	ISSUED	210	WAREHOUSES
3.31	FL	DEER POINT COVE	RESIDENTIAL	1.5 CR; 75 PRE	12/18/91	12/24/91	6	11/30/92	ISSUED	342	RESIDENTIAL COMMUNITY
3.55	CO	DENVER	RECREATIONAL	4.97 CRE/ENH	8/28/91	8/28/91	2	2/7/92	ISSUED	163	
3.57	PA	TREES DEV CO	RESIDENTIAL	1:1 ON SITE		4/8/91		12/16/92	ISSUED	618	RESID/RECR COMPLEX
3.71	CA	PIERSON HRDWR; W&W	COMMERCIAL	8.65 CREATE +	9/14/87	1/14/88	122	1/21/92	ISSUED	1468	1.45 A/F.
3.8	MD	C.P. JOHNSON	AGRICULTURAL	5 9 CREATE	6/30/92	7/9/92	9	11/5/92	ISSUED	119	LAND LEVELLING
3.9	AR	MICHAEL NELSON	AGRICULTURAL	1.3 RE; 5.9 CR	4/24/91	5/21/91	27	5/28/92	ISSUED	374	LAND LEVELLIND FOR CROPS
4	MN	DARRIL PETERSON	COMMERCIAL	NONE	9/11/91	9/30/91	19	1/27/92	DENIED	119	FAILED GUIDELINES
4	MS	FASTWAY SYSTEMS	COMMERCIAL			10/17/91		3/20/92	DEN W/O P	155	FAILED TO GET 401. SOME A/F
4.1	PALAU	NGIWAL STATE GOVT	ROAD			12/4/90		4/18/92	ISSUED	501	
4 12	SC	SC DHPT	ROAD	?		3/1/91		3/2/92	ISSUED	387	US HWY WIDENING
4 25	TN	RUSSELL KOSTKA	RESIDENTIAL	20 REST/ENH	9/4/91	9/10/91	6	2/21/92	ISSUED	164	SOME PRE-PERMIT CLEARING
4.3	AR	J B CALLOWAY	AGRICULTURAL		7/26/91	8/7/91	12	7/27/92	DENIED	355	LEVEE. FAILED GUIDELINES
4 6	RI	RI DOT	ROAD			11/29/90					STATE HIGHWAY
4.66	AL	AL DEPT OF CORR	MUNICIPAL	?		9/27/91		8/10/92	ISSUED	318	PRISON
4 8	FL	HUXLEY WALTERS	COMMERCIAL	12 CREATE	1/6/92	1/10/92	4	2/24/92	ISSUED	45	COMMERCIAL DEVELOPMENT
4 8	LA	US FWS	REFUGE	120 ENHANCE	4/25/91	5/3/91	8	2/13/92	ISSUED	286	FACILITATE ROAD DRYING ON REFUGE
				AVERAGE DAYS			28			289	
80				NUMBER REPORTING			37			62	
5	GA	POLK COUNTY	MUNICIPAL			11/16/89		9/18/92	W/D	1037	FLOOD CON RES. FAILED TO PROV INFO
5	MS	HIGHWAY 63 PROPERTIES	COMMERCIAL			7/24/92		11/12/92	DEN W/O P	111	FAILED TO GET 401 & CZM
5	MO	ST JOS LT & POWER	INDUSTRIAL	10 CREATE	5/5/92	9/21/92	139	11/10/92	ISSUED	50	
5 05	AK	KEN BLAINE	RECREATIONAL	NONE	3/27/82	4/10/92	14	8/24/92	W/D	136	APPLIC WITHDREW DUE OPPOSITION
5.17	CO	CO DOT	ROAD	18 CREATE		2/28/92		6/24/92	ISSUED	117	
5.3	AR	MAJOR MILLIGAN	RECREATIONAL	5.3 CR; 13 ENH	4/30/91	5/24/91	24	11/22/91	ISSUED	182	25 ACRE LAKE
5.3	IL	DEERPOINT HOMES	RESIDENTIAL	6.36 CREATE	4/24/91	2/28/92	310	7/8/92	ISSUED	131	
5.4	LA	MANDEVILLE ASSOC	COMMERCIAL	$ 8,100 TO LNC	4/25/91	5/24/91	29	2/20/92	ISSUED	272	ELDERLY CARE FACILITY
5.6	TN	TDOT	ROAD	10.8 REST/PRE	8/22/91	8/28/91	6	2/7/92	ISSUED	163	PARKWAY

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Beveridge & Diamond, P.C.

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5.65	LA	LA PSYCHIATRIC CO	HOSPITAL	$ 9,608 TO LNC	11/22/89	12/11/89	19	9/16/92	ISSUED	1010	HOSPITAL
5.73	FL	FLOOT	ROAD	3.3 ENH	2/18/92	3/23/92	34	5/7/92	ISSUED	45	TOLL PLAZA ENL
6.1	PA	G.P.O.W.S.,INC	INDUSTRIAL		4/8/92	4/22/92	14	5/29/92	ISSUED	37	MINING
6.11	NY	WAL-MART STORES	COMMERCIAL	16.8 ?		9/21/92		12/17/92	ISSUED	87	SAM'S CLUB OUTLET
6.3	ID	CITY OF MCCALL	RESIDENTIAL	11 CREATE	5/5/92	5/7/92	2	10/15/92	ISSUED	161	RESIDENTIAL/GOLF COURSE
6.4	PA	GROVE CITY CNTRY CLB	RECREATIONAL	6.7 CREATE		9/16/91		4/7/92	W/D	204	GOLF. FAILED TO DO ARCHAELOG SURV
6.46	PA	PADOT	ROAD	6.46 CREATE		2/18/92		3/11/92	ISSUED	22	HIGHWAY
7	AR	MELVIN TAYLOR	RECREATIONAL		8/9/91	8/16/91	7	10/29/92	W/D	440	FISH POND. ADDL INFO NOT PROVIDED
7	TN	1ST AM NAT BANK	COMMERCIAL	3 ENHANCE		3/3/92		6/16/92	ISSUED	105	
7.3	LA	LEISUREMONT VILLAS	RESIDENTIAL	5.3 CR; 2.0 ENH	4/7/92	4/16/92	9	9/8/92	ISSUED	145	
7.9	TN	JIM ETHRIDGE	RESIDENTIAL	14 ENH	10/28/91	11/1/91	4	3/31/92	W/D	151	WITHDRAWN BY APPLICANT
8	MO	BERNARD KERTZ	AGRICULTURAL			1/25/90		11/23/92	DENIED	1033	FAILED GUIDELINES
8	MS	WARREN CO BD OF SUP	INDUSTRIAL	20 PRESERVE	2/13/92	2/20/92	7	12/1/92	ISSUED	285	
8.9	OH	CHAMPIONS DEV CORP	GOLF/RESID	13.5 CREATE		7/17/91		3/11/92	ISSUED	238	PUBLIC HEARING 10/29/91
9.07	WI	WISC DOT	ROAD	25 RESTORE				3/5/93	ISSUED		ROAD
9.3	CA	GADOT	ROAD	11.8 CREATE +	8/2/91	10/2/91	61	5/1/92	ISSUED	212	ROAD WIDENING WAYNESBORO BYPASS
9.6	IA	WASHINGTON CO	ROAD	6 ENH; 2.5 CRE	7/22/91	8/1/91	10	1/22/92	ISSUED	179	
9.6	TN	TDOT	ROAD	14.4 CR/REST +	8/2/91	8/14/91	12	2/12/92	ISSUED	182	HIGHWAY WIDENING
9.8	MO	HUGHEY INMAN	AGRICULTURAL	14.7 CREATE	6/10/91	7/19/91	39	6/9/92	ISSUED	326	LAND LEVELLING; 8 AC ADD'L FILL W/D
9.91	FL	WALT DISNEY WORLD	RECREATIONAL	410 ENHANCE	9/19/91	9/25/91	6	8/17/92	ISSUED	327	ROADS, HOTEL
29				AVERAGE DAYS			39			264	
				NUMBER REPORTING			19			28	
10	CA	DIXIE RECYCLING	MUNICIPAL		9/18/92	9/18/92	0	11/30/92	DENIED W/O P	73	SAN LANDFILL, LACK OF STATE PERMIT
10.5	NC	NCDOT	ROAD	10.5 CR/REST		11/14/91		5/19/92	ISSUED	187	HIGHWAY
10.8	ID	KEITH ELKINGTON	RECREATIONAL	0.02 CREATE	4/28/92	4/29/92	1	10/23/92	W/D	177	INFO NOT PROVIDED
10.9	DE	DEDOT	ROAD	20.7				9/2/92	W/D		PENDING 401 & RESPONSE TO COMMENTS
12	KS	MAURICE WALKER	AGRICULTURAL	18 VEG BUFFER	4/2/91	5/20/91	48	4/8/92	ISSUED	324	SOME RESTORATION
12.7	MS	JERRY PALMER	COMMERCIAL	13.3 CR/ENH	7/29/91	8/7/91	9	2/26/92	ISSUED	203	FISH POND IN FARMED WETLAND
12.78	NE	NE DEPT OF ROADS	ROAD	18 RESTORE	12/9/91	12/19/91	10	4/6/92	ISSUED	109	
13	WI	PLAZA CRANBERRY FAR	AGRICULTURAL	34.3 CR/RES/EN	3/25/91	4/12/91	18	8/20/92	ISSUED	496	CRANBERRY BOG EXPANSION
13.24	SC	HORRY COUNTY	MUNICIPAL	69 CR; 65 PRES		7/12/91		8/3/92	ISSUED	388	LANDFILL EXP
13.27	WI	WILLIAM SMITH	INDUSTRIAL		1/16/92	2/5/92	20	3/20/92	DEN W/O P	44	401 CERT DENIED. SALVAGE YARD
13.5	IL	1ST MIDWEST TRUST	COMMERCIAL	14 CREATE	11/16/90	11/30/90	14	2/5/92	ISSUED	432	0.9 ACRES CLEARED PRIOR TO AUTH
14.2	KY	HOME QTRS WAREHOUSE	COMMERCIAL	28.4 RESTORE	4/8/91	5/3/91	25		ISSUED		HOME IMPR STORE
14.9	CA	TILLMAN PROPERTIES	RESIDENTIAL	130 PRESERVE	4/3/90	6/14/90	72	6/11/92	ISSUED	728	RESID/GOLF
15	WI	KURT BOSSHARD	AGRICULTURAL					12/1/92	W/D		ADD'L INFO NOT PROVIDED. CRANBRY RES
15.3	MN	MN DOT	ROAD	14.5 CREATE		4/2/92		6/23/92	ISSUED	82	
15.35	MD	BLADES MATERIALS	MINING	? CREATE	1991			4/15/92	W/D		SAND MINING, APPLIC W/D-ECON PROB
15.7	MS	MSHD	ROAD	17.4 ENH +	8/9/91	8/21/91	12	1/23/92	ISSUED	155	HIGHWAY WIDENING
16	CA	CHATHAM COUNTY	ROAD	1.6 RES;13.1 PRE	5/23/90	6/1/90	9	8/27/92	ISSUED	818	JIMMY DELOACH PARKWAY
16.4	MS	CHEVRON, U.S.A	INDUSTRIAL	24 CREATE		12/5/91		4/20/92	ISSUED	137	
17	MS	KLEIN&BENNETT	COMMERCIAL		6/2/92	6/10/92	8	9/16/92	DEN W/O P	98	FAILED TO GET 401 & C2M
20	VA	ROCK CHURCH	RECREATIONAL		10/16/92			11/16/92	W/D		CORPS ENC-LOW APPROVAL CHANCE
21	MO	MERVYN JENKINS	AGRICULTURAL		8/20/91	11/27/91	99	6/9/92	DENIED	195	WETLAND LOSS
21.5	GUAM	GUAM FIRST GREEN CORP	GOLF	13.9 LAKES		1/14/91		8/19/91	ISSUED	217	GOLF COURSE PREMIT ACTUALY ISSUED 2/20/92
21.6	OH	ODOT	ROAD	7 CR; 20.30ENH	6/27/90	10/2/90	97	7/6/92	ISSUED	643	PARKWAY
22	CT	LYMAN FARMS	RECREATIONAL	33 ENH,150PRE	11/22/90	11/28/90	6	8/28/92	ISSUED	639	GOLF COURSE
22.2	OH	RICHARD LAMBERT	RECREATIONAL	18.8 CREATE				1/27/92	ISSUED		LAKE/WILDLIFE PRESERVE

Source Individual Decision Documents, 1992

Beveridge & Diamond, P.C

EXHIBIT 6

ACREAGE SORT FOR 303 SEC. 404 PERMIT ACTIONS COMPLETED IN 1992

SEE FINAL PAGE FOR EXPLANATORY NOTES

IMPACT ACRES	STATE	APPLICANT	PROJECT	MITIGATION ACRES	COMPLETE APPLIC. (CA)	PUBLIC NOTICE (PN)	DAYS CA-PN	DECISION DATE(D)	DECISION	DAYS PN-D	REMARKS
22 6	AK	CITY OF KOYUK	MUNICIPAL	NONE	6/2/92	6/10/92	8	11/5/92	DEN W/O P	146	DUE PROBLEMS GETTING 401 CERT
23 3	CO	INDIAN MEADOWS	GOLF/RESID	17 CR, ? ENH	3/20/90	4/4/90	15	6/1/92	ISSUED	789	
24 53	SC	SC PORTS AUTHORITY	INDUSTRIAL	33 REST + +		8/14/92		10/9/92	ISSUED	56	BMW AUTO PLANT
24.7	TX	TX DOT 2 PERMITS	ROAD	100 PURCH(1)	4/1/92	4/3/92	2	5/22/92	ISSUED	49	(1) INCLUDES MITIG FOR 2 OTHER PERMITS
25 2	LA	KRONOS LA INC	INDUSTRIAL	95 ENHANCE	8/29/91	5/2/92	247	7/20/92	ISSUED	79	SOLID WASTE LANDFILL
26	MS	H GORDON MYRICK	COMMERCIAL			5/6/92		6/22/92	DEN W/O P	47	APPLIC TO MODIFY PROPOSAL
26 2	MD	MD SHA/MD	ROAD	42 2 CR, ETC				8/21/92	ISSUED		HIGHWAY
27	MN	CITY OF PLYMOUTH	RECREATIONAL	NONE	3/31/92			8/10/92	W/D		STATE WITHDREW. COMMUNITY LAKE
27	AK	ARLENE DARLING	INDUSTRIAL	NONE	1/21/92	2/11/92	21	5/19/92	W/D	98	AFTER DISC W/ CORPS ON NEED
28.4	SC	CITY OF ORANGEBURG	MUNICIPAL	29CR; 87 PRES		5/8/92		8/10/92	ISSUED	94	AIRPORT EXP
28 8	GA	COOPER, SUGRUE, ET AL	RESIDENTIAL		1/9/88	1/25/88	16	8/11/92	DENIED	1660	DAM/LAKE FAILED GUIDELINES
29	MS	W H. STEELE	INDUSTRIAL	29 CREATE	4/17/92	6/1/92	14	11/30/92	ISSUED	215	
39 51	PA	CITY OF DUBOIS	COMM/INDUS	42 5 CREATE		4/28/89		10/30/92	ISSUED	1281	INDUSTRIAL PARK
39.8	ID	ORVILLE BAILEY	RESIDENTIAL	NONE	4/30/92			5/1/92	DEN W/O P		STATE DENIED PERMIT
41	GA	GILMER COUNTY	MUNICIPAL		12/28/87	1/19/88	22	10/14/92	W/D	1730	WATER SUPP RES. FAILED TO PROV INFO
42	LA	E T REICKE	RESIDENTIAL	$ 71,400 TO LNC	2/10/92	3/2/92	21	7/10/92	ISSUED	130	SUBDIVISION
45	GA	STEVE DIXON	AGRICULTURAL					12/20/91	W/D		IRRIG POND. APPLICANT WITHDREW
53	AK	CITY FAIRBANKS	MUNICIPAL	2.1 CREATE	11/16/90	12/18/90	32	12/31/91	DENIED	378	FAILED GUIDELINES; CONTRARY TO PI
67	AR	JOHNNIE STUBBS	AGRICULTURAL		8/26/91			4/10/92	W/D		CATFISH PONDS - MOVED OUT OF WTLNDS
87.8	AL	MOBILE AIPORT AUTH	MUNICIPAL	143.2 CREATE	5/16/91	5/31/91	15	4/8/92	ISSUED	313	
90 7	IN	INDIANAPOLIS AP AUTH	MUNICIPAL	400 REST, ENH	2/13/92	2/27/92	14		ISSUED		AIRPORT EXPANSION
				AVERAGE DAYS			31			377	
47				NUMBER REPORTING			28			35	
100	ID	NICK MICKELSEN	AGRICULTURAL	NONE	4/18/91	4/19/91	1	1/15/92	DEN W/O P	271	STATE DENIED 401
319	GA	FAYETTE COUNTY	MUNICIPAL	177 RST;515PRE*	12/18/91	12/26/91	8	12/29/92	ISSUED	369	WATER SUPPLY RES. *PLUS 72 ENH;$175,000
883	NC	USFWS	REFUGE	NONE		9/19/91		2/26/92	ISSUED	160	FIREBRKS, SOME A/F BORROW FOR RDS
				AVERAGE DAYS			5			267	
3				NUMBER REPORTING			2			3	

NOTES:

1 THE "TARGET" ACTIONS ARE APPLICATIONS FOR A STANDARD, INDIVIDUAL SECTION 404 PERMIT INVOLVING WETLAND IMPACTS FOR NONWATER DEPENDENT ACTIVITIES

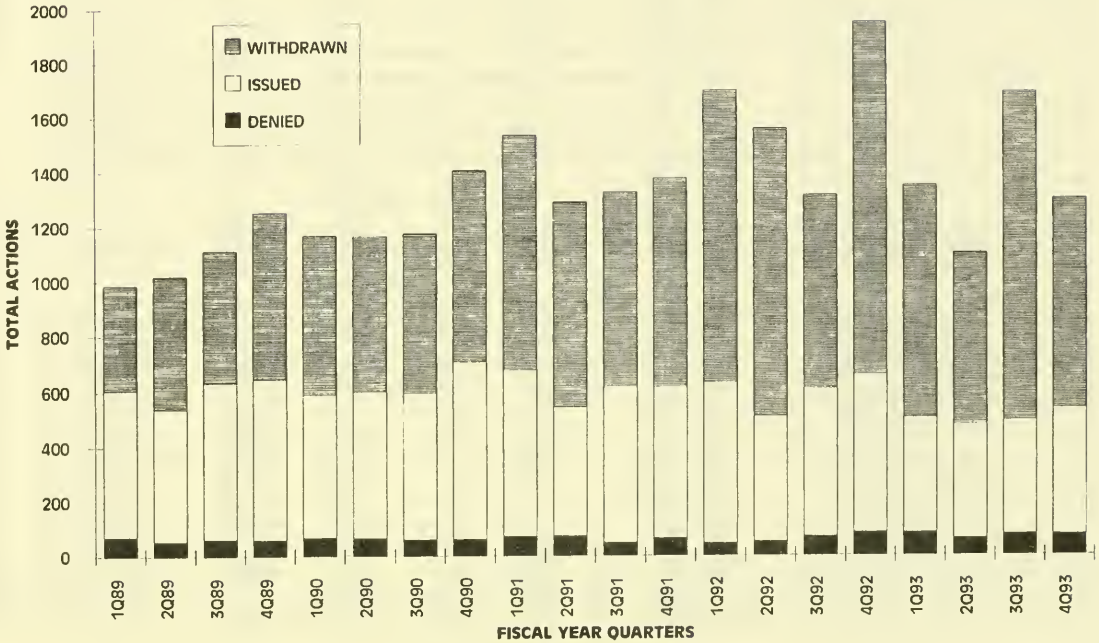
2 ALL DATA WERE TAKEN DIRECTLY OR CALCULATED FROM DOCUMENTS COLLECTED FROM CORPS OF ENGINEERS DISTRICT OFFICES

3 A BLANK CELL INDICATES THE INFORMATION WAS NOT CONTAINED IN THE AVAILABLE DOCUMENTS.

4 "NONE" UNDER THE MITIGATION ACRES COLUMN INDICATES NO COMPENSATORY WETLAND MITIGATION WAS OFFERED OR REQUIRED.

5 A QUESTION MARK IN THE MITIGATION ACRES COLUMN INDICATES THAT COMPENSATORY MITIGATION WAS REQUIRED BUT THE ACREAGE OR TYPE COULD NOT BE DETERMINED

EXHIBIT 7
SECTION 404 QUARTERLY ACTIONS
OCTOBER 1, 1988 - SEPTEMBER 30, 1993



Source: Corps Headquarters Quarterly Reports.

Beveridge & Diamond, P.C

APPENDIX A

A SUMMARY AND ANALYSIS OF WETLAND LOSS DATA FOR THE LOWER 48 STATES

1. INTRODUCTION. Our study of the Section 404 program revealed that Corps permits accounted for about 10,000 to 12,000 acres of wetland loss annually in 1992 and 1993. At the same time, the permits required mitigation acreage that exceeded the loss acreage. See paragraphs 2.3, 5.2.5 and 5.2.6 of the main report. Because the 10,000 to 12,000-acre figure is dramatically lower than figures that are often quoted for total wetlands loss and because wetland loss figures play such an important role in the wetland debates and controversy, we decided to look at the available data on wetland losses and draw some general conclusions on current loss rates. Our review demonstrated to us that there is clearly a need for the government to update its estimates.

2. LOSSES FROM MID-1950'S TO MID-1970'S. In 1982 the U.S. Fish and Wildlife Service's (FWS) National Wetlands Inventory estimated there were 108.1 million acres of wetlands in the 1950's in the conterminous United States.[11/] The total acreage in the 1970's was reported to be 99 million or a loss of 9.1 million acres over the 20-year period. The average annual loss was stated to be 458,000 acres. The report estimated that 439,000 acres per year or 96 percent of the total wetland losses were palustrine (freshwater, inland) wetlands. And of the palustrine wetlands losses "[n]early all the loss was due to agriculture." EPA stated in a 1988 report titled

[11/] See, Frayer et al. 1983. Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950's to 1970's. Colorado State University, Ft. Collins.

"America's Wetlands, Our Vital Link Between Land and Water" that "Agricultural drainage of wetlands was responsible for 87 percent of the losses between the mid-50s and the mid-70s."

3. LOSSES FROM MID-1970'S TO MID-1980'S. The Emergency Wetlands Resources Act of 1986 directed the FWS to update the 1982 report every ten years. The first update was submitted to Congress in 1991.[12] The 1991 study sampled 3,629 plots using aerial photography from the mid-1970's and mid-1980's. The mean photo dates were 1974 and 1983. The study estimated there were 105.9 million acres of wetlands in the mid-1970's and 103.3 million acres in the mid-1980's, a net loss of 2.6 million acres over the study period. Using a nine-year study period as represented by the mean photo dates, the report estimates an average annual loss of 290,000 acres. Freshwater wetlands accounted for 98 percent of the losses. Conversion to agriculture uses accounted for 54 percent of the losses while conversion to urban land uses accounted for 5 percent; conversion to "other" uses accounted for the remaining 41 percent. According to the report, a substantial portion of the "other" category included lands that had been cleared and drained, but had not yet been developed or otherwise put to an identifiable use.

4. ADJUSTMENT OF THE MID-1970'S WETLAND ACREAGE. As noted in the preceding paragraphs, the 1982 study estimated the total wetland acreage existing in the mid-1970's as 99 million whereas the 1991 study placed the figure at 105.9 million. The 1991 report explains that the 6.9 million-acre difference resulted from retrofitting the superior quality imagery (including infrared color photos) used for the mid-1980's calculations to the 1970's photos. If an area was identified as wetlands on the 1980's photos but not on the 1970's photos and there was no obvious land use change, the 1970's acreage was adjusted to reflect the new wetland classification. However, the 1991 report stated that the correction "does not invalidate the estimated losses for the mid-1950's to the mid-1970's." This then would presumably cause the

[12] Dahl, T.E. and C.E. Johnson. 1991. Status and Trends of Wetlands in the Conterminous United States, Mid-1970's to Mid-1980's. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C.

1950's acreage estimate to increase by the same 6.9 million acres or from 108.1 million to 115.0 million.

5. RECENT EVENTS AFFECTING LOSS RATES. Over ten years have passed since the 1983 (mean) aerial photos that formed the basis for the last official wetland estimate made by FWS were taken. A number of significant events have occurred in that ten-year period to stem, if not reverse, wetland losses.

a. Swampbuster. The most significant event since 1983 causing a reduction in the rate of wetland conversions was probably the "Swampbuster" provision of the 1985 farm bill (Food Security Act of 1985). Swampbuster withholds Federal farm program benefits if a farmer plants an agricultural commodity crop in a former wetland converted to agricultural use after December 23, 1985. Thus, Swampbuster is designed to discourage the types of wetland conversions that caused most of the reported wetland losses from the 1950's to the mid-1980's. The Swampbuster provision was amended by the 1990 farm bill (Food, Agriculture, Conservation, and Trade Act of 1990), which withholds benefits if a wetland is converted for the purpose of, or to make possible, agriculture commodity production after November 28, 1990.

b. Farm Bill Restoration Incentives. Both the 1985 and 1990 farm bills contain important incentives for farmers to restore previously drained wetlands. The 1991 FWS report states: "From 1987 to 1990, programs to restore wetlands under the 1985 Food Security Act have added about 90.0 thousand acres to the nation's wetlands inventory." The Corps of Engineers stated in the preamble to its 1991 nationwide permit regulations: "The USFWS has restored approximately 55,000 acres of wetlands through activities associated with private land wetland restoration and protection initiatives since 1987 and is presently restoring wetlands on approximately 2,000 to 2,500 sites per year. Under the 1990 Farm Bill and other associated private land restoration activities approved by Congress, it is expected that the FWS and the SCS will accomplish 8,000 to 10,000

wetland restoration projects per year." 56 Fed. Reg. 59127 (1991). Other agencies such as the Forest Service and the Bureau of Land Management are also mentioned in the preamble discussion as having wetland restoration programs in place.

c. Emphasis on Restoration Programs. EPA and FWS have placed emphasis on a number of federal programs for wetland restoration and protection. Such programs include USDA's Agricultural Restoration, Wetland Reserve, Water Bank, Agricultural Conservation, Forestry Incentive, Stewardship Incentives and Forest Legacy Programs and FWS' Partners for Wildlife and North American Waterfowl Management Programs. State and local governmental programs and private programs sponsored by organizations such as Ducks Unlimited have also enjoyed increased attention.

d. No Net Loss Policy. EPA and the Corps adopted a no net loss of wetlands policy for the Section 404 program in 1990. No net loss has become the goal of many other federal wetland programs and activities as well.

e. Mitigation Banks. EPA and the Corps as well as the Clinton Administration and the Congress have been emphasizing the establishment of mitigation banks. EPA announced in its Wetlands Fact Sheet # 14 that approximately 100 mitigation banks are in operation or are proposed for construction in 34 states. EPA843-F-93-001n, March 1993.

Because of these dramatic developments since the mid-1980's wetland estimate, the 290,000 acres per year loss rate from the mid-1970's to the mid-1980's clearly does not represent current experience.

6. SCS 1991 STUDY. The most current information we could find on national losses was a report by the SCS titled: "1991 Update of National Resources Inventory, Wetlands Data for Non-Federal Rural Lands." During June and July of 1991, SCS personnel conducted field visits of nearly 20,000 scientifically selected sample points that were inventoried in the 1982 and 1987

National Resource Inventories. According to the report, "The NRIs include all non-Federal rural land. Rural land includes, for example, cropland, forest land, and rangeland. Open water and developed land, such as roads and urban areas, are not part of rural land." The study revealed that 117,000 acres of wetlands were converted to agricultural activities between the 1987 inventory and the 1991 inventory -- an average wetlands loss of 29,000 acres per year. The 1991 inventory also estimated 1987-91 conversions of non-federal rural wetlands to other uses and found that 58,000 acres per year were converted to development uses, and 20,000 acres per year were converted for "other" purposes, primarily wetlands converted to open water. The total four-year loss of wetlands in non-federal rural areas was determined to be 431,000 acres or about 108,000 acres per year. This 1991 study provided no estimates of areas that became new wetlands or were converted back to wetland status.[13] SCS is currently updating this inventory with considerably more data and expects to have some conclusions by April 1994.

7. SUMMARY OF LOSS RATE ESTIMATES. From the above discussion and the estimate of 221 million acres of wetlands existing in the 1780's found in the 1991 FWS report, a table can be constructed showing wetland loss rate estimates.

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[13] Moreover, a significant portion of the reported "loss" was actually change of ownership from non-federal to federal lands, not loss of wetlands per se. Cabbage, F.W. and Flather, Forested Wetland Area and Distribution, Journal of Forestry, May 1993, p. 37.

Table A-1

Wetland Loss Rate Estimates

Period	Total Loss Acres	Loss Rate Acres/Yr	Source
1780s - 1950s	106,000,000	624,000	FWS 1982, 1990
1950s - 1970s	9,100,000	458,000	FWS 1982
1970s - 1980s	2,600,000	290,000	FWS 1991
1987 - 1991	432,000	108,000*	SCS 1991

* Does not include losses on Federal lands or non-rural lands; does not include wetland gains.

Since it is safe to assume that a net loss of wetlands is not occurring on federal lands (see paragraph 9 below) and that losses in non-"rural" areas would be quite small, the 108,000-acre annual loss figure from 1987 to 1991 is fairly representative of all wetland losses during the period. But the fact that it does not include wetland gains is significant.

8. WETLANDS RESERVE PROGRAM. USDA's first wetlands reserve program sign-up in 1992 was a big success. Bids to restore 249,059 acres on 1,314 farms were received by the September 1992 deadline. Because of the 50,000-acre funding limitation, bids could be accepted on only 265 farms to restore 49,888 acres.[14/] On January 5, 1994, USDA announced the second Wetlands Reserve Program sign-up from February 28, 1994 through March 11, 1994. The 1994 program is funded to restore up to 75,000 acres.[15/]

[14/] 1992 Wetlands Reserve Program, Report to Congress, U.S. Department of the Agriculture, 1993.

[15/] USDA News Release No. 0015.94, January 5, 1994.

9. FEDERAL PROGRAMS. Federal agencies using funding programs from Fiscal Years 1989 through 1992 reported to the White House's Interagency Task Force on Wetlands that the various federal programs on federal and non-federal land would result in the restoration/enhancement of 281,926 acres of wetlands on federal land and 552,479 acres on non-federal land, a total of 834,405 acres during the four-year period.[16] The Task Force said in August of 1992: "Together with federal and state regulatory programs that largely prevent future unmitigated wetland losses, the proposed National Program for Wetlands Restoration and Creation should enable us not only to achieve 'no net loss' of wetlands but also to finally reverse the historical trend of declining wetland resources." The 834,405 acres of restoration/enhancement did not include USDA's newly initiated Wetlands Reserve Program. Considering the Wetlands Reserve Program and other initiatives, the Task Force estimated the restoration rate between 1993 and 1995 would be 570,000 acres per year.

10. CURRENT LOSSES. The above data suggest that the nation is making substantial progress towards no net loss of wetlands or may even have reached that goal. Yet this progress goes unreported; instead the 290,000 acre figure continues to hold sway.[17] When Senator Chafee introduced his wetlands bill on July 28, 1993, he said: "I continue to believe we are losing too many wetlands - an astounding 200,000 acres per year - and it would be wise to significantly strengthen wetlands protection efforts." Cong. Rec., Vol 139, No. 107, July 28, 1993. It is time for the Federal agencies to develop a reliable current estimate of wetland losses and gains.

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[16] A National Program for Wetlands Restoration and Creation, Report of the Interagency Committee on Wetlands Restoration and Creation to the Policy Coordinating Group, Interagency Task Force on Wetlands, August 1992.

[17] For example, USA Today recently reported that "About 290,000 acres continue to be lost each year." August 25, 1993, p. 6A.

APPENDIX B
CORPS HEADQUARTERS CONSOLIDATED QUARTERLY REPORT
1ST QUARTER FISCAL YEAR 1994

REGULATORY QUARTERLY REPORT OFFICE OF CHIEF	DISTRICT/DIVISION OCE OCE	QTR 1	FY 1994

EVALUATION WORKLOAD

LAWS SEC	CARRY OVER	REC-IEVED	WITH DRAWN	STAN-DARD	LOP	DENIAL W/P	DENIAL WO/P	PEND-ING	REG-IONAL	NWP
10	1102	1235	253	330	565	2	17	1170	3047	938
404	3032	1138	962	386	42	9	55	2716	815	5902
10/404	2000	778	353	458	58	3	23	1883	1045	1151
10/103	43	6	1	2	XXXXX	0	0	46	XXXXX	XXXXX
TOTAL	6177	3157	1569	1176	665	14	95	5815	4907	7991

EVALUATION DAYS

LAWS SEC	STANDARD	LOP	DENY W/P	DENY WO/P	REGIONAL	NWP
10	26928	18761	211	2382	56877	6593
404	50778	1280	2232	8916	11603	95708
10/404	46847	3328	278	1186	16385	21784
10/103	200	XXXXX	0	0	XXXXX	XXXXX
TOTAL	*****	23369	2721	12484	84865	*****

DAYS OF EVALUATION	STANDARD & DENIAL	LOP	REGIONAL	NATIONWIDE
0-60	501	561	4827	7695
61-120	454	80	61	184
OVER 120	330	24	19	112
TOTAL	1285	665	4907	7991

% OF ALL ACTIONS < 60 DAYS 91% | % OF STD ACTIONS < 120 DAYS 74%
TOTAL NO. ALL ACTIONS 14848 | TOTAL ALL ACTIONS < 60 DAYS 13584

PRIMARY CAUSE FOR DELAY FOR STANDARD & DENIAL ACTIONS COMPLETED > 120 DAYS

APPL	401 CERT	CZM	HIST	404Q/INF	404Q/FORMAL	INTERNAL	TOTAL
138	39	25	16	22	0	78	330

OTHER WORKLOAD ITEMS

NO PERMIT REQD	2963	EIS PENDING	74	PUBLIC HEARINGS	8
APPL MODIFIED	268	EIS COMMENTED ON	63	PUBLIC INFO MEETINGS	496
PERMITS MODIFIED	571	JUR. DET. OFFICE	5775	PREAPP. CONSULTATIONS	3237
SITE VISITS	3995	JUR. DET. FIELD	3370		

STAFFING

FTE'S ALLOCATED 983.3 FTE'S EXPENDED 260.1

REGULATORY QUARTERLY REPORT — DISTRICT/DIVISION: OCE OCE — QTR: 1 — FY: 1994

OFFICE OF CHIEF

ENFORCEMENT WORKLOAD

UNAUTHORIZED ACTIVITIES DATA

SECTION	CARRY OVER	REPORTED	UNAUTHORIZED ACTIVITY RESOLUTION ATF	REST	LIT	PEN	ADMIN	OTHER	TOTAL	PENDING
10	636	137	40	33	0	0	20	103	196	577
404	4402	1165	108	186	2	6	138	744	1184	4383
10/404	776	200	34	46	3	1	25	131	240	736
10/103	1	0	0	0	0	0	0	0	0	1
TOTAL	5815	1502	182	265	5	7	183	978	1620	5697

UA SITE VISITS 1471 | UAs DETECTED BY COE 269

% UNAUTHORIZED ACTIVITIES RESOLVED 22 %

DATA ON COMPLIANCE INSPECTIONS OF PERMITTED ACTIVITIES

CARRY-OVER	COMP INSP	NON COMP	NONCOMPLIANCE RESOLUTIONS MOD	VOL REST	LIT	PENALTY	MINOR	PENDING
605	1581	118	22	34	1	0	59	607

WETLANDS CASE STUDY
Bennett Center, Middletown, New Jersey

BACKGROUND

In the 1970's, Ed Bennett purchased a 49 acre borrow area adjacent to the Lakewood Industrial Park. The parcel was utilized as a storm water detention basin for the industrial park for several years, then, in the mid 1980's, Donald W. Smith Associates, a consulting engineering firm, was hired to prepare plans and secure permits for developing the site.

After obtaining verbal permission from the Corps and securing a Soil Erosion and Sediment Control Certificate from the Soil Conservation District, filling activities occurred between December 1987 and February 1988. In October 1991, papers were submitted to the New Jersey Department of Environmental Protection and Energy (DEPE) for a Coastal Area Facility Review Act permit. DEPE representatives then notified the Corps of what they believed to be activities conducted on a site which was under the jurisdiction of the Corps, namely the filling of the western borrow pit four years earlier. The Corps indicated that regulated activities may have occurred without a permit and later determined that there had been a violation. Efforts to resolve the conflict have yielded little relief. To date, the Corps has not indicated whether they will treat this matter as an enforcement action or an after the fact permit process. In the meantime, the Corps has required mitigation of the 9 impacted acres.

In the mid 1950's, the site was excavated to obtain fill for the construction of the Garden State Parkway. This excavation, completed in 1958, resulted in the creation of two borrow pits, designated as the "western" and the "eastern" pits. The western pit, the subject of this case study, was dry except during severe storm events and did not support any wetlands vegetation. Although the Corps agreed that the pit was isolated from a nearby stream, they nonetheless asserted jurisdiction. This jurisdictional call was disputed, citing the preamble to the Federal regulation which indicates that borrow pits (water filled depressions created in dry land incidental to pits excavated in dry land for the purpose of obtaining fill) are generally not considered waters but can be determined on a case by case basis. The Corps, however, stood firm and retained jurisdiction.

OUTCOME

It has been over two years since the Corps asserted jurisdiction over the borrow pit, yet a determination has yet to be made concerning whether the Corps will treat this as an enforcement or a permit matter. Mitigation costs alone total $475,000.00, while total expenditures exceed $500,000.00. The owner still firmly believes that the Corps has no jurisdiction and has acted beyond its authority by assuming regulatory control over the pit. Further, the pit did not regularly exhibit any of the wetland parameters necessary to deem it a wetland.

WETLANDS CASE STUDY
McMillin Woods, Bethlehem, New York

BACKGROUND

In November 1988, Stephen Boldock and a partner purchased a 4.5 acre parcel in the town of Bethlehem, NY. After consulting with the building commissioner and other local officials, they felt confident that there would be few problems in developing the site into 12-13 residential lots. After a four year process and an investment of $35,000.00, they obtained town approval for the subdivision. A week later, they were told they may have a wetlands problem. A preliminary walk-through with a representative from the Corps confirmed this notion. Approximately 80% of the land was declared a wetland, even though it did not have standing water and possessed little, if any, natural evidence of wetlands. Lack of resources has precluded the owners from pursuing the project any further.

OUTCOME

Steve and his partner have already spent $35,000.00 to obtain permits which have been virtually invalidated by the wetlands determination. The owners are small volume builders and lack the financial backing to further pursue the subdivision due to the costs associated with applying for and obtaining a Section 404 permit. They may be able to resell the land in two lots and break even.

Steve was unaware of the existence of wetlands on the property. While he admits that the land was low and served as a drainageway for runoff from adjacent properties, the wooded area never had standing water, and supported no readily identifiable wetlands vegetation. Since the definition of a wetland includes areas that are dry for as much as 95% of the time, and areas that are not necessarily readily identifiable from the uplands, Steve is apprehensive about purchasing property in the future.

WETLANDS CASE STUDY
Forest Lake, Harrison Township, Michigan

BACKGROUND

Between 1958 and 1962, prior to the enactment of the Clean Water Act and any subsequent wetlands regulations, the Charfoos family purchased 67 acres for future residential development. In preparation for the development, the construction of initial improvements commenced immediately, including the completion of a sanitary sewer lift station, and the installation of sanitary and storm sewer piping and utilities. In 1969, 140 apartment units were constructed on an 8.5 acre parcel. The balance of the land area remained vacant for over 11 years until it was economically viable for further development to proceed.

In 1986, the family sold an option on a 24 acre parcel to the Metro Development Corporation. Metro prepared all the necessary plans for the development of 220 apartments. After receiving all the required local permits, however, Metro learned that the entire property was riddled with pockets of wetlands. Metro and the Charfoos' were then advised that the Michigan Department of Natural Resources (DNR), the state agency responsible for administering the Section 404 program for the Corps, required a section 404 permit prior to the commencement of the project. After walking the property with DNR, FWS and the Corps, the Charfoos' were informed that most of the property was wetlands, and that the DNR would likely deny any permits because of the wetlands. Metro subsequently dropped its option on the property.

The Charfoos family would not give up, however, and hired consultants to initiate development plans of their own. The proposed project was to initially include 220 apartments, followed by approximately 100 homes. The request was forwarded to the DNR in July 1987. DNR and the Corps continually requested additional information and the site plans were revised several times in an attempt to comply with DNR's and the Corps' wishes. Mitigation plans were drawn up and negotiations continued for over two years, until August 30, 1989, when DNR denied the permit. The Corps subsequently concurred with DNR's denial. Shortly thereafter the Charfoos' retained legal counsel to file a petition to initiate a contested case hearing on behalf of the Charfoos'. As of this date, the land remains vacant and the case is in litigation.

OUTCOME

The Charfoos' purchased the land prior to the enactment of the Clean Water Act and any wetlands regulations, yet are obligated to comply with the terms of the subsequent laws. Tens of thousands of dollars were spent in real estate taxes, rezoning, improvements, engineering and planning only to have the property deemed unbuildable, and those monies wasted. The inability of the agencies to make timely decisions added to these costs, while additional costs continue to accrue.

WETLANDS CASE STUDY
Discovery Bay West, Concord, California

BACKGROUND

In 1988, the Hoffman Company acquired an 805 acre site on the edge of the Sacramento-San Joaquin Delta for a planned residential development. Around the turn of the century, dikes were constructed in the region to protect the farmland from tidal and seasonal flooding. The dikes remain in place today.

Preliminary plans were prepared which showed the siting of 1400 single family homes, to be interspersed with lakes, tidal lagoons and a golf course. Initial estimates concluded that 20 to 40 acres of the land adjacent to the levee would be determined to be wetlands, thus, those areas were generally avoided in the schematic plan. When the County's consultant visited the site, however, the total wetlands acreage delineated was 211 acres, including what appeared to be dry, barren fields and a small amount of scrub brush. All of these wetlands were, and continue to be, heavily grazed by cows, and are further degraded by the chemical-laden runoff from the adjacent agricultural lands.

The plans were revised after the wetlands delineation was completed. Avoiding the wetlands resulted in the elimination of the lakes, lagoons and golf course and mandated the increase in the number of units to 2000 in order to make the project economically viable. Proposed wetlands impacts were reduced to less than 5 acres and the plan received preliminary approval from the Corps. An Environmental Impact Report is currently being prepared for a General Plan Amendment and Rezone.

The Hoffman Company was prepared to mitigate the 200+ acres of severely degraded wetlands that would have been impacted by the initial development plan through the nearby and adjacent creation of more than 400 acres of highly productive, well-managed wetlands. The Corps, however, would not discuss mitigation until the project proceeded through the alternatives analysis and the applicant had shown that he could not practicably build elsewhere.

OUTCOME

Because the Corps does not allow a comprehensive evaluation of a project's net environmental impacts during the planning process, the environmentally preferred options were overlooked. The project will now occur almost entirely outside of the wetlands; the severely degraded wetlands will continue to be farmed and further degraded; and the environment has gained nothing, but has lost the creation of hundreds of acres of prime habitat from mitigation. Additionally, the wetlands in question, although severely degraded, were given the same amount of scrutiny as a pristine coastal marsh, and even areas that appeared to be dry and barren were determined to be jurisdictional wetlands.

WETLANDS CASE STUDY
Centerville Properties, Chesapeake, Virginia

BACKGROUND

In 1989, Crestar Bank and ESG Enterprises, Inc. acquired a 922 acre site in Chesapeake, Virginia for a planned mixed residential/commercial development. The site is typical in character, elevation, soil types, vegetation and hydrology to the adjacent areas and is surrounded on three sides by residential development.

The Corps asserted jurisdictional control over the area by declaring much of the parcel wetlands, although there was little evidence of surface saturation parcel-wide. The owners refuted this determination, and sought to overturn the ruling by demonstrating that the hydrology criterion had not been met, and therefore, the area was not subject to the Corps jurisdiction. The consulting firm of Langley and McDonald, P.C. was hired to delineate the wetlands using the 1989 Manual. Many areas of the parcel met both the vegetation and soils criteria, but it was not apparent that they had wetlands hydrology. Monitoring wells were installed and data collected for over two years to verify this assumption. The monitoring information substantiated the lack of hydrology, as it demonstrated the absence of sufficient surface or groundwater to meet the criterion.

In addition, representatives from several Corps Districts, Corps Headquarters, and the Corps Waterways Experiment Station were consulted in an attempt to clarify the definition of "saturation to the surface." Although each meeting resulted in the issuance of contradictory guidance, and Headquarters confirmed that such guidance is not published and not clearly stated in the Corps' Manual, they do not intend to issue new guidance on a nationwide basis for this issue, and will presumably continue to make these determinations on a case-by-case basis. In this case, the Corps held fast to their assertion of jurisdiction, and maintained that 822 acres of the 922 acre parcel are wetlands.

OUTCOME

Crestar and ESG recently suffered the loss of over $10 million, since they lost the purchase option on one portion of the parcel and were forced to sell the remaining acreage. Although the "wetlands" on site are not readily discernable from the adjacent uplands, the Corps used its discretion to exert jurisdiction over nearly 90% of the parcel, even though the hydrology criterion was not documented. The contradictory guidance provided by the Corps concerning the depth of saturation exacerbated the confusion and delay, and, although it is the determining factor regarding whether or not one must go through the process, the definition of "depth of saturation" was said to constitute a "finer point" of the regulatory program.

WETLANDS CASE STUDY
Stone Ridge, Midland, Michigan

BACKGROUND

In 1992, Ben Lerner and a partner purchased a 63 acre parcel in Midland, Michigan for the purpose of constructing a residential development. In the preliminary stages of planning, prior to purchase, a wetland consultant was hired to delineate the wetlands, which were not readily apparent to the untrained eye. In an attempt to come to an agreement on the wetland delineation, several site visits were held with a representative of the Michigan Department of Natural Resources (since Michigan administers the Section 404 program, the DNR is the lead agency). After it was believed that an agreement had been reached, a layout of the subdivision was prepared to avoid the wetlands and still maximize the return to the owners. The DNR subsequently rejected this plat, citing that they had located more wetlands on the site.

The original design of the subdivision included 130 lots on the 63 acres. The final approved plat included 95 lots and required on-site, in-kind mitigation of the impacts. Discussions concerning the mitigation ratio ranged from 1.5:1 to 3:1, with a final decision of 2:1, meaning that for every acre of wetland impacted, two acres of a similar type of wetland had to be constructed on site. Additional requests to enlarge the building sites were refused since there was no more land on which mitigated wetlands could be constructed.

OUTCOME

The continual delay caused by the inability of the DNR to come to a final agreement on the wetlands delineation cost Mr. Lerner nearly 1.2 million dollars, broken down as follows:

Lost sales of 30 lots @ $35,000	$1,050,000
Interest for six months	32,000
Mitigation Costs	95,280
TOTAL	$1,177,280

In order to recover the costs from these expenses, the price of each of the 95 lots must be increased by $12,392.42, thereby pricing the middle income home buyers out of the market for those properties.

Other problems arose as plans were reviewed on the 80th day of a 90 day limiting period. Cutting this close to the deadline does not allow for modifications of the plan prior to the 90 day limit, thus, the owner is "required" to ask for an extension or have the plan rejected. The inability to utilize a mitigation bank, coupled with the ad hoc determination of mitigation ratios further complicated and aggrieved the process.

WETLANDS CASE STUDY
Mowat Highlands, Lynn Haven, Florida

BACKGROUND

In 1945, the Mowat family purchased 120 acres in the City of Lynn Haven, Florida. Although they utilized the property as a dairy farm for most of this period, in the spring of 1985, they initiated plans for developing a portion of their property into a single family residential community. Because residential development is limited in Lynn Haven by surrounding commercial development and North Bay, the proximity of the Mowat property to the city made it a natural site for development. Further, it is one of a limited number of developable sites in Bay County that offer sewer and water service.

Department of Environmental Regulation permits were obtained, and an on-site visit was made by the Corps of Engineers. In January, 1988, the Phase One plat was approved by the City Commission, recorded, and lots made available for sale. During the process of building a paved access road to the development site, a cease and desist order from the Corps was received. This citation came months after Phase One was completed, and two years after the on-site inspection by the Corps. The Corps charged that all five phases of Mowat Highlands infringed on wetlands that were under the Corps jurisdiction and that since there was no permit, they were in violation. Since receiving the C & D order, continual efforts were made to resolve the problem. Finally, after numerous telephone calls, the Corps asked the Mowat family to submit a request for a nationwide permit. The permit request promptly rejected.

During a subsequent meeting, a Corps representative assured the Mowats that upon filing for a general permit, they would be permitted within 90 days. A revised application was filed and a public notice published. The Corps then informed the project engineer that if the Mowats would set aside the hardwoods wetlands areas, he would recommend approval of the project. The Mowat family acquiesced, and these areas were identified, surveyed, and 4.13 acres were relinquished to a conservation easement. A final permit was finally issued in November 1989, allowing them to proceed.

OUTCOME

The indifference paid to property owners who have held land since prior to 1972, coupled with the inability of the Corps to make binding decisions has cost the Mowat family over $300,000.00 plus the potential income from the sale of 100 building lots. The Mowats have received no compensation for land that has been declared unusable by the federal government and their planned retirement income has been severely affected. When they first purchased the property in 1945, prior to any wetlands regulation, there was no indication that some day the land would not be developable.

WETLANDS CASE STUDY
$ave On $torage, Mount Vernon, Washington

BACKGROUND

In 1989, John Piazza purchased a 7 acre tract in Mount Vernon, Washington for commercial use, to include office/warehouse space and a mini-storage facility. A conditional use permit was obtained for the proposed storage facility in 1991, at which time it was "suggested" that the site be checked for wetlands. The "wetlands" on site consist of three small pockets which are not readily discernable from the uplands, areas which, when delineated using the 1989 Manual, total 0.30 of an acre. Only one of the areas performs any wetlands function, and was created by the installation of an extra drainage pipe on the adjacent freeway from which rainwater flows onto Mr. Piazza's land. The two other "wetlands" are actually small depressions, neither of which hold water, and neither of which support any true wetlands vegetation.

The proposed mini-storage facility was designed so that only 0.18 acres of wetlands would be impacted. Impacts were to be mitigated by expanding the functioning wetland. With this plan, John applied for a nationwide permit. After several delays, the Corps visited the site and made a preliminary determination that the wetlands were adjacent, not isolated, and therefore the project was not eligible for a general permit, thus an individual permit would be required. Mr. Piazza refuted this determination and submitted additional documentation demonstrating the wetlands' isolation, but the Corps held fast to its "adjacency" determination.

An individual permit application was subsequently filed, including an extensive alternatives analysis, an updated site plan, and additional information as requested by the Corps. A mitigation plan followed, as did the public notice procedure. Prior to the site visit scheduled before the final decision was to be made, several trees were destroyed in the vicinity of the wetlands by an unknown party, instigating the issuance of a cease and desist order. This dispute was finally resolved after months of negotiation and a redelineation of the wetlands on the property utilizing the 1987 Manual. Further, since the new delineation shows that the wetlands areas total 0.089 acre, the Corps has indicated that it will issue a nationwide permit for a road crossing over one of the wetland areas.

OUTCOME

Mr. Piazza has spent over $25,000.00 and has lost business opportunities because of the inability of the Corps to make decisions, to accurately determine wetlands adjacency and to tailor permits based on the environmental importance of a wetland. Further, although John has taken all the necessary steps to comply with the wishes of the various government agencies, after nearly three years, he is still without a permit.

◂ THE NATIONAL ASSOCIATION OF HOME BUILDERS ▸

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WETLANDS CASE STUDY
K-4 Industrial Park, Corvallis, Oregon

BACKGROUND

In 1990, K-4 Incorporated purchased a 90 acre site in Corvallis to be used for light industrial purposes. A portion of the parcel contains existing industrial structures, while the undeveloped portion includes two abandoned log ponds, previously utilized by the logging industry for log storage and processing. Since this is the only industrial area within the city boundaries that is served by both rail and water service, it is a natural site for industrial and economic development.

Excavated out of uplands, the log ponds were created in the late 1950's and early 1960's for use by the logging industry. The ponds have been abandoned for several years, although they do hold water on occasion. Soils maps of the area indicate a small finger of hydric soils through one of the ponds, and the area does support various reeds and willow trees. There is no surface water connection to other waters, and the area does not consistently meet the hydrology criterion. K-4 has argued that these isolated regions, further defined by the nature of their method of creation, should not be considered "waters of the United States," yet the Corps has indicated that they retain jurisdiction.

OUTCOME

K-4 has spent over $50 thousand trying to demonstrate to the Corps that it lacks the authority regulate wetlands areas which are excavated from uplands and which do not regularly exhibit wetlands characteristics. Further, in attempting to obtain preliminary information from the Corps on how they will direct the future permit application, K-4 has generally not received any guidance concerning design specifications nor suggestions of how to proceed in a fashion acceptable to the Corps. K-4, Inc. has since retained legal assistance to further pursue the project.

WETLANDS CASE STUDY
Duck Pond Place, Wilton, Connecticut

BACKGROUND

In 1969, Pat Thomasetti purchased a 22 acre tract of land which he intended to subdivide and construct single family homes. The 9 lot subdivision was approved in 1971 to be completed in three stages of three lots each. The first two phases were completed prior to 1987, and the final stage was scheduled for completion shortly thereafter.

Work proceeded in accordance with the approved plans until 1987 when the State of Connecticut amended its Inland Wetlands Act, deleting any "grandfathering" provisions. At that time, the full road had been constructed for all nine lots, drainage accomplished, curbing completed, some decorative ponds excavated, etc., all under the original conditions approved in 1972. After the 1987 amendment to the Act, the state issued a Cease and Desist Order against the completion of the subdivision.

Mr. Thomassetti received mixed signals from the Corps, as after the issuance of the C & D order, he was informed of the need to obtain a Nationwide permit from the Corps, but later was told that the Nationwide permit was not necessary. In both instances, however, he learned that he must obtain a Water Quality Certification from the State for the planned excavation of a small pond within a wetland. To be on the safe side, a Nationwide permit was applied for and a conditional permit obtained in June 1992, with the contingency that it was only valid after receipt of a water quality certification from the state. A year later, the State of Connecticut denied Pat's water quality certification for the project. Several years of hearings and litigation later, a decision has not yet been rendered, court proceedings continue, and the project has yet to be completed.

OUTCOME

Expenditures to date include yearly property taxes of $1800, over $20,000 in legal fees, and approximately $75,000 in interest. Since the issue has not yet been resolved, these costs will most certainly increase. Mr. Thomasetti purchased the property and received subdivision approval prior to the promulgation of the federal wetlands regulations, yet is still bound by the mandates included therein. Further, the Corps' indecision regarding the necessity for a permit and the uncertainties surrounding the need for and coordination with state water quality certification have produced additional timely and costly delays.

TESTIMONY OF

WILLIAM L. WEST

BEFORE

THE WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE

U. S. HOUSE OF REPRESENTATIVES

CONCERNING SUBSTITUTE H.R.3948

MAY 24, 1994

TESTIMONY OF WILLIAM WEST
LTV STEEL COMPANY

SINCE THE PASSAGE OF THE FEDERAL WATER POLLUTION CONTROL ACT IN 1972, THE IMPLEMENTATION OF THE ACT AND ITS SUBSEQUENT AMENDMENTS HAVE CENTERED ON THE CONTROL OF POINT SOURCES AND, IN PARTICULAR, INDUSTRIAL POINT SOURCES. INDUSTRY HAS MADE GREAT STRIDES IN THE INTERVENING YEARS IN REDUCING THEIR DISCHARGES OF POLLUTANTS RESULTING IN SIGNIFICANT IMPROVEMENTS IN WATER QUALITY. PROGRESS HAS BEEN SUBSTANTIALLY SLOWER IN THE PUBLIC SECTOR THAN THE PRIVATE SECTOR, ESPECIALLY IN ADDRESSING THE PERSISTENT WATER QUALITY PROBLEMS RESULTING FROM INADEQUATELY TREATED SEWAGE, COMBINED SEWER OVERFLOWS, URBAN RUNOFF AND NON-POINT SOURCES. IT IS IN THIS CONTEXT THAT WE REVIEW THE PROVISIONS OF H.R.3948, THE WATER QUALITY ACT OF 1994. WHILE THE PROPOSED BILL DOES ADDRESS, FOR THE FIRST TIME, THESE PERSISTENT SOURCES OF WATER QUALITY PROBLEMS, IT DOES SO AT A MEASURED PACE THAT RECOGNIZES THE TREMENDOUS RESOURCES REQUIRED TO ADDRESS THE PROBLEMS. AT THE SAME TIME, H.R.3948 WOULD INITIATE MAJOR NEW PROGRAMS THAT ADDRESS THE MOST CONTROLLED SOURCES OF POLLUTANTS - THE INDUSTRIAL SECTOR. TODAY, I WOULD LIKE TO DISCUSS TWO ISSUES OF MAJOR CONCERN WITH THE BILL -- THE GROUND WATER PROVISIONS AND THE INTAKE CREDIT ISSUE.

SECTION 404 OF H.R.3948 REQUIRES PERMITS FOR ALL DISCHARGES INTO GROUND WATER AND SECTION 305 OF THE BILL REQUIRES THAT EPA ESTABLISH EFFLUENT LIMITATIONS FOR SUCH DISCHARGES. ANY

APPLICANT FOR AN NPDES PERMIT MUST CHARACTERIZE ALL "KNOWN OR SUSPECTED" RELEASES ONTO THE GROUND OR TO GROUND WATER THAT HAVE A HYDROLOGIC CONNECTION TO SURFACE WATERS, AND DESCRIBE ANY MEASURES THAT WILL BE TAKEN TO ELIMINATE SUCH RELEASES.

THESE GROUND WATER PROVISIONS IMPOSE AN ILL-DEFINED AND UNNECESSARY BURDEN ON NPDES PERMITEES WITHOUT SUFFICIENT EVIDENCE THAT DISCHARGES TO GROUND WATER ASSOCIATED WITH POINT SOURCES ARE CAUSING WATER QUALITY PROBLEMS FOR SURFACE WATERS. EXTENDING PERMIT REQUIREMENTS TO INCIDENTAL NON-POINT SOURCES THAT MAY BE DISCHARGING TO GROUND WATERS IS SIMILARLY UNJUSTIFIED AT THIS TIME CONSIDERING THE UNCONTROLLED WATER QUALITY IMPACTS OF NON-POINT SOURCES, COMBINED SEWER OVERFLOWS AND URBAN RUNOFF ON SURFACE WATERS.

SEVERAL SPECIFIC CONCERNS ARISE FROM A REVIEW OF THE BILL AND ARE AS FOLLOWS:

- THE PROVISION REQUIRING EPA TO PUBLISH GUIDANCE FOR EFFLUENT LIMITATIONS FOR DISCHARGES TO GROUND WATER CONTAINS NO STANDARD.

- NO CONSIDERATION HAS BEEN GIVEN IN EITHER SECTION 303 OR 404 OF THE ACTUAL EFFECT OF DISCHARGES TO GROUND WATER ON SURFACE WATER QUALITY.

- IT IS UNCLEAR WHAT "NO OTHER FEDERAL LAW DIRECTLY ADDRESSES THE ACTIVITY RESULTING IN THE DISCHARGE" MEANS, AND WHAT IS THE SCOPE OF DISCHARGES OR RELEASES THESE PROVISIONS ARE INTENDED TO COVER.

- THESE PROVISIONS COULD RESULT IN MASSIVE EXPENDITURES AND THE CLOSURE OR REPLACEMENT OF SURFACE IMPOUNDMENTS THAT ARE KEY PARTS OF EXISTING TREATMENT FACILITIES, WITH LITTLE OR NO BENEFIT TO THE ENVIRONMENT.

- IT IS UNCLEAR WHAT INFORMATION OR DEGREE OF INVESTIGATION WILL BE REQUIRED TO FORESEE OR DEMONSTRATE A DIRECT HYDROLOGIC CONNECTION BETWEEN GROUND WATER AND SURFACE WATERS IN THE PROXIMITY OF THE DISCHARGE.

THE CONCEPTS CONTAINED IN THIS BILL CONCERNING GROUND WATER ARE AMBIGUOUS AND WILL CONFLICT WITH OR BE DUPLICATIVE OTHER OF FEDERAL AND STATE PROGRAMS ADDRESSING GROUND WATER QUALITY, SUCH AS THE SAFE DRINKING WATER ACT, RCRA CORRECTIVE

ACTION AND PROVISIONS IN STATE PROGRAMS. THE GROUND WATER PROVISIONS SHOULD BE SIGNIFICANTLY MODIFIED TO ACHIEVE A WORKABLE PROVISION.

THE SUBSTITUTE H.R.3948 ATTEMPTS TO ADDRESS THE EXTREMELY IMPORTANT ISSUE OF INTAKE CREDITS BUT SIMPLY DEFERS THE ISSUE TO THE DISCRETION OF THE ADMINISTRATION AND THEREIN LIES OUR CONCERN. THE EPA HAS PLACED SO MANY RESTRICTIONS ON THE USE OF INTAKE CREDITS THAT THE GRANTING OF SUCH CREDIT IS EXTREMELY UNLIKELY. FUNDAMENTAL FAIRNESS SHOULD DICTATE THAT DISCHARGERS NOT BE HELD RESPONSIBLE FOR POLLUTANTS IN THEIR EFFLUENTS THAT RESULT FROM THE PRESENCE OF SUCH POLLUTANTS IN THEIR INTAKE WATERS. WE, THEREFORE, RECOMMEND THAT H.R.3948 BE REVISED TO CLARIFY THE PRINCIPLE THAT DISCHARGERS ARE TO BE HELD RESPONSIBLE ONLY FOR POLLUTANTS THAT THEY THEMSELVES ADD TO THEIR DISCHARGES.

THIS CONCLUDES MY TESTIMONY. I WOULD LIKE TO REQUEST THE OPPORTUNITY TO SUBMIT MORE EXTENSIVE WRITTEN COMMENTS AFTER THE CLOSE OF THE HEARING.

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Statement of

Romer Wilsek, Director
Environmental Affairs
Kraft General Foods, Inc.
Northfield, Illinois

On behalf of the

Food Industry Environmental Council

Before the

Water Resources and Environment Subcommittee
of the
House Committee on Public Works and Transportation

Hearing on the reauthorization of the

Clean Water Act

May 24, 1994

Thank you, Mr. Chairman. I am Romer Wilsek, Director of Environmental Affairs for Kraft General Foods, headquartered in Northfield, Illinois. Kraft General Foods is the largest food company in North America, with 220 facilities and 63,000 employees. We produce 2500 products, including such household favorites as Post cereals, Maxwell House coffee, Kraft cheeses and salad dressings, Oscar Mayer meat products, Entenmann's baked goods, Kool-Aid and Crystal Light powdered drink mixes, and Jell-O brand dessert products.

I am here today representing the Food Industry Environmental Council (FIEC), a coalition that includes virtually the entire food processing industry. Our members together represent some 15,000 manufacturing facilities across the nation, contributing over $121 billion in sales to the economy and employing 1.4 million people. Our industry has a sincere interest in clean water. It is an essential ingredient in many food products and is used throughout the manufacturing process, both to wash raw product and to clean and sanitize food preparation surfaces and other equipment.

First of all, let me explain certain key points regarding food industry wastewaters:

- Publicly owned treatment works (POTWs) built under the original Clean Water Act were designed to meet the statutory schemes for effluent and pretreatment guidelines, reflecting the public policy that large, professionally operated, POTWs were the best means of protecting the nation's waters.

- The food industry is just a "big kitchen" using the same class of detergents and disinfectants as homes, but on a larger and more efficient scale.

- Chemicals contained in our wastewater do their job and when that job is complete, are discharged as partially spent mixtures of detergents, disinfectants, and organic matter from our vats and filling lines. These discharges are regulated when released to the POTWs and they must meet the existing pretreatment regulations and effluent guidelines applicable to the local municipality.

We have a number of comments regarding H.R. 3948 and how it would affect the food industry that are detailed in written testimony, but I will focus my comments on issues related to risk and risk assessment. We believe it is essential that the Committee consider risk in several contexts as it proceeds with the Clean Water Act reauthorization process.

First, Congress should consider risk as it sets overall priorities for revision of the Clean Water Act. H.R. 3948 is commendable in that it attempts to address significant remaining water quality problems, such as those from non-point sources, while not including unnecessary new

restrictions on those who discharge to POTWs. However, the bill also envisions programs that may not be true priorities for action, such as the expansion of the permitting program to include discharges to the ground and groundwater. Existing state and federal programs already have the authority and ability needed to protect groundwater, and we do not believe that such a program expansion is necessary.

Second, risk assessment should be applied to individual issues or provisions to maximize cost/benefit considerations. For example, within the non-point source title it may be useful to target programs only to impaired waters. Society's efforts and limited resources will be diluted if we impose extensive requirements on all waters nationwide when problems only exist in certain watersheds or locations.

Third, Congress should ensure that a risk assessment is an integral consideration in the issuance of any standard, effluent limitation or other regulatory requirement resulting from reauthorization of the Act; thus social, environmental and economic benefits will be properly considered. Environmental risks, while important, are not the only risks. It would be shortsighted to craft laws and regulations that could elevate the weight of the environmental risk to the exclusion of others.

Let me describe an example within the food industry that helps to illustrate the importance of how we deal with risk. The food industry uses detergents followed with disinfectants as the last step to prevent microbial contamination of the food supply. By necessity, these disinfectants are toxic to living organisms -- we use them precisely because they do kill bacteria. Importantly, the disinfectants we use are limited to those approved by FDA and USDA, the agencies that regulate all food manufacturing processes, including our uses of water. After use, trace amounts of these disinfectants or their by-products may be present in our wastewater; but the alternative -- not using the disinfectants -- may compromise the safety of the foods we all eat. Thus, the benefits society derives from our careful use of disinfectants to help ensure food safety clearly outweighs any potential risks posed by possible trace amounts that may be found in the wastewater. Curtailing the use of disinfectants to eliminate their discharge could needlessly put the food supply at risk without significantly improving the environment.

Where in the Mineta substitute might such a problem arise? Section 309, where additions are proposed to the listing of toxic pollutants, is one example. While this section may properly raise factors of concern, it does not direct EPA or other agencies to consider possible equal offsetting risk or benefits. This would be a move in the wrong direction by according preeminence to one set of risks over another. Section 315 is another example where risk assessment should include consideration of the need for chemical use and the degree of activity of the mixtures which are discharged.

Another example of where risk assessment would be beneficial is illustrated by the application of current law. Currently, the term "oil and grease" is too broadly defined in the original Act. Food oils and greases

and petroleum oils and greases are not differentiated and are regulated similarly in spite of significant differences between them. Food oils and greases are readily biodegradable and generally non-toxic to aquatic and animal life, unlike those that are petroleum based. Risk assessment would allow agencies the flexibility to differentiate where appropriate. A provision to correct this deficiency is included in an alternative discussion draft; we urge its inclusion in any final measure.

We frequently hear from federal program personnel that they understand and agree with us about the problems we point out in the implementation of the current law. Unfortunately, too often their hands are tied by inflexible statutory requirements that may have produced unintended consequences. Therefore, we urge you and your colleagues to take several important steps to help ensure an effective reauthorization of an efficient and focused Clean Water Act. Specifically,

- Direct program improvement only to those significant remaining water quality concerns.
- Maintain flexibility for the regulated community, allowing it to select the most efficient and cost-effective controls rather than dictating process or other changes.
- Recognize that food industry wastewaters are similar to homes, and are compatible with and regulated by the local POTW. In short, there is no compelling reason to change a program that has been effective for more than twenty (20) years and is a model for the world.
- Adopt risk assessment language such as that contained in the alternative discussion draft.
- Require federal agencies to coordinate and consult with one another when overlapping jurisdictions create possible conflict in regulatory action that might have adverse food safety and health consequences.

Thank you for listening to our concerns.

AMERICAN PUBLIC WORKS ASSOCIATION
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STATEMENT FOR THE RECORD

by

Christine F. Andersen, P.E.
American Public Works Association

regarding

Clean Water Act Reauthorization

given to the

House Subcommittee on Water Resources and Environment

May 24, 1994

This Statement for the Record is being submitted by Christine F. Andersen, Director of Public Works, City of Eugene, Oregon and a member of the American Public Works Association (APWA). It is in Mrs. Andersen's capacity as President of APWA's Institute for Water Resources that this statement is being provided today.

The American Public Works Association is a nonprofit educational and professional association that is an outgrowth of the American Society of Municipal Engineers which was established in 1894. APWA is headquartered in Kansas City, Missouri, with a governmental affairs office in Washington, D.C. The purpose of the Association is to assist public works agencies in fulfilling their responsibilities and to enable people involved in this field to work together to improve their professional practice, thereby serving the best interests of the tax-paying public. Membership is comprised principally of local officials, but also includes strong representation from the federal and state levels of government. Educators and representatives of the private sector are also counted among our over 25,000 members. APWA defines public works very broadly as, "the physical structures and facilities developed or acquired by public

agencies to house governmental functions and provide water, waste disposal, power, transportation, and similar services to facilitate the achievement of common social and economic objectives." Both the membership and the interests of APWA reflect the breadth of that definition. The training and focus of our members, and hence our Association, are in the technical disciplines underlying the various aspects of public works engineering and administration.

To foster professional development among public works personnel, APWA has established a number of institutes which focus on the following fields of activities: administrative management, buildings and grounds, equipment services, municipal engineering, transportation, solid wastes and water resources. The institutes exist to promote high standards of competence in each of these areas. They conduct surveys and studies, and collaborate with APWA's Education and Research Foundations in presenting training programs and conducting research projects. APWA's Institutes for Water Resources focuses on the development and protection of water resources, management of water supply and distribution systems, wastewater collection, treatment and disposal, drainage and flood control, and other programs involving the use of water for the generation of power, irrigation and recreation.

Our Association, on a whole, believes that amendments to the Clean Water Act are necessary to address increases in knowledge of pollution and recognition of new environmental problems since the last amendments to the Act were passed in 1987, to address certain technical matters, and to continue the federal commitment to provide resources to address water pollution. We applaud the efforts being made on Capitol Hill to accomplish this objective. The Association has prepared a position paper that is provided for the record that recommends Congressional action in certain areas of clean water legislation. Before getting into the details on this paper and commenting on the

substitute to HR 3948, let me set the stage by stating that over the years the American Public Works Association members have become increasingly aware of their role as being good stewards of the environment. In 1991, the Association adopted a comprehensive policy on the environment which recognizes, among other things, the need for sustainable development. A copy of this policy is provided for the record. Our members clearly find themselves on the cutting edge of environmental protection in their day-to-day work and take their work seriously. Although we like to think that our members have an environmental mindset, our members are also practicing engineers and have an acute appreciation for what makes engineering and economic sense. Let me now detail our thoughts on specific issues of importance to the American Public Works Association that are addressed or need to be addressed in the substitute to HR 3948.

Financing

Available resources to improve our water resources are limited. Federal, state and local governmental funds are inadequate for many existing programs and are not readily available to institute new programs. Consideration must be given to the costs and benefits at all governmental levels of any new initiatives to insure that they can be and should be supported by public money and staffing resources. Additional improvements should therefore be required and undertaken only if they can be economically justified, i.e., the benefits derived exceed the costs of implementation. Moreover, it should be recognized that communities are unable to undertake stormwater and CSO controls beyond the limits of their financial resources. Officials and professionals at all levels are currently unable to effectively meet the demands of the current Act, and their ability to undertake additional programs is questionable. The ability of these people to obtain funds to institute such programs given the current

economic climate is also uncertain. APWA appreciates the significant increases in authorizations levels that are proposed for SRF funding in the substitute HR 3948. Nevertheless, APWA feels very strongly that if the federal government is going to ultimately mandate national standards as HR 3948 does for stormwater, then it should pay for its mandates. State and local governments can no longer afford legislative initiatives from Washington that tells them what to do while leaving the responsibility to these governments for finding the necessary funds.

Stormwater

The stormwater permitting process is a new program that is becoming a tremendous burden to municipalities which are being threatened with unrealistic numerical effluent limitations for stormwater discharges. Because stormwater systems are not treatment systems, imposition of specific effluent limitations may not be practical and cannot be cost-effective in most cases. APWA supports a change in approach to these permits to use quality management programs or best management practices as the primary means to achieve water quality standards before any treatment alternatives are required. HR 3948 provides some relief by declaring that stormwater permits cannot require municipalities to meet water quality-based effluent limitations prior to the year 2010. HR 3948 also requires that municipalities adopt management measures that would result in reasonable programs toward attainment of water quality standards by the end of the year 2009. Although APWA views these two provisions as a positive approach in line with its policy, there is one element missing. APWA endorses the EPA "Green Book" position which adds this missing provision. EPA and the states should be required to develop, by the end of year 2004, designated uses and water quality standards reflecting the episodic nature of stormwater and its risk to receiving waters. Until this is accomplished, effluent limits or water quality standards

should not be identified and required in municipal separate storm sewer system permits.

CSOs

APWA worked very hard along with other municipal and environmental organizations to help EPA develop its National CSO policy. We therefore concur with the provisions of HR 3948 which endorse EPA's policy. We strongly believe that the compromises worked out by the participants in the policy formulation process represent the best possible outcomes for all parties concerned.

Wetlands

This program cries out for reform and we applaud the fact that the substitute HR 3948 addresses this issue. In recent years, the 404 program has been "clarified" by such documents as the Federal Manual for Identifying and Delineating Jurisdictional Wetlands and various Memoranda of Agreement (MOA's) between the regulatory agencies. Although these documents have been somewhat helpful in determining what constitutes a wetland and what measures should be instituted to compensate for destruction of wetlands, they have had the practical effect in the minds of many to make it exceedingly difficult to secure a permit in a timely fashion , if at all. Moreover, when permits are granted, mitigation is being required with increasing frequency. In addition, although it is clearly recognized that wetlands make an invaluable contribution to the aquatic ecosystem, it is not at all clear that all wetlands, of themselves, are invaluable. Therein lies a problem which requires national attention and which we hope the Congress will seriously address as substitute HR 3948 goes to mark-up. Toward this end, our Association urges that Congress, when addressing Sec

404 of the Clean Water Act, recognize that wetlands in general make an invaluable contribution to the quality of life and well being of the country. In addition, we also urge that Congress recognize that public works infrastructure projects based on sound engineering and economic decisions contribute to the quality of life and well being g of this country as well. A balance between these two often competing interests must be struck.

One way that we believe this can be accomplished is by passing legislation that requires a three-tiered classification system for wetlands. Such a system would consider the relative importance of wetlands, e.g., invaluable wetlands, significant wetlands and low value wetlands. A system for regulating and managing wetlands can then be established that would allow development in low value wetlands without compensatory mitigation, allow development in significant wetlands with compensatory mitigation, and would generally preclude development in invaluable wetlands unless there is a compelling public interest reason and only after all feasible and practicable compensatory mitigation is provided. A copy of APWA's position paper on wetlands which elaborates on this position is being provided herewith for the record. APWA believes that this consideration should be added to the wetland provisions in the substitute HR 3948.

Research

The APWA has also established policy regarding research and development. It has found that increased research and development to solve the environmentally related problems of local governments is a pressing national need and supports programs to stimulate research and development to meet this need. APWA also supports authorization and funding of the National Academy of Sciences to evaluate research

and development programs and to explore the feasibility of expanding the environmental research programs to provide authoritative information to policy-making officials on environmental issues and to more effectively respond to the environmental research needs of state and local governments. Such an effort would permit more informed judgments in establishing policy and in writing legislation such as future amendments to the Clean Water Act. Please give this serious consideration in preparing the final version of HR 3948. Acting on this now will help provide a mechanism for future Congresses to set policy based on sound science rather than on anecdotal opinion.

The American Public Works Association appreciates this opportunity to provide our views on Clean Water Act reauthorization. We stand ready to assist in any way possible.

AMERICAN PUBLIC WORKS ASSOCIATION
1301 Pennsylvania Avenue, NW, Suite 501, Washington, DC 20004, 202/393-2792; Fax 202/737-9153

Source: IWR

APWA Position Paper

CLEAN WATER ACT

Approved by the IWR Executive Council on August 30, 1992
Approved by the Panel on Policy Review on March 8, 1993
Approved by the Executive Committee of the Board of Directors on March 8, 1993

Position

Amendments to the Clean Water Act are necessary to address increases in knowledge of pollution and recognition of new environmental problems since the last amendments to the Act in 1987, to address certain technical matters, and to continue the federal commitment to provide resources to address water pollution.

Available resources are limited. Federal, state, and local governmental funds are inadequate for many existing programs and are not readily available to institute new programs. Consideration must be given to the costs and benefits at all governmental levels of any new initiatives to insure that they can be and should be supported by public money and staffing resources. Additional improvements should therefore be required and undertaken only if they can be economically justified, i.e. the benefits derived exceed the costs of implementation.

Officials and professionals at all levels are currently unable to effectively meet the demands of the current Act, and their ability to undertake additional programs is questionable. The ability of these people to obtain funds to institute such programs given the current economic climate is also uncertain. The effectiveness of technologies to abate the impact of combined sewer overflows (CSO's) is uncertain as is local government authority and capability to institute controls of toxic pollutants from stormwater run-off and from domestic sources. Such efforts would be better advanced through demonstration projects and abatement plans by municipalities. These projects should be allowed some flexibility to evaluate available means of abating the impact of pollutants from these sources.

Wetlands protection is very important to clean water. Although the Senate in the 102nd Congress did not wish to address wetlands, as part of reauthorization, APWA believes the issue must be addressed. APWA previously has developed a resolution with regard to this matter and asks that the wetland program be changed as part of reauthorization in accordance with this resolution. Briefly, the position taken by APWA is that although wetlands make a valuable contribution to the quality of life, so too do sound public works

infrastructure projects. Therefore, a balance must be achieved between wetlands protection and infrastructure development. APWA has also taken the position that all wetlands are not of equal importance and that this should be recognized in the development and administration of the Sec. 404 program.

The APWA policy on CSO's specifies that in addressing this issue, recognition must be given to the site-specific nature of CSO controls. Moreover, it should also be recognized that communities are unable to undertake CSO controls beyond the limits of their financial resources.

The APWA resolution on Environmental Policy espouses principles that relate to any environmental law or action. These include a stipulation for sustainable development, pollution prevention, recognition of the need for sustainable energy sources, prioritization of resources, education and enhanced research and development.

The APWA has also established policy regarding research and development. It has found that increased research and development to solve the environmentally related problems of local government is a pressing national need and supports programs to stimulate research and development to meet this need. APWA also has supported authorization and funding of the National Academy of Sciences to evaluate research and development programs and to explore the feasibility of expanding the environmental research program to provide authoritative information to policy-making officials on environmental issues and to more effectively respond to the environmental research needs of state and local governments.

The stormwater permitting process is a new program that is becoming a tremendous burden to municipalities which are being threatened with unrealistic numerical effluent limitations for stormwater discharges. Because stormwater systems are not treatment systems, imposition of specific limitations is not practical and cannot be cost effective in most cases. APWA supports a change in approach to these permits to use quality management programs or best management practices as the primary means to achieve water quality standards before any treatment alternatives are required. EPA must then develop water quality standards appropriate for CSO's and stormwater that are reasonable and achievable. This approach is being discussed in greater detail by the National Association of Flood and Stormwater Management Agencies. APWA also feels very strongly that if the federal government is going to mandate national standards then it should pay for its mandates. State and local governments can no longer afford legislative initiatives from Washington that tells them what to do while leaving the responsibility to these governments for finding the necessary funds.

The APWA is aware that an analysis of proposed amendments to the Clean Water Act is also being conducted by the Water Environment Federation and

urges that all parties working toward reauthorization of the Act carefully consider the comments of this group of environmental professionals.

Issue

The 103rd Congress will be considering amendments to the Clean Water Act sometime within the next two years. Most recently amended in 1987, this law is the foundation for federal, state and local efforts to insure ground and surface water quality. Both the costs and benefits of the existing law have been enormous. The amendments as presented in legislation introduced in the 102nd Congress (S.1081) and expected in the 103rd Congress would greatly expand the responsibilities and obligations of federal, state, and local governments.

Rationale

The membership of the American Public Works Association is largely responsible for the administration of water pollution control and industrial permitting programs and seeks to insure the development of the best laws and regulations to reasonably address water quality objectives.

AMERICAN PUBLIC WORKS ASSOCIATION
1301 Pennsylvania Avenue, NW, Suite 501, Washington, DC 20004 (202)393-2792, Fax 202/737-9153

APWA Policy Statement

ENVIRONMENTAL POLICY

Approved by the Task Force on
Environmental Policy on August 9, 1991
Approved by the APWA Board of Directors on August 25, 1991

Policy

The American Public Works Association supports an environmental policy embodied in the following six (6) principles and their supporting position statements:

PRINCIPLE #1: One of the highest goals of all environmentally concerned citizens and governmental entities must be to develop long-term environmental strategies for sustainable development. Sustainable development is defined as growth or development that, through the use of appropriate technologies, policies and programs, satisfies existing needs without compromising our environment, or the ability of future generations to adapt to evolving environmental and development needs. Environmental and socioeconomic concerns need not be in conflict, but are intertwined. They should result in long-term environmental and economic progress for a healthier and more stable world that recognizes the need to protect and enhance irreplaceable ecosystems.

PRINCIPLE #2: Pollution prevention, including source reduction and all forms of recycling and reuse, provides a framework for solving and avoiding environmental problems with efficiency and innovative technology. Pollution prevention should be emphasized as the front line of environmental defense, thus decreasing our reliance on the more traditional disposal and pollution treatment methodologies.

PRINCIPLE #3: Federal governments in cooperation with state/provincial, regional and local governments, the private sector and the public, must develop a sound and effective comprehensive energy policy which recognizes the goal of maintaining and improving the quality of the environment, emphasizing the use of sustainable energy sources, energy efficiency and conservation.

PRINCIPLE #4: Due to limited availability of resources, environmental protection efforts and remedies of past practices,

should be prioritized on the basis of opportunities for the greatest risk reduction.

PRINCIPLE #5: Promote a spirit of environmental stewardship through education, communication and coordination. This should be done by emphasizing the early coordination and continuous involvement of federal, state/provincial, regional and local governments, private businesses, interest groups, communities and interested individuals.

PRINCIPLE #6: There must be a strong commitment to the enhancement of research and development activities that evaluate the environmental risks and benefits of public works policies and programs.

Issue

In the United States, according to EPA, there has been a thirteen million ton increase in the amount of waste generated annually between 1986 and 1989. Also, environmental resources, including clean air, land and water are under increasing pressure from energy related and non-energy related developments. To assist in compliance and clean-up, during the past twenty years Congress has passed an impressive array of environmental laws, each adding stricter and more costly requirements. Still, a comprehensive, global, ecological perspective needs to be taken in solving our problems. This would include public education, communication and close coordination of all levels of government. It also includes a renewed commitment to environmental R&D. Finally, long-term environmental strategies must provide for sustainable development if a healthier and more stable world is to thrive.

Rationale

Members of the American Public Works Association (APWA), public agency and individual members, alike, have responsibility and concern for the protection, enhancement and sustainability of the environment while simultaneously providing the total spectrum of public works services and facilities that form the physical structure of our nation and communities. In addition, federal, state/provincial, regional and local governments are continually reshaping environmental policies and priorities to balance economic growth and public works development. Such governments should benefit from the advice and counsel of public works professionals. To assist the membership in discharging their duties, the foregoing environmental policies and principles have been developed which provide guidance for APWA and its membership.

AMERICAN PUBLIC WORKS ASSOCIATION
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APWA Position Paper

WETLANDS PROTECTION

Approved by the Executive Committee of the
Institute for Water Resources on February 23, 1991
Approved by the APWA Board of Directors on March 19, 1991

Position

The American Public Works Association believes that although wetlands make a valuable contribution to the quality of life and well being of the country, public works infrastructure projects, based on sound engineering and ecological and economic decisions, also contribute significantly to the nation's quality of life and economic well being. A balance must therefore be struck between wetlands preservation and infrastructure development. Since all wetlands are not of equal value, APWA believes a three-tiered classification system is needed to classify wetlands for which Sec. 404 permits are being sought. This system should consider the relative importance of wetlands, e.g. low value wetlands, significant wetlands, and invaluable wetlands. APWA further believes that in administering the Sec. 404 program, a system for regulating and managing wetlands developed around this classification system is required which will: (1) allow development in low value wetlands without compensatory mitigation; (2) allow essential infrastructure development in significant wetlands with compensatory mitigation; and (3) generally preclude infrastructure development in invaluable wetlands unless there are compelling public interest reasons and all feasible and practicable compensatory mitigation is provided.

Issue

The Congress of the United States in Sec. 404 of the Clean Water Act established what has become a wetlands protection program by vesting responsibility with the Secretary of the Army through the Chief of Engineers for controlling discharge of dredge or fill material into waters of the United States. The ensuing permit process often does not allow for timely decisions by the Federal Government in approval or denial of permits, thereby contributing to schedule delays and resulting in additional project costs. Moreover, denial of Sec. 404 permits may result from the failure to strike the proper balance between infrastructure development and wetlands protection.

Rationale

American Public Works Association members are involved in activities for the public good, which may often run headlong into the need to protect and preserve the environment, particularly wetlands. A classification system for classifying wetlands must be developed which will allow for the more effective administration of the Sec. 404 program and a better balancing of infrastructure development with the need to preserve wetlands. Without such a system, meritorious infrastructure development projects will continue to be delayed and in some cases denied.

Buckeye Florida
Route 3, Box 260 • Perry, Florida 32347
Telephone: (904) 584-0121

June 2, 1994

Honorable Douglas Applegate
U. S. House of Representatives
Committee on Public Works and Transportation
Water Resources and Environment Subcommittee
Suite 2165 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Applegate:

On May 24, 1994, Buckeye Florida -- which owns and operates a dissolving cellulose plant near Perry, Florida -- was referred to by name in testimony before the Water Resources and Environment Subcommittee. The testimony was given by witness Joy Towles Cummings.

Ms. Cummings' testimony did not reveal the fact she is a lead plaintiff in pending environmental litigation against the cellulose plant. Furthermore, her testimony did not reveal that she has been engaged in other litigation against the plant that was resolved in her bankruptcy proceedings.

On behalf of the 850 employees at the Perry plant, I want to respond to some of the more flagrant allegations in Ms. Cummings' testimony. I request this letter and Exhibits A-E be added to the record.

Ms. Cummings' characterizations of the Buckeye plant and the Perry/Taylor County community are seriously distorted.

In her testimony, Ms. Cummings stated "...leukemia and non-Hodgkins lymphatic rates in Taylor County are twice the average rate in Florida." This is simply not true. The Florida Department of Health addressed this issue June 10, 1993. Their conclusion: "Indeed, in the majority of cancers and for the comparison of all types of cancer, the Perry area rates were less than the Florida rates." (See Exhibit A, enclosed.)

Ms. Cummings stated, "...chemical tests have never been completed to show whether or not the city (Perry) water is safe for human consumption." This is simply not true. The Florida Department of Environmental Regulation addressed this issue July 28, 1992. Their conclusion: Water supplied by the city of Perry water system "is satisfactory and meet federal and state standards." (See Exhibit B, enclosed.)

Ms. Cummings stated Taylor County has become an "...unsustainable tree farm." This is simply not true. According to the U.S. Forest Service, Taylor County is 87.6 percent forested. There are more trees in Taylor County today than when the Buckeye plant began operating in 1954. (See Exhibit C, enclosed.)

Ms. Cummings stated that "toxic sludge" is "dumped" on area wetlands. This is simply not true. Sand and fiber in the plant's wastewater is captured in an on-site settlement basin permitted by state and federal regulators. No settlement is taken off-site.

Ms. Cummings stated, "The pulp and paper industry can convert to chlorine-free processes without the loss of jobs... ." This is simply not true. The total elimination of chlorine would close over 33 pulp and paper plants and result in the direct loss of 21,500 jobs and the indirect loss of 86,000 jobs, according to a letter addressed to EPA Administrator Carol Browner from 73 U.S. Congressmen and -women. (See Exhibit D, enclosed.)

Ms. Cummings stated, "...European companies are currently making chlorine-free versions of the same products, using the same type of pulping processes - but without chlorine or chlorine dioxide." This is simply not true. According to investigations by EPA's Engineering and Analysis Division, "...the Agency is not aware of any non-U.S. mill that produces dissolving kraft pulp using a TCF (totally chlorine free) process." (See exhibit E, enclosed.) The Buckeye plant uses the dissolving kraft process.

Most, if not all, of the above facts were in the public domain and available to Ms. Cummings prior to her testimony before your committee.

In her testimony, Ms. Cummings made this statement about former Florida DER Secretary, now EPA Administrator, Carol Browner: "Ms. Browner made that statement just a few months <u>before the pulp and paper industry executives convinced her, in an under-the-table deal, to agree and push for lax dioxin standards for the entire pulp and paper industry in Florida.</u>"

This is absurd and demonstrates Ms. Cummings' callous disregard for the facts. Ms. Cummings' unfounded allegations are offensive to Florida's environmental professionals who have worked to eliminate dioxin.

The Buckeye plant has a long history of doing the right things... and doing things right. For over 40 years the operation has been a leader in reforestation, wildlife protection, energy conservation, and in developing technologies and strategies to prevent and abate air and water pollution.

In the late 1960's, the Buckeye plant voluntarily installed Florida's first industrial secondary wastewater treatment system. This was before the first federal Clean Water Act; before the first Earth Day; and before the creation of EPA. For this leadership, the site was presented the Izaak Walton League's first National Clean Water Award.

Our environmental accomplishments have also been recognized by Florida's Governors, the Nature Conservancy, industry peers, and state and federal environmental regulators.

Since 1970, the plant has invested the equivalent of $200 million (1994 dollars) in capital projects to protect air and water resources. In 1990, a $40 million project was completed to ensure the plant's treated wastewater is "non-detect" for dioxin.

Buckeye has just completed a three-year, $3 million environmental study to determine how to further improve the water quality of the Fenholloway River. The study was designed and authorized by Carol Browner when she was head of the Florida Department of Environmental Regulation. We will continue to work in good faith with state and federal agencies, invest in environmental protection, produce valuable products, and improve Florida's economic base.

Buckeye understands the importance of protecting the environment and we share the Subcommittee's goal of renewing and improving the Clean Water Act. Thank you for allowing us to respond to the unfair allegations and for making our response part of the public record.

Sincerely,

C. S. Aiken

C. S. Aiken
Plant Manager

CSA/epj

Attachments A-E

HRS STATE OF FLORIDA
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

June 10, 1993

David Johnson, President
Perry-Taylor County Chamber of Commerce
428 N. Jefferson Street
Perry, FL 32347

Dear Mr. Johnson:

Dr. Tom Atkeson has asked me to respond to your letter of June 2 which seeks his comments on a letter from CNN producer Peter Bergen. Mr. Bergen's letter was in response to a letter from you which apparently asked for information on the methodology used by CNN in producing a story titled "The Smell of Money." I did not see the story when it aired on CNN, but I was present during the lengthy taped interview that CNN conducted with Dr. Atkeson. I have the following comments in regards to Mr. Bergen's letter.

HRS, as Florida's public health agency, had also heard local resident's health concerns relating to emissions from the paper mill. HRS deals with these types of concerns on a regular basis and we use a protocol similar to that employed by other public health agencies. The first part of this protocol is to analyze existing data to ascertain if there is any evidence of increased death or disease in plant workers or nearby residents. If this initial analysis indicates that death or disease is significantly elevated within a group, then a site-specific epidemiological study is conducted.

There are several potential sources of data for the initial evaluation, but all of them suffer varying limitations on their applicability to a specific situation. This is generally because they measure broad categories of disease or death over relatively large geographical areas. Mr. Bergen acknowledges this when he discusses the fact that CNN researched data provided by "the American Cancer Society, the National Cancer Institute and several other organizations" but attributes an inability to draw meaningful results "in part because of faulty collection methods by the various organizations." In reality, this simply reflects the fact that these data bases were not designed or intended to definitively answer the question "Does the operation of a paper mill near Perry, Florida adversely impact the health of nearby residents?"

1317 WINEWOOD BLVD. • TALLAHASSEE, FL 32399-0700

LAWTON CHILES, GOVERNOR

ATTACHMENT A-2

Initially, Dr. Atkeson performed a preliminary comparison of the overall cancer rate for Taylor County versus the state average to get a quick indication of the priority to afford this situation. I do not know if this is the study that Mr. Bergen disparages, but it was not intended to be, and was not, the culmination of our efforts. It merely indicated that a more thorough study was not imperative and that several other similar issues, particularly concerns about the health effects of the pesticide Benlate could take precedence. I heard Dr. Atkeson advise the CNN reporter of the chronology of our efforts.

The more thorough evaluation was begun in late-1992. Dr. Atkeson and his successor determined that the Florida Cancer Data System represented the best data for the evaluation which was a comparison of statewide cancer rates to the Taylor County/Perry area. It appears that this data base was also used by CNN staff at the recommendation of their unnamed advisors. It is important to recognize that HRS compared the statewide data to zip code 32347 (which is the area closest to the paper plant) while CNN compared the statewide data to cancer rates for all of Taylor county. I believe the HRS approach is an improvement over the CNN approach because our comparison is to a population which is potentially subject to higher exposures since they reside closest to the plant.

CNN next broke their data into four-year age groups which according to Mr. Bergen "allowed us to separate the 'retiree' factor." HRS eliminated the 'retiree' factor by simply comparing statewide age-specific rates to the age-specific rates for the Perry area. CNN further broke the data down by sex, but HRS did not do this because gender-adjusted rates were not available by zip code (only by county). Finally, both HRS and CNN made the comparison by type of cancer, although there is some difference of opinion as to what cancers may be caused by environmental factors (specifically soft-tissue sarcoma).

In summary, despite Mr. Bergen's allegation that the HRS methodology was universally condemned as "meaningless" by unnamed experts, the methodology used by CNN and HRS were almost identical. HRS reached the conclusion that the rate comparison showed that there was no significant increase in the various cancers between the statewide average and the Perry area. **Indeed, in the majority of cancers and for the comparison of all types of cancer, the Perry area rates were less than the Florida rates.** We therefore reached the conclusion that a more specific investigation of the health impact of the paper plant was not warranted.

ATTACHMENT A-3

Apparently, CNN reached a different conclusion based on their study, but it appears from Mr. Bergen's letter that he cannot provide the various rates they calculated due to a general CNN policy. This makes it impossible for me to comment on the relevance of their conclusion. We did attempt to recreate CNN's methodology as described on the last page of Mr. Bergen's letter. Based on that data, we continue to conclude that there is no evidence of significantly elevated cancer rates in Taylor County and additional epidemiological studies are not warranted.

I realize that the different conclusions reached by CNN and HRS have caused concern for you and other members of the community. I can only say that the ultimate decision on credibility between the two groups belongs to you and the public. I have the utmost confidence in Dr. Atkeson and his staff and believe our program to be well respected by the various state and Federal health agencies.

I am enclosing a copy of the results of our comparison of cancer rates and a memo (dated March 2, 1993) which Dr. Atkeson's successor sent to the administrator of the Taylor County Public Health Unit in response to his request for our methodology.

Please call me at 904-488-6811 if I can provide further information.

Sincerely,

Richard G. Hunter, Ph.D.
Assistant State Health Officer
for Environmental Health

cf: Charles S. Mahan, M.D., HRS State Health Officer
David Adams, HRS PIO

ATTACHMENT A-4

STATE OF FLORIDA
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

MEMORANDUM

DATE: March 2, 1993

TO: Dr. Jerry Boland
Administrator
Taylor County Public Health Unit

FROM: Sharon Watkins
Acting Chief, Environmental Epidemiology

SUBJECT: Perry: Florida Cancer Data System data review

RECEIVED
MAR 08 1993
D.E.R. OFFICE
OF THE SECRETARY

We have reviewed data from the Florida Cancer Data System (FCDS) to evaluate cancer incidence in the community surrounding the Proctor and Gamble Buckeye Cellulose Company and Fenholloway river.

The FCDS is a complete registry of all cancers diagnosed or treated in Florida hospitals since 1981. It was established by law and funded by the state through HRS contract with the University of Miami. The data items collected for FCDS are compatible with national standards set by the Surveillance, Epidemiology and End Results reporting program (SEER), a project of the National Cancer Institute (NCI).

For the purposes of this review, nine year rates (1981-1989) for the state of Florida and case counts for zip code 32347 were obtained for "all gender" and "all race" categories from FCDS. Race-, and sex-specific rates are not available for evaluation at this time. Information was extracted for 9 cancer sites which are known or suspected to be related to environmental exposures. These sites are: Lip, Oral Cavity & Pharynx; Liver; Nasal Cavity, Sinuses & Ear; Urinary Bladder; Hodgkin's Disease; Non-Hodgkin's Lymphoma; Acute Lymphocytic Leukemia; Brain & other Nervous System; and All Sites.

The attached table lists each of the above sites, their International Classification of Diseases for Oncology (ICD-O) codes, the rate per 100,000 persons for the entire state and the number of cases in zipcode 32347 which represents the Perry area. "Expected" numbers of cases have been calculated by applying age-specific rates for the state of Florida to the Perry (zip code 32347) age distribution. The resulting number of cases reflects how many cases of each type of cancer would have occurred in Perry if the Florida rate of cancer incidence had been achieved in that community. Calculated in this manner, the expected number also eliminates differences caused by variation in age-structure between the entire state and Perry. The expected number of cases is provided in the table to provide a basis for comparison of the number of cases that have actually occurred in Perry.

The expected and observed numbers are quite similar except for one instance when the expected number slightly exceeds the observed number (Hodgkin's Disease). In general, the differences between observed and expected numbers are small and may be influenced by gender or race differences between the entire state and Perry. Race and gender adjusted rates are not available at this time.

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LAWTON CHILES, GOVERNOR

ATTACHMENT A-5

If you feel that additional investigation is warranted or have any further questions, please do not hesitate to contact me at 904/488-3370.

cc: Dr. Landis Crockett
Deputy District Administrator for Health
District II

Dr. Rick Hunter
Assistant Secretarty for Environmental Health

Mr. Richard Harvey
Director, Division of Water Facilities
Department of Environmental Regulation

CANCER RATES, SELECTED SITES
Perry, Florida
1981-1989

Cancer site	ICD-O-1 Codes	Florida rate	Perry cases	Expected Number
Lip, Oral Cavity & Pharynx	140.0-149.9	14.3	18	17.42
Liver	155.0	2.3	3	2.69
Nasal cavity, Sinuses & Ear	160.0-160.9	1.0	1	1.17
Urinary Bladder	188.0-188.9	25.5	16	30.18
Brain & other Central Nervous System	191.0-192.9	6.5	5	8.36
Hodgkin's Disease	M9650-M9667	2.4	5	3.33
Non-Hodgkin's Lymphoma	M9590-9642 & M9670-9714 & M9723& M9740-9750	13.5	8	16.45
Acute Lymphocytic Leukemia	M9821	1.0	1	1.74
All Sites	140.0-199.9	470.2	518	590.41

- RATES PER 100,000 PERSONS
- FLORIDA RATES CALCULATED USING NINE YEAR AVERAGE OF ANNUAL CENSUS ESTIMATES FROM THE GOVERNOR'S ESTIMATING CONFERENCE
- ZIPCODE 32347 POPULATION DATA TAKEN FROM 1985 CALIFORNIA ANALYTICAL CONSULTANTS, INC. ESTIMATES.
- EXPECTED NUMBERS CALCULATED BY APPLYING FLORIDA AGE-SPECIFIC RATES TO PERRY AGE DISTRIBUTION.

ATTACHMENT B - 1

Florida Department of Environmental Regulation
Northeast District • Suite B200, 7825 Baymeadows Way • Jacksonville, Florida 32256-7577
Lawton Chiles, Governor Carol M. Browner, Secretary

TO: Interested Persons

FROM: Blanca R. Rodriguez BRR
Environmental Administrator - Potable Water

Date: July 28,1992

SUBJECT: Evaluation of the Water Quality supplied by the City of Perry Water System - Taylor County

Our office and the Tallahasse-Drinking Water office received various calls the last month regarding the water quality of the drinking water served by the City of Perry Water System. The persons calling were concerned about the quality of drinking water and the possible effect of the industrial activities of Proctor & Gamble Co. in the ground water of this area.

Ms.Joan Stevens called from Illinois on July 10,1992 to investigate the water quality of the wells in this area and any possible contamination because she was planing to move to this city. Ms. Joan Johnson, receptionist of Proctor & Gamble called Van Hoofnagle (DER Tallahassee) on July 24,1992 and complained about bad odor and color of the water at her home, which is served by the City of Perry Water System. She lives at Pine Valley Mobile Home Park which was connected to the City of Perry Water distribution System in 1989 due to complaints from their residents regarding ground water contamination. Mr.Ernest Frey (DER Jax) also received a call from a news reporter regarding this issue. Vince Seibold (DER- JAX) also has received various calls regarding this situation.

Due to this concern, our office reviewed our files to evaluate better the water quality of the treated water at the City of Perry Water System (PWS ID - 2620208) and to investigate any possible problem at their wells. Vince Seibold is visiting some of the people complaining and he is taking samples.

The City of Perry Water System consists of three wells (wells No. 1,2 & 3), pre-chlorination, a settling/chlorine contact chamber, sand gravity filters, polyphosphate for corrosion control, ground and elevated storage and pumping facilities. The raw water from well No.2 is high in iron, color and turbidity and it is treated at the filters. Wells No.1 & 3 have a good water quality and the raw

ATTACHMENT B-2

MEMO
CITY OF PERRY
PAGE TWO

water from these wells are only disinfected and treated with polyphosphate prior to distribution. Well No.4 is out of service.

A review of our files indicates that the quality of the treated water served by the City of Perry Water System is satisfactory and it is consistent since 1984. The data available indicates that the Primary Inorganics, Secondary Standards, Primary Organics, Volatile Organic Chemicals, Unregulated Contaminants, Turbidity and Radionuclides are below the Maximun Contaminant Level (MCL) allowable in drinking water. The only parameters that exceeded the MCL were iron, turbidity and color which are very high in well No. 2, (color=30 C.U., iron=0.946 ppm, and turbidity > 1). Due to this fact the Department requested in 1988 by Consent Order to correct the water quality problem and the city reactivated the filtration system at this plant. The analysis of the treated water after filtration dated Sept.9,1991 indicates that the problem was corrected . The iron level was 0.13 - 0.19, the turbidity level was 0.14 - 0.20 and the Coliform bacteria was absent.

In two occasions during this year this facility had two positive bacteria samples in the distribution system during a month. But all the rechecks analyses required by rule were completed and came absent for bacteria, indicating satisfactory quality. In both occasions they issued Public Notice, as required.

In overall all the data available in our office indicates that the treated [redacted] This data does not indicate any contamination at their wells. Attached is a copy of the last analysis available for this system.

Mr. Vince Seibold from this office is inspecting the Pine Valley Mobile Home today to investigate any possible cross connection or any unusual situation in this area.

Please contact this office if you has any questions or need additional information regarding this matter.

cc: Mr. Van Hoofnagle - DER Tallahassee
Mr. Phil Coram - DER Tallahassee
Mr. Ernest Frey - DER Jacksonville
Mr. Robert Leetch - DER Jacksonville
Mr. William E. Brynes - City manager, City of Perry
Taylor County Health Unit

ATTACHMENT C

Table 45.--Land area and total forest, by county, Florida, 1987

County	All land[a]	Total forest[b]		County	All land[a]	Total forest[b]	
	Acres	Acres	Percent		Acres	Acres	Percent
Alachua	576,941	307,773	53.3	Lake	610,790	258,234	42.3
Baker	374,509	338,624	90.4	Lee	513,952	181,037	35.2
Bay	484,858	402,062	82.9	Leon	432,562	295,031	68.2
Bradford	187,373	130,077	69.4	Levy	703,718	496,965	70.6
Brevard	637,062	118,545	18.6	Liberty	535,814	508,591	94.9
Broward	775,213	35,666	4.6	Madison	454,618	310,381	68.3
Calhoun	363,392	298,800	82.2	Manatee	478,163	49,249	10.3
Charlotte	441,613	54,217	12.3	Marion	1,030,195	576,799	56.0
Citrus	402,330	232,125	57.7	Martin	355,002	37,892	10.7
Clay	379,008	289,812	76.5	Monroe	661,824	420,634	63.6
Collier	1,276,224	745,852	58.4	Nassau	415,386	335,452	80.8
Columbia	509,728	364,523	71.5	Okaloosa	598,918	429,121	71.6
Dade	1,251,366	240,537	19.2	Okeechobee	493,114	33,366	6.8
De Soto	406,867	48,176	11.8	Orange	582,714	175,071	30.0
Dixie	448,826	396,866	88.4	Osceola	863,795	186,501	21.6
Duval	496,954	262,713	52.9	Palm Beach	1,275,590	82,691	6.5
Escambia	422,662	250,847	59.3	Pasco	472,224	150,790	31.9
Flagler	314,099	255,897	81.5	Pinellas	179,315	19,594	10.9
Franklin	348,698	312,324	89.6	Polk	1,166,803	288,235	24.7
Gadsden	331,264	242,495	73.2	Putnam	469,043	351,426	74.9
Gilchrist	226,413	138,145	61.0	St. Johns	395,059	270,465	68.5
Glades	488,301	91,189	18.7	St. Lucie	371,840	34,853	9.4
Gulf	357,523	294,176	82.3	Santa Rosa	655,053	476,441	72.7
Hamilton	331,193	228,055	68.9	Sarasota	366,810	57,102	15.6
Hardee	407,968	90,844	22.3	Seminole	190,739	76,704	40.2
Hendry	744,013	94,282	12.7	Sumter	359,174	178,938	49.8
Hernando	305,421	170,299	55.8	Suwannee	441,388	211,231	47.9
Highlands	658,310	84,688	12.9	Taylor	676,813	592,791	87.6
Hillsborough	673,830	131,354	19.5	Union	157,286	118,903	75.6
Holmes	312,000	184,977	59.3	Volusia	707,198	482,229	68.2
Indian River	318,118	36,513	11.5	Wakulla	384,845	337,567	87.7
Jackson	602,611	284,617	47.2	Walton	682,080	510,924	74.9
Jefferson	389,933	281,815	72.3	Washington	377,427	288,049	76.3
Lafayette	348,928	286,790	82.2	Total	34,652,841	16,549,012	47.8

[a]Excludes inland water.

[b]Includes timberland, reserved timberland, and woodland.

February 1990

Southeastern Forest Experiment Station
P.O. Box 2680
Asheville, North Carolina 28802

Congress of the United States
House of Representatives
Washington, DC 20515

March 24, 1994

The Honorable Carol Browner
Administrator
Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

Dear Administrator Browner:

This is written in response to the Environmental Protection Agency's (EPA) recently proposed regulations which would impose new air emissions and water effluent limitations on the pulp and paper industry. This activity is one of the most important rulemakings undertaken by your agency. We fully support the development of a reasonable, balanced rule that will protect the environment and U.S. jobs.

The ultimate outcome of this rulemaking could have extraordinary adverse consequences for the paper industry and for its workers and their families. Indeed, EPA estimates that the total capital investment cost to the industry to be approximately $4 billion (for Effluent Limitations only). Private industry, through the independent firm of SRI, Inc., estimates far higher economic and social dislocations. Preliminary estimates provided by the National Council on Air and Stream Improvements (NCASI) project that industry will spend at a minimum more than $11.5 billion in capital costs alone. [redacted], for a total of 107,500 jobs lost.

We strongly support air and water quality regulations that can be supported by sound scientific principles. We are concerned that these proposed rules go far beyond what is necessary to ensure that the environment and the public are protected. By any estimate, the potential costs are substantial. We believe it is critical that the final rule not unnecessarily jeopardize workers and their families for the sake of negligible environmental gains.

The alternative effluent guidelines proposal put forward by the paper industry and acknowledged by EPA in the preamble to

the proposed rule seeks to achieve this goal, and we believe it deserves the most serious consideration by you and our agency. This proposal, as we understand it, would effectively address the toxic pollutants identified by EPA and reduce them to limits that are non-detectable at the end of the pipe. Such a proposal provides a balanced, environmentally sound and economically efficient means of dealing with these pollutants. Furthermore, we believe the proposal is in complete agreement with the philosophy of the President's Executive Order on Regulatory Planning and Review issued on September 30, 1993. That order calls for a regulatory system that protects the environment "without imposing unacceptable or unreasonable costs on society."

We also understand that serious questions exist regarding the scientific and technical basis for the proposed Maximum Achievable Control Technology (MACT) requirements on air emissions from mills. Given the costs associated with the EPA-proposed standards, the Agency should ensure that its analyses and methodologies reflect the best available, most up-to-date information and data, including that provided by pulp and paper manufacturers. Unfortunately, EPA's lack of adequate data on air emissions for the industry renders the MACT provisions in the proposed rule seriously defective. Moreover, it does not appear from EPA's own analyses that the benefits would be commensurate with the costs.

As you proceed towards final promulgation, we urge you to obtain more accurate technical and cost data and to reassess the costs and benefits of the proposal. We also urge you to consider other approaches which will achieve similar improvements for the environment without exacting such unnecessarily high costs on American workers or the U.S. economy.

Sincerely,

Mike Parker, M.C.

Michael D. Crapo, M.C.

Jennifer Dunn, M.C.

Jack Kingston, M.C.

Charles Canady, M.C.

Bud Shuster, M.C.

Thomas Bliley, M.C.

Cass Ballenger, M.C.

ATTACHMENT D-3

Gene Taylor, M.C.

Ray Thornton, M.C.

Cary Condit, M.C.

Pete Geren, M.C.

Roy Rowland, M.C.

Larry LaRocco, M.C.

Tom Petri, M.C.

Dick Swett, M.C.

Ted Strickland, M.C.

Don Young, M.C.

Donald Manzullo, M.C.

Nathan Deal, M.C.

Sanford Bishop, M.C.

Jerry Hayes, M.C.

Richard Baker, M.C.

John Spratt, M.C.

Bob Livingston, M.C.

John Duncan, M.C.

Richard Pombo, M.C.

John Boehner, M.C.

Rod Grams, M.C.

Bill Baker, M.C.

Attachment D-4

Herbert Bateman, M.C.

Norman Sisisky, M.C.

Sonny Montgomery, M.C.

Arthur Ravenel, M.C.

Pete Peterson, M.C.

Tillie Fowler, M.C.

Bud Cramer, M.C.

Thomas Foglietta, M.C.

John Doolittle, M.C.

Rick Santorum, M.C.

Olympia Snowe, M.C.

Jim Bunning, M.C.

Sonny Callahan, M.C.

Toby Roth, M.C.

Roscoe Bartlett, M.C.

Bob Goodlatte, M.C.

Bob Inglis, M.C.

Tom Barlow, M.C.

Jim McCrery, M.C.

Bill Clinger, M.C.

Bill Emerson, M.C.

Bart Stupak, M.C.

ATTACHMENT D-5

Tom Ridge, M.C.

Jamie L. Whitten, M.C.

Tim Hutchinson, M.C.

Alan Mollohan, M.C.

Pete Hoekstra, M.C.

Bob Clement, M.C.

Jim Talent, M.C.

Blanche M. Lambert, M.C.

James Quillen, M.C.

Richard E. Neal

Gerald Solomon, M.C.

Bob Smith, M.C.

Lewis Payne, M.C.

Charlie Rose, M.C.

John Tanner, M.C.

Steve Buyer, M.C.

Helen Delich Bentley, M.C.

James Clyburn, M.C.

Jim Barcia, M.C.

Don Johnson, M.C.

Terry Everett, M.C.

ATTACHMENT E

PROPOSED
TECHNICAL DEVELOPMENT DOCUMENT
FOR THE
PULP, PAPER, AND PAPERBOARD CATEGORY
EFFLUENT LIMITATIONS GUIDELINES,
PRETREATMENT STANDARDS, AND
NEW SOURCE PERFORMANCE STANDARDS

October 29, 1993

Engineering and Analysis Division
Office of Science and Technology
U.S. Environmental Protection Agency
Washington, D.C. 20460

The mill has studied combinations of oxygen and ozone with peroxide and believes that an acceptable softwood TCF pulp can be made. The mill does not currently use a TCF bleaching sequence because it would substantially increase operating costs over those of the OZED sequence.

Although TCF bleaching has been demonstrated for both softwood and hardwood papergrade kraft pulps with lower brightness, the Agency has determined that TCF bleaching processes have not been adequately demonstrated for producing high brightness softwood papergrade kraft pulp at this writing. Softwood papergrade kraft pulp comprises a large percentage of U.S. bleached kraft pulp production.

~~8.3.12 Totally Chlorine-Free Bleaching of Dissolving Kraft Pulps~~

At present, none of the three U.S. dissolving kraft mills use a TCF process to bleach their pulp and **the Agency is not aware of any non-U.S. mill that produces dissolving kraft pulp using a TCF process.** Although laboratory investigations of alternative bleaching sequences for dissolving kraft pulps may be under way, at this time the Agency has determined that TCF processes are not demonstrated for or transferable to this subcategory.

8.3.13 Totally Chlorine-Free Bleaching of Dissolving Sulfite Pulps

At present, there are no mills in the U.S. that use a TCF process to bleach dissolving sulfite pulps. The Agency has received information from one dissolving sulfite mill located in Austria that uses a TCF bleaching process to produce viscose fiber-grade pulps using peroxide-enhanced oxygen delignification followed by a medium-consistency ozone stage and a peroxide stage. The mill uses magnesium-based sulfite cooking liquor to pulp hardwood (beech) to a Kappa number of 6 to 8 prior to bleaching. The bleach plant filtrates from this facility are incinerated in a dedicated incinerator, because sodium in the filtrates is not compatible with magnesium in the pulping liquor, which is recovered.

Bleached pulp properties at this mill were reported as follows (44,45):

Pulp Property	Quantity
Brightness	90-92 ISO
Cleanliness	< 45 specks/m^2
alpha-Cellulose	90.5 - 91%
Kappa	< 0.7
Ash	< 0.06%

CEI

COMPETITIVE ENTERPRISE INSTITUTE

Gaining Ground

An Analysis of Wetland Trends in the United States

by Jonathan Tolman

May 1994

Introduction

Federal wetland policy has had anything but a consistent history in the United States. At the turn of the century, the Supreme Court characterized wetlands as "the cause of malarial and malignant fevers" and proclaimed that "the police power is never more legitimately exercised than in removing such nuisances."[1]

Since then, the federal government has made a complete about face on the issue of wetlands. Today governmental police powers are used to protect, not remove "such nuisances." In his 1989 State of the Union address, then President George Bush pledged the government to a policy of "no net loss" of wetlands. Under Section 404 of the Clean Water Act, an individual must obtain a permit from the Army Corps of Engineers if a proposed activity would adversely affect a wetland. Corps regulations often require individuals to submit detailed applications, wait extended periods of time and modify their projects. In the end, many applicants either withdraw their application or are denied a permit by the Corps. Throughout this analysis there are several excerpts from letters and memos that the Corps has sent to applicants who were requesting a permit. Although they do not represent a statistical sample of permits, they do highlight a number of problems inherent with the current regulatory system.

Memos From The Corps

"This is in regard to your application for a Department of the Army permit to retain and discharge fill materials into wetlands adjacent to Wind Lake in Racine County, Wisconsin. The purpose of the project is to facilitate the construction of a single family home.

"I have determined that issuance of the requested permit would be contrary to the public interest. Therefore, I must deny your request."

Letter from Richard W. Craig, Colonel, Corps of Engineers, St. Paul District to Mr. Russel Jacobs, Muskego, Wisconsin, Jul. 17, 1992.

Given the historical attitude of the government towards wetlands it is not surprising to note that by 1991 the U.S. had lost half of all its wetlands. But over the last few years a largely unnoticed transformation has been taking place all across America. Where once wetlands were being drained and filled, today they are being restored. In fact they are being restored at such a rapid pace that wetland restoration in 1993 exceeded the conversion of wetlands to other uses.

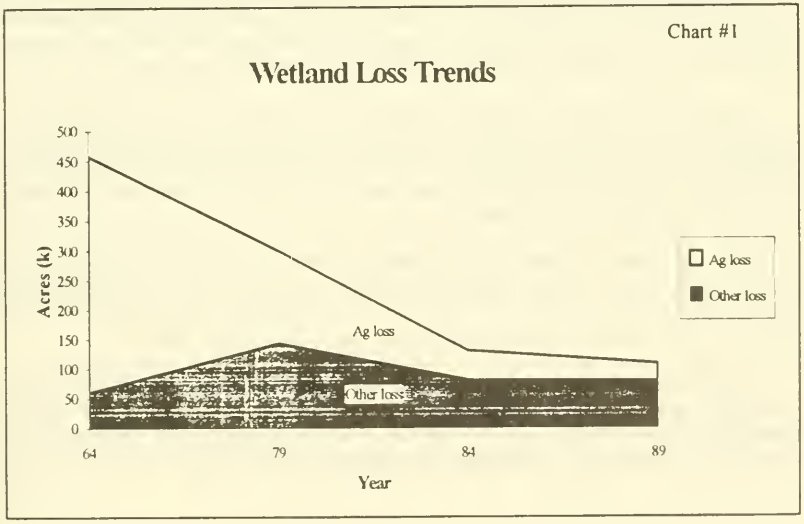
In 1994, nearly 60,000 net acres of wetlands will be restored. In short, Federal government statistics show that the lower 48 states are currently gaining wetland acreage.

1001 Connecticut Avenue, NW • Suite 1250 • Washington, D.C. 20036 • Telephone: (202) 331-1010 • Fax: (202) 331-0640

Why hasn't any one noticed this fact? The most prominent agencies regulating wetlands, the Environmental Protection Agency and the U.S. Army Corps of Engineers, are not the agencies which have been making the dramatic gains in restoration. The programs which have resulted in the U.S. achieving no net loss of wetlands are not the command and control regulations of section 404 of the Clean Water Act. Rather they are voluntary and economic incentive programs found in the Food Security Act of 1985, the North American Wetlands Conservation Act, and the North American Waterfowl Management Plan. This suggests that the goal of wetland conservation may be achieved more effectively through economic incentives than with federal land-use regulation. These findings also question the need for Congressional re-authorization of wetlands regulation under the Clean Water Act.

The fact that more wetlands are being restored than are being converted to other uses is in stark contrast to the current administrations policy. Upon releasing the Clinton Administration's wetlands reform plan in August of 1993, EPA Administrator Carol Browner stated, "The new agreement is a significant advance in protecting America's wetlands, which are being lost at a rate of nearly 300,000 acres per year."[2]

What Administrator Browner failed to mention was that the statistics indicating wetland loss rates as high as 300,000 acres a year are over a decade old. These lost rates represent the status of wetlands before passage of the Swampbuster provisions of the 1985 Food Security Act, before the North American Wetlands Conservation Act, and before the numerous judicial and regulatory decisions which granted broad authority to the Army Corps of Engineers and the Environmental Protection Agency to regulate wetlands. As a result this figure greatly misrepresents the status of wetlands in the U.S. today.



1991 Status and Trends Report

Wetlands, Status and Trends In The Conterminous Untied States, mid-1970's to mid-1980's, published in 1991 by the Department of Interior, is the source of the 300,000 acres per year figure quoted by Browner. The Status and Trends report analyzed aerial photography from 1974 to 1983. This nine year period has been used as the basis for calculating annual average acreage estimates.[3]

Wetland Conversion Rates
(acres per year)

	NWI '54-74	NWI '74-83	NRI '82-87	NRI '87-91
Agriculture	398,000	157,000	50,000	29,000
Other	60,000	143,000	81,000	79,000
Total	458,000	290,000	131,000	108,000

NWI: National Wetland Inventory NRI: National Resource Inventory

The *Status and Trends* report determined that 2.6 million acres had been converted from wetlands to other uses during the nine year period, resulting in an average annual conversion rate of 290,000 acres a year. This yearly conversion rate does not reflect current wetland conditions. In fact, the authors of the 1991 Status and Trends report tacitly acknowledged this. "Since the mid-1980's, indications are that wetland losses are slowing."[4] These trends are shown in chart #1.

National Resources Inventory

Shortly after the release of the 1991 *Status and Trends* report, the Department of Agriculture released a report on wetlands data obtained from the National Resources Inventory (NRI). The NRI is a survey conducted by the Soil Conservation Service every five years. The 1991 NRI wetland report used data collected from 1982 to 1991. Because the data is nearly ten years more current than the *Status and Trends* report, the NRI Wetlands report undoubtedly gives a far more accurate picture of current wetland losses than the mid-1970's to mid-1980's Status and Trends report.

The NRI Wetland Report, determined that 654,000 acres had been converted during the 5 year period from 1982 to 1987. An additional 431,000 acres had been converted during the 4 year period from 1987 to 1991. This represents an average annual conversion rate of 131,000 acres per year from 1982 to 1987 and 108,000 acres per year from 1987 to 1991. A significant change from the conversion rates of the previous decade.[5]

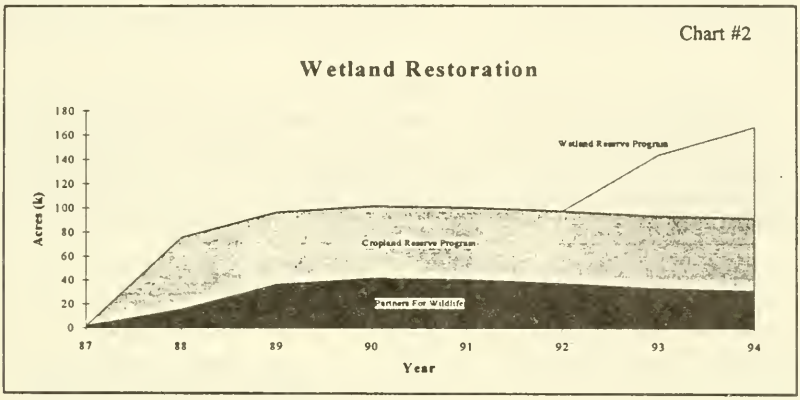
In addition to indicating reduced conversion rates, the NRI wetland report showed that the majority of those reductions came in the agricultural sector. During the 1987 to 1991 period less than 1/3 of the losses came from conversion to agriculture. This is significantly lower than the 54% agricultural conversion rate reported in the mid-1970's to mid-1980's. (See chart #1).

Although agricultural conversion of wetlands steadily declined, conversion due to development and other uses remained constant at roughly 80,000 acres a year through out the 1980's. In fact, wetland loss due to development was higher during the 1980's than it was during the period between 1954 and 1974, before any significant wetland legislation was in force.[6]

In short the best available data suggests that the United States is losing considerably less than the 290,000 acres a year, the figure so frequently quoted by some government officials and in many press accounts.

Wetland Restoration

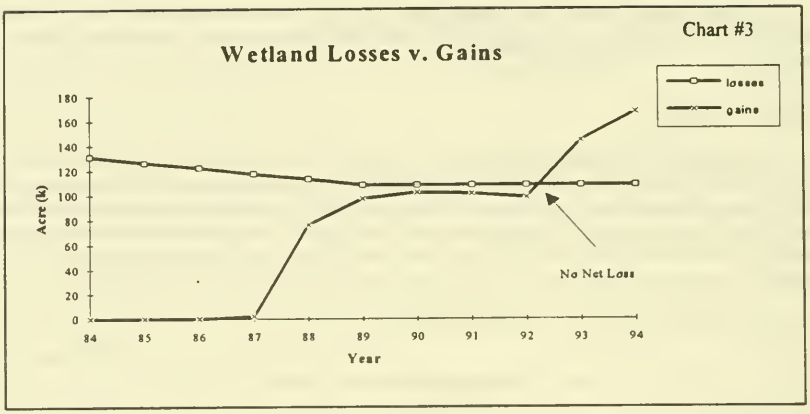
No discussion of wetland trends would be complete if it did not account for wetland restoration, which has been occurring on both public and private lands. During the late 1980's and early 1990's Congress funded a series of programs designed to acquire, restore and enhance wetlands. One report issued by the Department of Interior indicated that between 1989 and 1992, 834,405 acres of wetlands had either been restored or enhanced. Many of the these acres were restorations or enhancements on publicly owned lands, but a significant quantity also occurred on private lands.



In addition to restoration programs on public lands and wholly privately funded efforts, there are three principal programs which constitute the bulk of restoration on private land: the Partners for Wildlife Program, the Conservation Reserve Program and the Wetland's Reserve Program.

Since 1987, the Fish and Wildlife Service has entered into thousands of voluntary agreements with private landowners to restore converted or degraded wetlands on their property. To date the Partners for Wildlife (PFW) program has restored more than 210,000 acres of wetlands according to the Department of Interior.[7]

The Conservation Reserve Program (CRP) operated through the Agricultural Stabilization and Conservation Service (ASCS) offers landowners annual payments for ten years in return for placing environmentally sensitive cropland into an easement and implementing a conservation plan for the easement. Since 1988, previously converted wetlands have been candidates for restoration. In conjunction with the Fish and Wildlife Service the ASCS has restored roughly 300,000 acres of wetlands.[8]



The 1985 Food Securities Act authorized the creation of the wetland reserve program. However it was not until 1992 that Congress appropriated funds for the program. In 1993 the Soil Conservation Service secured permanent easements for the restoration of 50,000 acres of cropland. In 1994 the SCS has signed up an additional 75,000 acres of land for restoration. For 1994, the combined effect of these three programs was to restore an estimated 167,000 acres. (See chart #2)

No Net Loss

If an assumed constant conversion rate of 108,000 acres a year since 1991 is compared with the restoration efforts of the Partners for Wildlife, Conservation Reserve and Wetland Reserve Programs, it appears that nationally the U.S. has achieved no net loss on private lands. (See chart #3) This does not include the thousands of acres which have been restored on federal lands nor does it include solely private efforts. In 1991, for instance the Fish and Wildlife Service restored 33,120 acres throughout the National Wildlife Refuge system, yet this is not included in the above figure.[9]

Compensation for High Value Wetlands

Some current legislation calls for compensation to the land owners for high value wetlands. Under one such bill, HR 1330, when a landowner applies to the Army Corps of Engineers for a permit to develop on a wetland, the Corps would be required to classify the land into one of several categories. Those lands classified as having the highest wetland value would be deemed of critical signifi-

Memos From The Corps

"It has come to my attention that you have discharged fill materials into wetlands adjacent to the White River in conjunction with the excavation of wildlife ponds on you property... Our records indicate that a Department of the Army permit has not been issued for this project.

"You, your agents, and employees are hereby ordered to cease and desist from discharging additional fill materials into these wetlands... you will be provided an opportunity to obtain a Department of the Army permit for the unauthorized activity."

Letter from Richard W. Craig, Colonel, Corps of Engineers, St. Paul District to Ms. Dana Montana, Lake Geneva, Wisconsin. Nov. 25, 1991.

"This concerns your application for a Department of the Army permit to retain fill material previously discharged into wetland adjacent to the White River.... We have concluded our review and determined that issuance of the requested permit to retain dredged material, as it is currently distributed in the wetland would be contrary to the public interest."

Letter from Richard W. Craig, Colonel, Corps of Engineers, St. Paul District to Ms. Dana Montana, Lake Geneva, Wisconsin. Aug. 24, 1992.

cance. The Corps would prohibit most activities on such land, and allow the land owner to seek compensation for the fair market value of the land. Compensation is critical to private landowners as land use restriction often impose significant economic burdens on select individuals. Wetland preservation provides broad public benefits, compensation ensures that the costs are born by the public as a whole.

Critics of compensation have claimed that the plan would result in excessive costs and turn into a budget buster. However based on the current estimates of wetland loss this may not be the case. According to the Congressional Budget Office, HR 1330's definition of high value (or class A) would cover less than 9 million acres of privately owned wetlands.

There are an estimated 80 million acres of privately owned wetland in the lower 48 states. Consequently, class A wetlands would comprise only about 11% of all the wetlands which could potentially be developed.

With an average annual conversion rate of 108,000 acres per year, a compensation provision such as that in H.R. 1330 would require compensation for slightly more than 12,000 acres per year. According to the Congressional Budget Office, the acquisition of wetlands costs between $1,000 and $1,700 per acre. The budgetary requirement for these acquisitions would range from $13.5 to $20.3 million a year. This would represent an increase in the current acquisition budget for wetlands of less than 20%.

Memos From The Corps

"The applicants propose to fill approximately 0.04 acre of wetland to construct a house.

"The applicants have not adequately demonstrated that other alternatives were not, or are not available to them, including originally purchasing other property knowing the wetland regulatory history of this property, building on available upland on the property...

"After reviewing all available information, I conclude that the detriments greatly outweigh the minor benefits, and therefore, that the work will be contrary to the public interest."

Statement of Findings Memorandum on Proposed Fill in Wetland by James and Penny Stoglin, Charlevoix County. William H. Davy, Jr. Chief, Processing Section A, Regulatory Functions Branch, Detroit, MI. Sept. 21, 1992.

"The applicants were restricted as to where the septic drainfield could be located. The Health Department would only allow the drainfield to be located on one place on the property."

Environmental Impact Assessment on Proposed Fill in Wetland by James and Penny Stoglin, Charlevoix County. William H. Davy, Jr. Chief, Processing Section A, Regulatory Functions Branch, Detroit, MI. Sept. 21, 1992.

Efficacy of Programs

The reduction in annual wetland conversion appears to be due solely to reduction in the conversion of wetlands to agricultural lands. There are two principal reasons for this. First, the agricultural industry over the last twenty years has been experiencing continued yearly increases in farm productivity due to advances in a range of chemical, biological and other technologies. The average farm today is over 43% more productive than it was in 1970.[10] This means that a farm can produce the same amount of food today that he did in 1980, for example, but use while using 20% less land. Second, the Swampbuster provisions of the Food Security Act provided significant economic deterrent to wetland conversion for farmers receiving federal aid. The Swampbuster provisions eliminate any federal subsidies to farmers who convert wetlands for agricultural uses. Because a large number of farmers receive federal aid of one sort or another, the Swampbuster provisions appear to have been highly effective in deterring wetland conversion.

The conversion rate due to development, however, does not appear to have changed during the last decade. Section 404 which requires a permit for development in a wetland does not appear to have significantly slowed the rate of wetland conversion. There are two primary reasons why the 404 program may be ineffective. First, many activities may not fall under the jurisdiction of the 404

program. For example, until the summer of 1993 many type of wetland development were outside 404 jurisdiction because the wetlands were drained, rather than filled. In addition, many other types of activities are granted via a nation wide permit. The second reason is the economic nature of development. While the section 404 program, with its extensive delays and regulatory hurdles may deter development in wetlands where there is an economical alternative (e.g. nearby upland) in many cases there is no economic alternative. In areas like South Florida, where there are few if any economical alternatives to development in wetlands, a command-and-control permit process, such as section 404, simply imposes addition regulatory costs and delays onto landowners that ultimately do little to halt wetland conversion.

Conclusions

Over the last twenty years the United States has seen a dramatic decline in the rate of wetland conversion that occurs each year. Since the late sixties, when wetlands were being converted at a rate of more than 450,000 acres a years, wetland conversion has slowed to 108,000 acres a year. This represents an astounding 75% reduction.

Memos From The Corps

"We have received your letter dated August 24, 1992, requesting that we withdraw your pending Department of the Army permit application to discharge fill material into wetlands adjacent to the Pine River for the construction of a play ground."

Letter from Ben Wopat, Chief, Regulatory Branch, Corps of Engineers, St, Paul District to Reverend C.D. Fretz, Richland Baptist Temple, Richland Center, Wisconsin.

Trends also show that in most areas the rate of wetland conversion continues to slow. Wetland conversion due to agriculture has decline from nearly 400,000 acres a year in the late sixties to less than 30,000 thousand acres a year, a 93% reduction. And the rate of conversion due to agriculture continues to slow, due to continued improvements in agricultural technology and the Swampbuster provisions of the Food Security Act of 1985.

The only area where wetland conversion has not slowed has been conversion due to development, yet this has not prevented the achievement of "no net loss." Wetland conversion due to urbanization, strip development, highway construction and similar activities account for the conversion of more than half of all wetlands. From 1982 to 1987, development accounted for the conversion of 56,000 acres a year. From 1987 to 1991, development accounted for 58,000 acres lost a year. Government statistics suggest no decline in wetland conversion due to development despite the onerous impact of section 404 regulations on private land owners.

Overall the United States has compensated for the annual conversion of wetlands by instituting wetland restoration programs on public as well as private lands. The three largest programs focusing on private land, are expected to restore 167,000 acres in 1994. In addition to these three programs, there are dozens of other actions, on both public and private lands that are restoring tens of thousand of acres of wetlands a year.

Recommendations

Fundamental reform for wetlands regulation is needed. There are two major federal programs designed to reduce wetland loss, Swampbuster and Section 404 of the Clean Water Act. As wetland loss due to agricultural conversion have continued to decrease it appears evident that Swampbuster is having the desired effect. Wetland conversion due to development however does not appear to be

slowing.

There are two principal reason why the 404 program appears to be ineffective in further slowing wetland losses due to development. First, in most cases there are relatively few if any economically viable substitutes for development. Unlike agricultural production which can be shifted over time to other areas and still produce the goods required by society, development is highly geographically dependent.

The second reason the section 404 program is unlikely to slow the loss of wetlands is the nature of the program itself. Section 404 was not originally written to apply to wetland development of private property. The 404 permitting process with its public notice and comment period and consultation with up to three other federal agencies is reminiscent of a process designed to regulate the environmental impact of large government sponsored development projects. Certainly no Congressman debating section 404 in 1972 would have considered it appropriate to have public notice and comment as well as consultation with up to four other federal agencies for the construction of a single family home.

Half of all applicants for 404 permits were projected to disturb less than 1.1 acres. One fourth of the projects effected less than .25 of an acre. Because the majority of these activities are small residential or commercial projects, multiple agency consultation with public notice and comment amounts to regulatory overkill.[11]

At a minimum, the 404 program should be consolidated into one agency. If none of the four existing agencies are competent enough to issue permits by themselves, it is a mental stretch to think that more than one agency in "coordination" could produce a more efficient process.

Landowners should have the option of bypassing the permit process if they provide for mitigation. Wetland restoration technology over the last few years has seen significant advances. Currently it does not require huge sums of money to restore an acre of wetland. The Wetland Reserve Program is scheduled to restore 75,000 acres at a cost of $67 million. This equals less than $900 an acre. Contribution to a private mitigation bank, a state mitigation bank, or a federal program such as the Wetland Reserve Program or Partners for Wildlife Program, would simultaneously insure that nationally the U.S. achieves no net loss while avoiding the a lengthy, expensive and burdensome permitting process.

Wetlands which are considered so important that they should not be developed at all should be considered for acquisition by the government at the time a permit is denied. Purchase of the land by the government would enable the land owner to purchase additional land which would be more suitable for development. The programs which have economically encouraged land owners not to convert wetland have been more successful in helping the U.S. achieve "no net loss." Any reform of section 404 should emphasize these economic incentive programs and phase out the less efficient command and control regulations.

Notes

1. Leovy v. U.S., 177 U.S. 621, 686 (1900), and Bovard, James, *Lost Rights The Destruction of American Liberty*, 1994, pp32.

2. USA Today August 25, 1993.

3. Dahl, T.E. and C.E. Johnson. 1991. *Status and Trends of Wetlands in the Conterminous United States, Mid-1970's to Mid-1980's*, U.S. Dept. of Interior, Fish and Wildlife Service, Washington, DC. page 4.

4. Dahl, T.E. and C.E. Johnson. 1991. *Status and Trends of Wetlands in the Conterminous United States, Mid-1970's to Mid-1980's*, U.S. Dept. of Interior, Fish and Wildlife Service, Washington, DC. page 2.

5. USDA SCS, 1991 Update of National Resources Inventory, Wetlands Data For Non-Federal Rural Lands, Iowa State University Statistical Laboratory. This studied reviewed only rural lands. The 1990 census data determined that 2.5% of the land area in the U.S. is urban land. Since the 90% confidence interval for this study +28% which is significantly greater than 2.5%, it is assumed that his studied is not significantly different than U.S. lands as a whole.

6. National Wetlands Inventory. Status and Trends mid-1950's to mid 1970's. U.S. Department of Interior. 1982

7. A National Program for Wetlands Restoration and Creation, Report of the Interagency Committee on Wetlands Restoration and Creation to the Policy Coordinating Group, Interagency Task Force on Wetlands, August 1992, pp 10. Additional information obtained from Fish and Wildlife Service. Contact: Ron Crete.

8. A National Program for Wetlands Restoration and Creation, Report of the Interagency Committee on Wetlands Restoration and Creation to the Policy Coordinating Group, Interagency Task Force on Wetlands, August 1992, pp 10. Additional information obtained from Soil Conservation Service, Don Butz.

9. Wetlands Stewardship, U.S. Department of Interior, April 1992, pp 12.

10. U.S. Department of Agriculture, Economic Research Service, Economic Indicators of the Farm Sector: Production and Efficiency Statistics.

11. Albrecht, Virginia S. and Bernard N. Goode, *Wetland Regulation in the Real World*, Beveridge and Diamond, February 1994.

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COMPETITIVE ENTERPRISE INSTITUTE

MAY 23 1994

For Immediate Release:

Contact:Greg Smith
202-331-1010

Wetland Gains Make Federal Program Obsolete Study Finds No Net Loss Achieved in 1994

Washington DC, May 18, 1994 -- The United States is currently creating more wetlands than are being destroyed, an analysis of recent government statistics by the Competitive Enterprise Institute shows.

This new information is contrary to claims by environmental groups who say 290,000 acres of wetlands are lost each year. These claims are based on a study conducted more than ten years ago.

"This brings into question the need for burdensome wetland regulations," said Jonathan Tolman, author of the study, "Why is the federal government restricting economic development, if wetland loss is no longer a problem?"

In 1994 the United States will convert approximately 108,000 acres of wetlands to other uses, data collected from the government's National Resources Inventory shows. Simultaneously, three other government programs in conjunction with the private sector will restore 167,000 acres of wetlands each year.

Voluntary and economic incentive programs funded by the Department of Agriculture and the Fish and Wildlife Service have resulted in the most dramatic wetland achievements. The burdensome regulations administered by the EPA and the Army Corps of Engineers have done comparatively little to restore wetlands but can stifle development, delay critical projects and in some cases prohibit construction.

"Over the last few years we have seen a complete change in the status of wetlands. During the eighties we were losing tens of thousands of acres a year. Now, we are restoring tens of thousands of acres a year," said Tolman, an environmental policy analyst with the Competitive Enterprise Institute.

CEI is a Washington-based public interest group dedicated to the principles of free enterprise and limited government. For more information call Greg Smith at 202-331-1010

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Wetland Facts

- In 1994 the U.S. will achieve a net gain of nearly 60,000 acres of wetlands.
- There are 103 million acres of wetlands in the lower 48 states, the Department of Interior estimated in 1991.
- 108,000 acres of wetlands are converted to other uses each year, according to the National Resources Inventory, in 1991.
- 167,000 acres of wetlands are currently being restored each year, under just three government programs.
- The three programs responsible for the bulk of wetland restoration are the Partners for Wildlife Program, the Wetlands Reserve Program and the Conservation Reserve Program. Neither the EPA nor the Army Corps of Engineers are responsible for these programs.
- In the last 30 years the annual conversion of wetlands to other uses has declined by 75%.
- In the last 30 years the annual conversion of wetlands to agricultural use has declined 93%.
- The EPA and the Army Corps of Engineers are responsible for section 404 of the Clean Water Act which requires a permit to develop in wetlands.
- It takes the average applicant 373 days to get through the individual permit process.
- While only 5% of all individual permit applications are denied, more than half end up being withdrawn by either the applicant or the Corps.
- In the last ten years, conversion of wetlands due to development and other uses has declined less than 3%.

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FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS

REPORT TO SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT OF THE HOUSE PUBLIC WORKS AND TRANSPORTATION COMMITTEE

May 23, 1994

FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS

The Foundation for Environmental and Economic Progress, Inc. was established in January, 1990 to respond to problems surrounding increased regulation by the Federal government of matters affecting land utilization. Various reports have been prepared by the Foundation in response to a variety of governmental initiatives, and the Foundation has from time to time presented those reports, together with testimony respecting the same, to various committees of the United States Congress. The Foundation provides this report in order to compare and analyze various proposals for wetlands regulatory reform, including the ideas advanced by President Clinton's wetlands initiative ("Protecting America's Wetlands: A Fair, Flexible and Effective Approach"), announced on August 24, 1993. This report offers further suggestions born out of the experience of its members with the Section 404 program.

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OVERVIEW

Wetlands and their functions are vital to a balanced ecological system. That reality has been and continues to be at the core of the Foundation's recommendations for improving the regulatory scheme that protects and permits their use. We applaud both the President and Senators Baucus, Chafee and Graham, as well as Representative Hayes for their movement into this arena. The cumulative effect of these initiatives results in movement in the right direction, but each fails to address several important issues. The intent here is to highlight those areas in which progress has been made as well as those in which more remains to be done. The Foundation does so in the belief that the fundamental objective of the wetlands regulatory program is to provide a series of procedures and protocols that allow for the effective management and conservation of the resource but not at the expense of the economic engine of this country, and, in particular, the component part of that engine that is represented by the land development industry. What is needed is a balance, one that rationalizes through creative planning the usefulness of selected portions of our wetland resources while excluding or severely restricting access to others.

EXECUTIVE SUMMARY

WETLANDS DEFINITION AND ISOLATED WETLANDS/STATE DELEGATION . . 1
The Foundation supports a definition of wetlands that eliminates small isolated wetlands from federal regulatory oversight coupled with a plan for enhanced delegation of Section 404 permitting to the states and elimination of §404(c) veto on a permit-by-permit basis

CLASSIFICATION/SEQUENCING 3
The Foundation supports a permitting process providing for the classification of wetland functions and values, coupled with a permitting agenda that is tied to the value of the resource being impacted

CONSOLIDATION OF WETLANDS ADMINISTRATION 5
The Foundation supports the consolidation of the 404 program under one agency

NO NET LOSS 6
The Foundation supports the goal of no overall net loss of wetlands' functions and values

ADMINISTRATIVE/JUDICIAL REVIEW 7
The Foundation supports administrative and judicial review of jurisdictional delineations and of permit denials

DEADLINES FOR PERMIT APPLICATION 8
The Foundation supports the establishment of deadlines for permit decisions under the Clean Water Act, provided that the applicant controls the timing of the decision

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The Foundation supports mitigation banking as part of the solution to compensatory mitigation

CONCLUSION 9

WETLANDS DEFINITION AND ISOLATED WETLANDS/STATE DELEGATION

The Foundation supports a definition of wetlands that eliminates small isolated wetlands from federal regulatory oversight coupled with a plan for enhanced delegation of Section 404 permitting to the states and elimination of §404(c) veto on a permit-by-permit basis.

The Foundation believes that Congress should redefine the role of the federal government in protecting wetlands in order to provide a more efficient system that recognizes the traditional role of the states in land use planning and protection of water resources. Congress should define a category of wetlands and water bodies that are of sufficient importance to warrant federal oversight and therefore deserve designation as "waters of the United States." That line should be drawn in light of the recognition that, as it currently operates, the federal Section 404 program in effect constitutes federal land use regulation even though Congress has never sanctioned such extensive federal intrusion into what has historically been the province of state and local governments. Indeed, in passing the Clean Water Act in 1972, Congress stated its policy "to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources . . ." 33 U.S.C. §1251(b).

Once the line between federal and state jurisdiction is drawn, Congress should take steps to ensure that wetlands protection operates more efficiently by ending overlapping and duplicative permitting requirements. In areas outside federal jurisdiction, the states would be free to regulate as they wished. Within the defined sphere of federal jurisdiction, state and local regulation of wetlands should be preempted, although there should continue to be provisions for state assumption of the Section 404 program. In this connection, Congress should address the barriers that have discouraged states from assuming the 404 program and that have led the only state to assume the program after 16 years -- Michigan -- to consider giving it back. First, Congress should allow partial assumption of the program, e.g., assumption for specific waters or types of waters, rather than requiring an "all or nothing" approach. Second, EPA should not be allowed to micromanage state programs. EPA oversight should be on a programmatic level, not on an individual permit level, and should be limited to an annual review of the state program. Finally, some federal funding should be available for states willing to implement a federal mandate.

Under the above system, one agency would be the decision maker for any given project in wetlands. In the majority of cases, that will continue to be the federal government. States will be the decision makers where they have assumed the Section 404 program or where the wetland is essentially a local resource and is not considered to be a water of the United States. States would, of course, have the option of allowing local regulation of wetlands. Because preemption of state and local regulation would be a departure from current standards, there should be a phase-in period -- two to three years might be appropriate -- during which

states could decide whether to seek assumption of the 404 program. The Foundation believes that such a system would go a long way toward achieving the sort of "one-stop shopping" advocated by the National Wetlands Policy Forum.

Clearly, Congress should leave to the states the regulation of small isolated wetlands and small isolated "waters" such as drainage swales that flow only after storm events. It is the regulation of such wetlands and waters that provides the starkest examples of federal land use control. There are numerous examples of the Corps of Engineers ("Corps") and EPA asserting jurisdiction over minuscule wetlands -- sometimes measuring in the hundredths of an acre -- and then using such jurisdiction to dictate decisions regarding large projects. Thus, a project covering 20 upland acres can be delayed, fundamentally altered, or even abandoned, because the project would involve filling an isolated wetland covering only a tenth of an acre. This use by federal regulators of a "small federal handle" to involve themselves deeply in local land use decisions undermines support for the Section 404 program.

Moreover, this type of intrusive federal regulation is undertaken in the name of wetlands and waters that often have limited functions and values. The Foundation recognizes the importance of wetlands generally and strongly supports the protection of wetland functions and values. However, isolated wetlands and waters by definition generally play a more limited role in performing flood control and water quality functions precisely because they are hydrologically isolated. This is particularly true of small isolated wetlands, which ordinary citizens are often surprised to learn are currently considered "waters of the United States." S.B. 1114 moves in the right direction by encouraging state assumption of the §404 program and importantly attempts to limit the EPA to programmatic oversight of state-run 404 programs, eliminating the 404(c) veto on a permit-by-permit basis. This effort is supported by the Foundation.

Federal regulation of small isolated wetlands and waters would not be so problematic if obtaining a permit for activities in such wetlands were a relatively straightforward matter. Indeed, over a decade ago, the Corps issued a nationwide permit designed to cover such activities. However, today it is no easy matter to obtain authorization for activities in small isolated wetlands. The Corps has the authority to deny use of Nationwide Permit 26 in any given case and require an individual permit application, and the Corps districts are increasingly using this authority. Indeed, in some areas of the country, e.g., New England, Nationwide Permit 26 is essentially unavailable. Getting an individual permit is an arduous and lengthy task. A report just completed by the Foundation's general counsel indicates that the average time to get an individual Section 404 permit for activities in wetlands is over a year; and even for projects involving wetland impacts of a tenth of an acre or less, the permit processing time still averages over 200 days.

Moreover, the states are fully capable of protecting what are essentially local resources in any event. Most states have wetlands programs or other regulatory programs that currently provide protections for small isolated wetlands. Any number of states might increase such protections if

Congress were to end federal jurisdiction over small isolated wetlands. An increasing number of local jurisdictions are also developing their own wetlands ordinances. These state and local programs not only provide protections for isolated wetlands, under the current system they provide overlapping protections that result in duplication, inefficient use of agency resources, and sometimes conflicting demands on the applicant.

Accordingly, we would urge Congress to end Section 404 jurisdiction over small isolated wetlands and allow the Corps and EPA to devote scarce federal resources to wetlands that more clearly deserve designation as "waters of the United States," thereby ending the most egregious examples of federal intrusion into local land use planning.

CLASSIFICATION/ SEQUENCING

The Foundation supports a permitting process providing for the classification of wetland functions and values, coupled with a permitting agenda that is tied to the value of the resource being impacted.

Wetlands classification is critical to the rationalization of the 404 process and to creating a framework that attracts private capital to the restoration process. The Administration's acceptance of the notion that not all wetlands are created equal and that permit applicants deserve "a timely and predictable regulatory response that is appropriate for the project being proposed" are important first steps that are to be applauded and encouraged as part of a congressional response.

Unfortunately, neither the Administration nor either of the Senate Bills (1304 or 1114) go far enough in recognizing the absolute necessity for developing a mechanism for wetlands classification. H.R. 1330, however, does establish a classification system, and while the prior mapping and classification of all wetland areas is arguably impractical, the notion and acceptance of classification is appropriate. Congressman Mineta's bill requires that the alternatives to the activity proposed by the applicant be commensurate with the severity of the impact of the activity on the aquatic ecosystem and, as such, it recognizes implicitly the value in the development of a classification or valuation matrix. The President argues that "the prior categorization and ranking approach would not provide for consideration of the individual impacts associated with specific projects" and uses that as a rationale for concluding that national classification is not an agenda item for the Section 404 program. However, in the same breath, the Administration supports, as does both Senate Bills, the concept of advanced planning, which, if implemented with the rigidity that has characterized much of the Section 404 Advanced Identification Program, will also fail to provide for consideration of individual impacts associated with specific projects.

The Foundation's approach recognizes that classification criteria are watershed specific and can be developed and determined

simultaneously with a jurisdictional delineation. Classification is the linchpin needed to extrapolate private capital to achieve the fundamental objective not only of restoring degraded wetlands but also of increasing the wetlands inventory beyond "no net loss." The concept that wetlands of lesser value should receive some measure of expedited permitting authority, while antithetical to the environmental agenda, is nonetheless an important tradeoff if we are to bring to bear market-driven forces to encourage the replacement of wetlands of lower value with those of higher value and thus steer development activity away from the latter. In short, this concept imposes market-driven sequencing and delivers private capital to wetlands restoration by directing development to low-value wetlands in exchange for the restoration and enhancement of high-value wetlands.

The President's approach also suggests that as a precondition to the imposition of a classification system, there needs to be local or regionally developed advance planning at the watershed level that takes into account unique ecological characteristics. The Foundation does not disagree with that approach, but a few words of caution are appropriate.

A watershed planning process should be used to establish the sizes, types, and locations of wetlands complexes that have the potential to survive as long-term functioning ecosystems. This type of analysis should not have as its goal the rigid classification for permit analysis, but by the same token, it should not seek to classify for long-term preservation purposes either. In this context, it is entirely appropriate to consider not only the ecological consequences of wetlands classification, but also the economic and political consequences.

Our experience has been that when the classification process precedes far in advance of a permit application, it inevitably develops a rigidity that constrains creative planning. It immediately denies any prospective future development use to the parcel and is inconsistent with the stated implementation of the 404 permit review, which implies that a "public interest balancing" will occur only when an immediate and certain use for the site is identified. Not all land is ripe for development at the same time, and it is for that reason that the President's comments are well taken when he again points out that "prior categorization would not provide consideration for individual impacts associated with specific projects." It also is true that prior classification designed to limit access to lands is burdened by the same constraint.

What the Foundation recommends is a comprehensive and holistic look at the needs of a particular region that is overlaid with the wetlands agenda. Such a look should not be so precise as to take out of play any particular wetland resource, and it should also avoid premature conflict with the landowner and government while recognizing that environmental resources, and wetlands in particular, change over time.

Accordingly, wetlands classification criteria can and should be developed contemporaneous with watershed planning, but the application of those criteria should be undertaken on a case-by-case basis. In this context, we applaud the concept of valuation as contained in H.R. 1330 but believe that our procedure will prove more workable and

cost effective. The modification of per unit standards proposed by Congressman Mineta, if amplified to include a requirement for a valuation matrix, moves more effectively toward the goal.

When low-value wetlands are affected, the Foundation recommends that applicants move immediately to mitigation. For medium-value wetlands, applicants should show how they would address practicable alternatives and sequencing, but the application would be viewed holistically, and the mitigation component should be considered simultaneously and as a part of the application. For those wetlands that are of high value, rigid sequencing and rigid practicable alternatives would continue to apply. Such a system uniformly assures that market-driven capital would be attracted to low-value wetlands, for which the tradeoff is mitigation provided by the applicant. Private capital will not move to high-value wetlands except in extreme cases and, as a result, the market will avoid them. Thus, private capital will restore wetlands of low and medium value, and the agenda of "net gain" will be advanced while allowing some measure of development.

Until we can adopt a system that recognizes that all wetlands are not the same and develop procedures for permitting around that reality, then the regulated community will remain constrained by a process that fails to relax the permitting standards irrespective of the quality of the wetlands impacted.

CONSOLIDATION OF WETLANDS ADMINISTRATION

The Foundation supports the consolidation of the 404 program under one agency.

An announced principle of the President's plan is that the regulatory program must be "efficient, fair, flexible, and predictable, and administered in a manner that avoids unnecessary impacts on private property and the regulated public while providing effective protection for wetlands. Duplication among regulatory agencies must be avoided, and the public must have a clear understanding of regulatory requirements and various agency roles."

The Foundation has consistently urged that the administration of wetlands be consolidated under one agency. Clearly, to avoid duplication and achieve a measure of efficiency, fairness, flexibility, and predictability, serious consideration must be given to consolidating the 404 program under one agency. Consolidation is not presently a part of any Congressional plan, nor is it a part of the President's plan. However, in the "Questions and Answers" distributed with the narrative of the plan, the President acknowledges that "the Administration will take steps to emphasize a single decision maker to streamline the various federal wetlands programs and reduce duplication, overlap and delay." What this means remains to be seen, but on balance, the Administration appears to realize the need to

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continue to explore reform in this area.

If that cannot be accomplished, then we would recommend a compromise that would allow the Environmental Protection Agency, if it certifies affected wetlands to be of national significance within 60 days of the filing of an application, to take over the permitting responsibility from the Corps for a particular permit application. Appropriate interagency guidance could be developed to more precisely define the criteria by which the EPA could take over a permit, but the intent is that it must be an application of major significance. If the EPA exercises its takeover authority, then it would have exclusive decision making power on the permit, and the Corps would simply become a commenting agency for the balance of the process. If, on the other hand, the EPA does not exercise its takeover authority, then the Corps would be the exclusive decision maker, and the EPA would be a commenting agency with no right of a veto or other right of elevation. This compromise effectively leaves in play the regulatory apparatus of both agencies, allows both agencies to continue to participate in the permitting arena, but allows the applicant, at a particular point in time in the process, to deal with one Federal decision maker and one set of managerial prerogatives.

The recently announced initiative which reestablished the Corps as the lead agency for permit review has proved somewhat useful, but it does not ameliorate the fundamental fact that as and to the extent the EPA is not a satisfied constituent, the Corps is, as a practical matter, powerless to move forward until that constituency has been satisfied. Movement on this agenda is critical if we are to eliminate duplication among the regulatory agencies, and we would urge the Congress to refocus legislative effort on this issue.

NO NET LOSS

The Foundation supports the goal of no overall net loss of wetlands' functions and values.

The Foundation supports the President's goal of "no overall net loss of the nation's remaining wetlands and the long-term goal of increasing the quality and quantity of the nation's wetlands resources base." However, the concept of "no net loss" has always been interpreted to mean no loss of the *functions* and *values* of wetlands as opposed to no net loss of wetlands acreage. In that context, the Foundation again acknowledges the validity of that goal, but emphasizes its belief that without fundamental change in the present 404 program, this goal cannot be achieved.

Strict and absolute protectionism as the preferred regulatory approach will stifle the infusion of the private capital necessary to make the system work. The President's policy remarks leave open to interpretation the question of how no net loss is to be viewed. Although the Foundation believes that the President's position, particularly when considered in the context of the whole

program, accepts the concept of no net loss of "functions and values" of wetlands, we urge both Congress and the President to make that position clear as they offer legislative and regulatory guidance to the implementing agencies. The institutionalization of this concept is critical to the ability to increase the quality and quantity of the nation's wetlands resources.

ADMINISTRATIVE/JUDICIAL REVIEW

The Foundation supports administrative and judicial review of jurisdictional delineations and of permit denials.

Significantly, several legislative initiatives, together with the President's program move forward to provide additional protections to landowners in the areas of administrative and judicial review at various stages of the permitting process, and we applaud that effort. We believe, however, that some refinements are desirable in the interests of fairness and in the interest of leveling the playing field. The President would allow an administrative review of jurisdictional delineations. This is long overdue but does not go far enough to afford equal treatment to landowners. The necessity for providing for both administrative and judicial review of jurisdictional delineations is an extremely important concept that cries of fundamental fairness and assures a significantly increased level of accountability in the delineation of wetlands by those charged with that responsibility. We would urge in the strongest way possible that administrative and judicial review of jurisdictional delineations should be a part of the law and that the law should require that any administrative review be conducted independent of the regulatory office of the Corps. Parochialism is, at best, a perceived threat to objectivity and, at worst, a real threat to objectivity. It cannot be ignored in this type of endeavor. We believe most delineation issues would be resolved in an independent administrative review process, but failing that, a landowner should have access to the courts to test the legal sufficiency of the jurisdictional delineation. Failure to provide that additional level of protection leaves the landowner only with the choice of a long and uncertain permit process or risk of incarceration, a fine or both. The latter two choices must be augmented by a third; judicial review.

Some have suggested that a permit denial should first be reviewed administratively prior to seeking judicial relief. Given the finality of a permit denial and the impact that it has upon a landowner, we believe that a landowner should have the right to pursue <u>either</u> of these alternatives. The necessity for administrative review, however, is an important plus that ought to be available to a landowner, and it should, therefore, be retained but not at the expense of immediate judicial review. If the issues which give rise to the denial of the permit are perceived as negotiable, they may well be able to be resolved in the administrative review format. On the other hand, if the issues which gave rise to the denial of the permit are issues for which there is little chance of compromise, it

may well be that the only perceived recourse available to the applicant is through the courts. In that case, the applicant ought not have to expend another six to nine months to a year in the administrative review process before he can seek judicial relief from a decision he considers adverse to his interests. So, we would urge that at the point in time that a permit is denied, a landowner would have either option available; administrative review or access to the courts.

DEADLINES FOR PERMIT APPLICATION

The Foundation supports the establishment of deadlines for permit decisions under the Clean Water Act, provided that the applicant controls the timing of the decision.

The President's initiative, as well as that of most others, suggest the establishment of deadlines for wetlands permitting decisions under the Clean Water Act. Interestingly, the regulatory apparatus presently in place provides for similar deadlines, and while they seem to add some sense of predictability, satisfying a public that craves predictability, they, in reality, do not work. No one who has spent the time and effort to get an application to the public notice stage wants the application denied simply because the deadline has been reached, and absent one of the triggers for extension, that outcome is virtually assured. The question is, how do you create a framework for making timely decisions which advance the process to a place where a permit decision can be made. While deadlines may contribute to that framework, we would strongly urge that in every instance, the applicant be given the right to waive the 90-day period in order to keep the application alive and subject to continued review and processing. Assuming the applicant is actively engaged in addressing regulatory comments and is in good faith pursuing the obtaining of a permit, arbitrary deadlines controlled by the government are counterproductive. However, the applicant should always be able to call for a decision and, once called for, obtain one within 90 days. These concepts should be included in any forthcoming legislation.

MITIGATION BANKING

The Foundation supports mitigation banking as part of the solution to compensatory mitigation.

The Administration and all others are to be commended for their recognition of mitigation banking as part of the solution and not part of the problem. However, aside from a firm commitment that mitigation banking will become part of the future, none of the bills, the President's remarks, nor and subsequent regulatory guidance provide substantive direction. In this regard, it is important to distinguish between a mitigation bank and a wetland mitigation project developed by a permit application for mitigation credit.

A mitigation bank involves the restoration or enhancement of a degraded wetland. Unrelated third parties may gain access to this bank for mitigation credit by the payment of cash, after which they may go forward with an unrelated project, provided other regulatory requirements are satisfied. Viewing mitigation banking in this context, the Foundation remains concerned that neither the President's plan nor any of those now surfacing in the Congress have focused on the fundamental reality -- that mitigation banking using private capital is not going to happen in any meaningful sense until some set of incentives is created that allows it to attract private capital.

The requirement that all mitigation be completed, in place, and functional before credits can be withdrawn is unworkable. For those who would seek to invest in a mitigation bank, a requirement that it be totally successful before credits can be sold essentially means that the credit suppliers bear all risks and costs of mitigation failure. Those risks and costs are too high for a competitive return on investment. For a market-based trading system to work, suppliers must be allowed to sell credits from mitigation sites that are not yet fully mature or even self-sustaining. In other words, the ability to sell the mitigation credits must be shifted back in time on the demand/supply scale where some element of risk is assumed on the regulatory side of the equation. That risk can be somewhat minimized by appropriate bonding mechanisms and the like, but to leave all the risk to the credit supplier is wholly inappropriate if we hope to attract private capital to mitigation banking.

The Foundation encourages Congress and the President to expand their support of mitigation banking by providing more definitive guidance as to their intent, and then ensure that regulations that emerge conform to the intent of creating a workable mitigation banking system.

CONCLUSION

The Foundation is pleased with the direction in which wetlands reform appears to be going.

We believe that a unique opportunity exists at this time to structure a regulatory resource management apparatus that not only works but also that will attract the capital needed to achieve the fundamental objective of adding to the nation's wetlands base. The existing *command and control* regulatory apparatus frustrates cooperation between government and the private sector and has not proved workable; a reality that the President's plan implicitly, if not explicitly, recognizes. The Foundation urges additional creativity to -- in the President's words -- *reinvent government* to respond to the need to manage the resource as well as encourage market-driven incentives to restore and replenish the resource.

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FRIENDS OF THE EARTH
Northwest Office

Statement of

David E. Ortman,
Director, Northwest Office
Friends of the Earth

submitted to the

Subcommittee on Water Resources
Committee on Public Works and Transportation
U.S. House of Representatives

On Reauthorization of the Clean Water Act.

24 May 1994
Washington D.C.

4512 University Way NE
Seattle, WA 98105
206-633-1661
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foewa (MCI Mail ID)
foewase (EcoNet ID)

My name is David E. Ortman, Director of the Northwest Office for Friends of the Earth, 4512 University Way N.E., Seattle, WA 98105. Friends of the Earth is a national environmental organization with 50,000 members and supporters. We have affiliated organizations in 51 countries and work on a wide range of national and international environmental issues.

The Northwest office of Friends of the Earth covers the states of Washington, Oregon, Idaho and Montana and has been involved in Section 404 Clean Water Act issues since 1975 including: i) commenting on Section 404 regulations; ii) review of Section 404 public notices issued by four Corps Districts in the region; and, iii) as plantiffs in Section 404 lawsuits. We would request that this testimony and the accompanying material be placed in the hearing record of 24 May 1994.

OVERVIEW

Friends of the Earth supports strengthening the Federal role in protection of our nation's wetlands and waters of the United States. We cannot afford to let 50 states and more than 3,000 counties continue to make a mixture of unrelated decisions in the absence of clear Federal wetland protection policies and aggressive regulatory programs.

Many estuaries and watersheds have already suffered large amounts of wetland loss. According to the Puget Sound Water Quality Authority, for example, 60% of Washington State's coastal wetlands in eleven major river deltas in Puget Sound have been converted to other land uses.

Existing wetland programs simply do not protect this vital resource base. In the Northwest, for example, while some of the most ill-conceived projects do drop by the wayside, a persistent developer can usually convince the Corps to issue a Section 404 permit to destroy a wetland which may be over ten thousand years old in return for the "creation" of a new wetland. This can be similar to losing a 500 year old forest with its biodiversity and replacing it with a monoculture of seedlings.

Each Corps District is required (although not all comply) to issue a monthly list of permit decisions. The following is a summary of the four Northwest Corps districts since 1985:

PORTLAND DISTRICT: 36 Section 404 denials over 106 recorded months.
SEATTLE DISTRICT: 15 Section 404 denials over 95 recorded months.
OMAHA DISTRICT (including MT): 33 Section 404 denials over 98 recorded months
WALLA-WALLA DISTRICT: 21 Section 404 denials out of 64 recorded months.

This is an average of three permit denials per year for the Northwest. This is hardly a rigorous or burdensome permit program.

To properly document the extent of wetland losses, Corps Districts should keep track of the number and acreage of wetland permits issued. However, many Corps Districts still do not report wetland fills as a separate category on their monthly listings and we continue to find Corps Districts that do not comply with their own regulations which require a monthly list to be published of permits issued and denied.

In addition, the Environmental Protection Agency (EPA) has not adequately used its veto discretion over the Corps under its 404(c) authority. The purpose of 404(c) is to allow EPA to protect our nation's wetlands by prohibiting the use of any area for the disposal of dredged or fill material. Region 10 EPA has never protected a single wetland acre or function under its already existing 404(c) veto authority. This is not a record which reflects a commitment to wetlands protection.

We need environmental leadership to restore, not just save our remaining nation's wetlands. Perhaps we need a new approach, a new way of looking at what were called, swamps and bogs in the past. Washington State law, for example, defines areas that are subject to being submerged by water as "marginal lands." Such lands, according to this law, constitute ". . . a serious and growing menace which is condemned as injurious and inimical to the public health, safety, and welfare of the . . .people of the state." Since, this act was passed, however, there has never been a headline, "Wetlands Attack Washington Citizens at Beach."

We need another term for describing wetlands, more poetic, more lyrical. These areas could be called "watermeadows" for instance, habitats which are productive in their own right and do not need human management in order to provide human benefits." Such watermeadows, can include forested wetlands, as well as other wetland types.

CONGRESSIONAL ACTION

In general, Congress should address the following wetland protection issues.

1. CONGRESS SHOULD AUTHORIZE AND PROVIDE FUNDING FOR STATE WETLAND RESTORATION PROGRAMS.

The permitting program should remain at the federal level. The role of the States should be to focus on the restoration of wetlands, as well as using their existing authorities under Section 401 of the Federal Clean Water Act and the consistency provisions of the Coastal Zone Management Act to protect existing wetlands. Section 401 requires states to issue "water quality certification" for all 404 permits. The Coastal Zone Management Act requires that all 404 permits be consistent with Federally approved state coastal zone management programs.

Without specific goals and targets, however, we will not be able to measure the results of any National Wetlands Policy. Therefore, each State should also be required to prepare a plan which would:

* provide an analysis of the acreage of wetlands lost since historical times.
* inventory previously diked and drained wetlands areas.
* outline a five-year program of restoration to increase each state's wetlands acreage by 10% as a minimum.

2. CONGRESS SHOULD BROADEN SECTION 404 TO SPECIFICALLY INCLUDE MORE THAN JUST THE DISPOSAL OF DREDGED OR FILL MATERIAL.

Currently, the Section 404 program covers only the discharge of dredged or fill material. The 404 program must be amended to incorporate other activities which impact wetlands, such as draining, dredging, excavation, channelization, flooding, clearing of vegetation, driving or pilings or placement of other obstructions, diversion of water, or other activities which impair the flow, reach, or circulation of surface water, or which result in a more than minimal change in the hyrologic regime, bottom contour, or configuration of such waters, or in the type, distribution, or diversity of vegetation, fish, and wildlife that depend on such waters.

In addition, Congress should define "Fill Material" as any pollutant or material that replaces portions of waters of the United States or that changes the bottom elevation of a water body for any purpose.

3. CONGRESS SHOULD IMPROVE PUBLIC PARTICIPATION IN THE PERMIT DECISION-MAKING PROCESS.

Corps Public Notices for wetland fill applications are boilerplate documents. Proposed wetland mitigation/creation plans are usually not presented in a detailed fashion and other basic data, such as type of fill, are often lacking. Even the name of the applicant and location of the proposed activity is not <u>required</u> to be in the permit notice. The Corps regulations on permit notices are not binding and therefore can not provide adequate public notice.

The National Environmental Policy Act (NEPA) requires an agency to prepare an Environmental Assessment (EA) to determine whether a Finding of No Significant Impact (FONSI) should be issued or whether an Environmental Impact Statement (EIS) should be prepared for major federal actions affecting the environment. Under existing Corps regulations, however, the Corps refuses to make draft environmental assessments available to the public.

In addition, current Corps practice is to avoid preparing environmental impact statements for most Section 404 wetland fill activities under the narrow argument that mitigation will balance any wetland losses that might occur. In our view, an EIS can be particularly useful at examining alternatives and for analyzing the kind and type of mitigation involved.

4. CONGRESS SHOULD REMOVE EPA AUTHORIZATION TO CONDUCT "ADVANCED IDENTIFICATION OF WETLANDS."

EPA's Advanced Identification of wetlands (ADID) program has helped accelerate the loss of wetlands rather than contribute to a goal of "no net loss". In 1989, EPA Region 10 released a draft recommendation for an ADID survey in the Colville Delta of Alaska which identified approximately 25% of 135,000 acres of wetlands as suitable for filling. In practice, ADID is being used by EPA, in Alaska and other places, to identify wetland sacrifice areas for development with no protection afforded the critical wetlands identified

by the ADID process.

The entire intent of ADID is given in the title to Subpart I of 40 CFR 230.80: "Planning to shorten permit processing time". The ADID process is only minimally spelled out in this section. No definitions are given. No public hearings are required. Only a poorly worded "appropriate public notice" is mentioned in 230.80(c). However, the end result is all too clear in subsection (b):

> "The identification of areas that generally will not be available for disposal site specification should not be deemed as prohibiting applications for permits to discharge dredged or fill material in such areas." Its purpose is merely " to facilitate individual or General permit application and processing."

The more damaging problem with ADID, is that by identifying "lower quality" wetlands as suitable for filling, these wetlands become unavailable for restoration efforts. This is not only contrary to a goal of no net loss, it completely undermines the long-term goal of increasing our nation's wetland acreage.

5. CONGRESS SHOULD MAKE CLEAR THAT FAILURE TO MEET PERMIT CONDITIONS IS A VIOLATION OF THE FEDERAL CLEAN WATER ACT.

The Portland District Corps has recently stated that if a mitigation effort fails to meet success criteria required in a Corps' permit or letter of authorization, the Corps does not treat it as a violation (Letter from North Pacific Division, Corps of Engineers to Rep. Peter DeFazio, 15 December 1993, attached).

Enforcement of permit condition violations are not a priority of the Corps. Moreover, the Corps does not have adequate funding for its regulatory program to enforce against all unauthorized fills, much less monitor condition compliance on thousands of existing permits. Congress should clairify that wetlands permit violations are subject to the citizen suit requirements of the Clean Water Act.

6. CONGRESS SHOULD PROHIBIT THE FILLING OF WETLANDS FOR NON-WATERDEPENDENT PURPOSES.

We remain concerned that too many non-water dependent projects are granted permits for wetland filling. In late 1988, for example, the Portland District Corps issued a fill permit for a Fred Meyer shopping mall near Warrenton, Oregon - clearly a non-water dependent use - despite the presence of an empty 250-acre industrial site less than a mile from the proposed development area. Region 10 EPA did not object to the project and no environmental impact statement was prepared.

Even when EPA and other resource agencies do object to a non-water dependent use, the Corps will side with the applicant. On 19 January 1990,

the Portland Corps District issued a wetland fill permit to construct softball/baseball fields with parking in 5.4 acres of wetlands adjacent to the Tualatin River in Oregon. This permit was issued by the Corps over the objections of the resource agencies and citizen groups.

In May of 1992, the Seattle Corps issued a wetland fill permit for 37.5 acres of wetlands for an industrial park to help site a Canadian manufactoring firm. The permit was issued without an approved mitigation plan resulting in a lawsuit filed by Friends of the Earth and other environmental organization against the Corps. As a result, the Corps eventually revoked the permit.

7. CONGRESS SHOULD DIRECT THE CORPS TO INCREASE ITS APPLICATION FEE STRUCTURE TO FULLY RECOVER THE COSTS ASSOCIATED WITH IMPLEMENTING THIS PROGRAM.

The current permit application fee of $10.00 is far too low to cover the costs of administrating this program. It does not provide for site inspections, wetland determinations, monitoring or compliance investigations. In effect, the government is subsidizing the continued loss of wetlands in this fashion. In addition, the associated costs of reviewing wetland applications by other Federal and state resource agencies is not factored in.

SPECIFIC COMMENTS ON AMENDMENTS TO SECTION 404 AS SET OUT IN H.R. 3948.

Friends of the Earth is strongly opposed to H.R. 3948, including the wetland program amendments, in its present form. We support the strengthening amendments to Section 404 of the Federal Clean Water Act as set out in H.R. 350.

The following comments follow the sections of H.R. 3948 in order to address some of the broader wetland questions before this Subcommittee:

Title I. Sec. 101 (f) Wetlands. The use of the qualifier "overall" as opposed to the goal of no net loss of wetlands, significantly weakens the national goals and policies. Our nation can not trade east coast wetlands for west coast wetlands, or Alaska wetlands for those in Texas. Please delete the word "overall" from this section.

Title III. Sec. 316 State Watershed Management Programs.

This section allows a state to prepare an ill-defined "watershed management program". While watershed management may be a useful tool in achieving the goal of zero discharge of pollutents, this Section not only fails to tie such programs into pollution elimination, it allows too much latitude for states with too little oversight.

For example, any state agency, even an economic development agency could oversee the program under Sec. 322 (b)(1). Under subsection (b)(5)(D) polluting industries would be put in charge of both development and implementation of watershed plans, a sure recipe for failure. Under

subsection (h)(2)(A) and (B), NPDES permits could be extended from 5 to 8 or 10 years, which would delay meeting the zero pollution discharge goal of the Act. Under subsection (h)(3) "Transfer of Responsibilities" a state first gets an approved watershed management program, than submits a separate watershed plan that is designed to transfer point and nonpoint source pollution reductions. The transfers section (h)(3)(C) does not achieve reductions, but rather puts in place a pollution trading system without any review by resource agencies or the public.

Sec. 317. Wetlands Conservation, Management and Restoration.

In addition to the watershed program and planning, a separate state wetlands conservation plan program is established which will do little more than collect existing information. Even before a state has prepared even a single page of a state wetlands conservation plan, it is allowed to prepare and submit to EPA wetlands management plans. This is particularly the cart before the horse. If the states don't even know the extent of their wetland losses, how can they designate management entities to prepare individual wetland management unit plans?

In particular Sec. 324(a)(3) allows the State to designate management entities which could be any type of public entity and must include the persons designated to develop and implement any Section 322 watershed management plan including polluting industries and developers. Therefore, it is a hodgepodge of local "management entities" not the States which will develop wetlands management plans <u>without any public input or review!!</u>. This means that oversight will be extremely difficult for natural resource agencies, the public and the Administrator.

Resource agencies currently state that they can not adequately review case-by-case wetland fill permits. How will resource agencies and the public be able to monitor, much less participate in thousands of multi-year wetland management unit planning processes?

We are particularly opposed to subsection (d)(1-3) Incentives for Wetlands Management Planning. (d)(1) involves expedited permit review regardless of the size of the wetland fill. Public notices review will be greatly shortened if the Corps has to review public comments on a major permit fill and make a decision within 60 days of the issuance of a public notice.

We are opposed to the use of both mitigation banks (d)(2) and general permits (d)(3) and request that these subsections be deleted.

Title IV. Sec. 405. Permits for dredged or fill material.

This entire section weakens the Federal Clean Water Act. It weakens the 404 guidelines (Sec. 405(b)(2)). It weakens the act by authorizing general permits for categories of activities and waters and State programs (Sec. 405(d)). It limits Federal resource agencies to a review of State program permit decision (Sec. 405(d)) adding (e)(3)(F). It grants special exemption to cranberry production (Sec. 405(f)). It allows landowners to appeal permit

denials, but does not allow the public to appeal permit issuance (Sec. 405(h)). It authorizes mitigation banks that will allow wetlands to be filled for non-water dependent uses (Sec. 405(i)). It turns over wetland delineation on ag land to the Secretary of Agriculture (405(n)(3)).

While we support the language in Subsection 405(d) which reaffirms that only activities similar in nature will receive general permits, we are opposed to the language which amends existing Subsection 404(e)(1) because "categories of waters" is not defined and serves to confuse the clear requirements found in subsection (e)(2)(A).

Regarding subsection (3) on State Programs, we are opposed to this entire subsection. General permits are not the appropriate vehicle in which to delegate Federal programs. The requirements found in subsections (A-F) are too general and lack the criteria and oversight a federally delegated program requires. We request that this subsection be deleted.

The administrative appeal process found in Subsection 405(f) is entirely one sided. If an administrative appeal process is deemed necessary, due process should make it available to both the applicant and the public. However, subsection (5) on Official Deciding Appeal is too vague and general and, conceivably, an appeal could be heard by an Army file clerk. We urge that the Administrative Conference of the U.S. be requested to make recommendations on the establishment of a viable appeal process.

We remain opposed to the use of mitigation banks as set out in Subsection 405(i). The Intermodal Surface Transportation Efficiency Act (ISTEA) already authorizes mitigation banks for transportation projects with no public involvement or review. These mitigation banks must be monitored and a report made to Congress before any new mitigation banks are authorized. The fundamental flaw in mitigation banks is that the Secretary can not reasonably foresee wetlands losses from future discharges of dredged or fill material. Therefore, mitigation banks can not ensure no net loss of wetland functions and values.

Title V. Sec. 501. Definitions. We strongly object to the removal of prior converted cropland from the Clean Water Act Section 404 program. The loss of agricultural land to non-agricultural production rather than wetland restoration will accelerate. We request that prior converted cropland remain subject to Section 404 when agricultural use ceases.

In general, agricultural and silvicultural activities already have an explicit exemption from permit requirements for normal farming practices. Efforts to eliminate wetland farming subsidizes through the Food Security Act of 1985 should not serve to undermine wetland regulation under Section 404. When wetland converted agricultural land is proposed to be taken out of agricultural production such areas should remain within the jurisdiction of the Section 404 program.

We are also concerned that the Corps in implementing the Clean Water Act [illegible], relying on project consultants reports to delineate wetlands on farmed

wetlands. For example, the Seattle Corps District has admitted that in 1992 they accepted a wetland delineation of 6.9 acres on a portion of agricultural property in Fife, WA, but in 1994 when the Corps actually looked at the site the estimate that over 40 acres were actually within Corps jurisdiction. In our view the Department of Agriculture will also erroneous rely on consultant reports resulting in the continued loss of wetland areas.

CONCLUSION

In summary, like the current Senate Environmental Committee bill, H.R. 3948 will only compound the controversy surrounding projects which should not be located in wetlands in the first place.

We would ask that the attached information including summeries of wetland issues and the summary from our data base which documents the extremely low numbers of Section 404 permits denied in the Pacific Northwest during the last number of years be entered into the hearing record. We have recently begun tracking Nationwide 26 permits issued by Northwest Corps Districts and find that we are losing an alarming number of wetlands without notification to the public or mitigation through the NW-26 general permit. We find that the fills associated with NW-26 are not similar in nature and do not meet the requirements of Section 404(e) of the Federal Clean Water Act.

It is time for a new legislative initiative, especially for those watermeadows in our coastal states where the greatest percentage of our population now lives. We pledge to work with you in that effort.

Please send us a copy of the complete hearing record on this subject when it becomes available. Thank you for the opportunity to submit these comments.

DEPARTMENT OF THE ARMY
OMAHA DISTRICT, CORPS OF ENGINEERS
1520 EAST SIXTH AVENUE
HELENA, MONTANA 59620-2301

just a monthly list

CEMRO-OP-R-MT

NOTICE OF PERMITS ISSUED, DENIED, SUSPENDED OR WITHDRAWN
MONTANA WATERWAYS
JANUARY 1, 1994 THRU APRIL 30, 1994

199390447	CASCADE COUNTY CONS. DISTRICT	STREAM REHAB. MUDDY CREEK	PERMIT ISSUED 2/11/94
199490198	CONOCO, INC	PORTABLE INTAKE HAUSER RESERVOIR	LOP ISSUED 4/15/94
199390352	P&D LAND ENTERPRISES	WETLAND FILL NEAR WHITEFISH LAKE	WITHDRAWN 4/18/94
199290048	RAVALLI COUNTY MONTANA	DROP STRUCTURES BITTERROOT RIVER	WITHDRAWN 3/24/94
199290492	WOLCOTT RANCH	BANK STABILIZATION WARM SPRINGS CR.	WITHDRAWN 4/13/94
199490049	WILLIAM GRIFFEL	BANK STABILIZATION YELLOWSTONE RIVER	WITHDRAWN 4/26/94

DEPARTMENT OF THE ARMY
NORTH PACIFIC DIVISION, CORPS OF ENGINEERS
P.O. BOX 2870
PORTLAND, OREGON 97208-2870

Reply to
Attention of:

DEC 15 1993

Operations, Construction and
Readiness Directorate

RECEIVED
DEC 21 1993

Honorable Peter A. DeFazio
House of Representatives
1233 Longworth House Office Building
Washington, DC 20515-3704

Dear Mr. DeFazio:

This is in response to your letter dated November 29, 1993, enclosing an inquiry of Mr. David Ortman representing The Friends of the Earth. You requested comment on any enforcement action the Corps has taken against the Oregon Department of Transportation (ODOT) for what has been interpreted as a violation of Section 404 of the Clean Water Act (CWA). Of concern is the mitigation for wetland losses on the first phase of a highway project to improve State Route 126 near Veneta, Lane County, Oregon. The activity was described in a public notice issued by the Portland District Corps of Engineers for a permit application for the second phase of the roadway project.

I understand that the apparent failure of a mitigation site is ODOT's own assessment. The failure or success of required compensatory mitigation must be verified by the Portland District, which issued the permit for the Phase I work. Generally, if a mitigation effort fails to meet success criteria required in a Corps' permit or letter of authorization, the Corps does not treat it as a violation, but rather consults with the permittee in coordination with interested resource agencies to require appropriate remedial action. If the cause of the failure is impracticable to rectify, a new mitigation plan could be required.

The District reports that technically ODOT is not in violation of their previous CWA authorization. While ODOT has not fulfilled special conditions of the issued permit, ODOT is volunteering to initiate the failed mitigation elsewhere. In evaluating the active permit application for the second phase of the highway improvements, the District will look at the project

impacts and the entire mitigation effort associated with phase I, and incorporate the information into the permit evaluation and conditions for the proposed phase II work.

I hope I have addressed your concerns. Should your staff have additional questions, please have them contact Mr. Burt Paynter, Chief, Regulatory and Environmental Resource Branch, U.S. Army Corps of Engineers, Portland District, at (503) 326-7730.

Sincerely,

Ernest J. Harrell
Major General, U.S. Army
Division Engineer

Copy Furnished:

Honorable Peter A. DeFazio
Representative in Congress
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Eugene, Oregon 97401-2772
CENPD-PA
CENPP-PA
CECW-ZW
CENPP-PE-R

ENVIRONMENTAL PERSPECTIVE

David Ortman
Friends of the Earth
Seattle

ENVIRONMENTAL PERSPECTIVE
Good Reasons to Leave Sensitive Areas Alone
Seattle, WA
2-3 December 1993

by
David E. Ortman
Director, Northwest Office
Friends of the Earth
4512 University Way N.E.
Seattle, WA 98105

I. Definition of Sensitive from Webster's New World Dictionary, Second College Edition, 1984:

A. TOP 10 SENSITIVE Definition list:

10. dealing with highly secret or delicate government matters
9. showing unusual variation
8. designed to measure small changes or differences
7. changing readily in the presence of some external force of condition
6. easily offended, disturbed, shocked
5. having or showing keen sensibilities
4. easily hurt
3. responding or feeling readily and acutely
2. receiving and responding to stimulate from outside objects
1. of the senses or sensation

B. Better Descriptions:

*RETROSPECTION AREAS - An act of looking back on or reviewing past events.

*RESIDENCE AREAS - the status of providing habitat long enough to qualify for certain rights, privileges, etc.

*REVEREND AREAS - worthy of reverence

*REVOLUTIONARY AREAS - causing a revolution in a government or social system

*RHAPSODY AREAS - great delight

Consider one of these areas. Consider the thousands of years of geologic

time during which these areas have survived by virtue of being too wet or too steep. In addition, consider the nonsustainable assult of development pressures of the last century in Washington State. The fact is, the lands we today thing of as sensitive areas are in fact, remarkable survivers for being present in 1993 to hold a conference on.

Whatever we call these sites they should be left alone.

II. SENSITIVE BOOKS

I would like to turn briefly to three extremely obscure books related to land use, that are not likely to be in your local law library.

A. My first obscure book is Putting the Public Trust Doctrine To Work, The application of the Public Trust Doctrine to the management of lands, waters and living resources of the Coastal States, November, 1990, David C. Slade, Esq. Project Manager. It too has an obscure origin:

> This report was prepared under contract with the Connecticut Department of Environmental Protection, coastal resources management division, with funds provided under section 309 of the Federal Coastal Zone Management Act by the Office of Ocean and Coastal Resources Management, National Oceanic and Atmospheric Administration, United States Department of Commerce, as part of a national project on the Public Trust Doctrine.

It begins with a quote from Herman Melville in Moby Dick:

> "But look! here come more crowds, pacing straight for the water, and seemingly bound for a dive. Strange! Nothing will content them but the extremist limit of land. . .No. They must get just as nigh the water as they possibly can without falling in. And there they stand-miles of them-leagues! Inlands all, they come from lanes and alleys, streets and

avenues - north, east, south, and west. Yet here they all unite! Tell me, does the magnetic virtue of the needles of the compasses of all these ships attract them thither?"(preface p. xxxv)

And you thought Moby Dick was just about a whale.

The Public Trust Doctrine is described as follows in the executive summary:

"Authority vested in the State through the Public Trust Doctrine is based upon its power over State property, rather than a State's regulatory powers through its sovereign 'police powers.' Thus, if the lands, waters or living resources are within the scope of the doctrine, then the State can govern and manage them as its own property. This is in sharp contrast to a State regulating a citizen's private property through its police powers."

The reason we have an articulation of the public rights doctrine is that one women got angry at a sweetheart deal cut by the Washington Legislature to provide free use of publicly owned state property for private residence docs and piers. We must pay tribute to Benalla Caminiti who brought a public trust lawsuit in 1983 which challenged

* Constitionality of giving away state resources
* whether there was a violation of the Public Trust Doctrine
* Constitionality of creating two classes of citizens, those with state "gifts" and those without. (15 November 1993, personal conversation with B. Caminiti).

The end result was a 1987 Washington State Supreme Court decision, Caminiti v. Boyle, 107 Wash. 2d 662,666, 732 p.2d 989 (1987). (While the State

has authority to convey trust land, "[t]he Legislature has never had the authority. . .to sell or otherwise abdicate State sovereignty or dominion over such tidelands and shorelands.")

The public trust doctrine has appeared in another Washington Supreme Court Case: Rettkowski, et al. v. State of Washington, No. 59086-9). In his dissenting opinion, Judge Guy writes,

> "I recognize that the restriction of the public trust doctrine to navigability waters is well founded in precedent. Nonetheless, the navigability requirement is not inherent in the doctrine and should be abandoned. This becomes clear when one considers the history and theory of the public trust doctrine. (p. 8)
>
> "The doctrine has been recognized since ancient times. The Institutes of Justinian, a compilation and restatement of the Roman law first published in 533 A.D. states: '[T]he following things are by natural law common to all--the air, running water, the sea and consequently the sea-shore." [cite ommited]. Similarly, a statement of regional French law in the 11th century declared that 'the public highways and byways, running water and springs, meadows, pastures, forests, heaths and rocks. . .are not to be held by lords. . .nor are they to be maintained. . .in any other way than that their people may always be able to use them.' [cite ommited]. (p. 8)
>
> "Historically, as the majority states, the public trust doctrine has been most commonly applied in relation to the public's interest in commerce over navigable waters and shorelands. [cite omitted] The doctrine is not strictly limited to such contexts, however, either in application or in

theory. (p. 9)

It is time to recognize that the public's interest is in water as an essential natural, finite resource, not in water just as a public highway or playground. Application of the public trust doctrine should not depend on artificial concepts of navigability. (p. 13)

B. My second book is entitled, Preserving Our Natural Heritage, Volume III Private, Academic, and Local Government Activities, prepared for the United States Department of the Interior by The Nature Conservancy 1982.

"This study is the third and last of a series of studies, entitled Preserving Our Natural Heritage. They were prepared by The Nature Conservancy as part of Project V-3.1 of the U.S.- U.S.S.R. agreement on cooperation in the Field of Environmental Protection of 1972 and UNESCO's Man and the Biosphere Programme. The ultimate goal of the studies is to provide a comprehensive overview of federal, state, and local government and private sector activities involving the preservation of natural areas." (preface iii.)

In 1982, this study said:

* With the introduction of technology, America's natural heritage has greatly diminished. The principal cause of this loss is unplanned alternation of the landscape. (66.1 p. 3)

* Unplanned land alteration has resulted in the irretrievable loss of large ecological systems and hundreds of plant and animal species. The vast American prairies once covered a third of this continent. Now only a few pockets of native tall grass prairie remain. Roughly half the nation's wetlands have been dredged and filled, even though wetlands are critical to America's fish resources. Very few stands of virgin timber exist anymore in

the United States except in the northeast, and the bottomland hardwood forests of the southwest have been nearly eliminated. At least 145 mammal species and subspecies have become extinct since 1600, including 30 birds, 15 mammals, and 17 fish. (66.1 p. 3)

Who spoke these words? "In its land and its history the nation finds the things which give it continuity. By preserving places that have special natural, historical, cultural, and scientific value, we can insure that our children and grandchildren have a chance to know something of the America that we . . .simply took for granted." (66.3 p. 4)

President Jimmy Carter in his 1977 Environmental Message. But what about those remaining areas that just have ordinary, not special, natural, historical, cultural, and scientific value? Just leave them alone.

There is something heartwarming about how this study attempts to classify and describe private efforts to preserve our natural heritage no matter how obscure. For example, section 69.3 (p. 46) "Notifying others and applying indirect pressure:

> Direct notification of the individual may suffice to convince an individual or developer of the principle of preservation. A good presentation of the land's uniqueness by responsible people may even persuade a developer to change his plans. However, because direct notification may not always be successful, conservationists can take a stronger action by notifying other organizations or institutions on which individuals may be dependent for permission or subsidies to alter the environment. Properly notified, zoning boards, local state, and federal permit offices, funding sources, the press, and local organizations can

expect a good deal of pressure against changing the status quo. For example, many developments require a rezoning action by local authorities. Since local authorities are responsible to the people, if enough people present a well-thought-out case for the protection of an area, the authorities can be persuaded to deny the rezoning application and, thus, kill the development plans.

The application of indirect pressure for areas where developers are particularly vulnerable has already been used effectively to block environmentally unsound development. Generally a developer feels his reputation is important. If he is a local individual or corporation, he has to be very conscious of his image since he has a commitment to both the community and state. If he hopes to stay in business, he cannot afford to destroy any area that has significance to the people of the community or state. Nevertheless, in order to be convinced of the importance of the land, he often must be persuaded that it is significant to those with power to stop him from developing it." (p. 46)

If only it were this easy.

C. The third book is obscure but readily available. It is the land laws of the people of Israel as set down in the book of Leviticus, Chapter 25. Leviticus is a "liturgical handbook of the levitical priesthood" (The Jerome Biblical Commentary, Ed. by Raymond E. Brown, S.S., et al., Prentice-Hall 1968) or what we might call the Committee Language to the Ten Commandments. Chapter 25 sets out the holy years where the land itself was to have a year of reprieve at stated intervals. There is, indeed, a nice cadence to verse 23 which says: "The land shall not be sold in perpetuity, for the land is mine;

for you are strangers and sojourners with me." (Revised Standard Version).

The concepts of property rights are not rooted in the land laws of Leviticus.

III. SUMMARY

If you are so fortunate as to have paper title to a RETROSPECTION, RESIDENCE, REVEREND, REVOLUTIONARY, RHAPSODY AREA do not be mislead by consultants who claim that they can recreate a 5,000 year old wetland in three years. Do not be mislead by engineers who claim to be able to construct the Taj Mahal on the steep slopes of a volcano. Do not be mislead by the seductive voice of property values and development rights.

Count your blessings that you have a little island of planet earth providing functions and values which can not be duplicated and can not be reproduced. What better stewardship is there than to pass along to the next generation such a treasure.

CLE INTERNATIONAL

ONGOING SECTION 404 ISSUES IN THE FEDERAL CLEAN WATER ACT

by David E. Ortman

May 1994

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ONGOING SECTION 404 ISSUES IN THE FEDERAL CLEAN WATER ACT

by David E. Ortman

I. SECTION 404

(a) Discharge into navigable waters at specified disposal sites.

ISSUE: The Secretary may issue permits
CONCERN: Despite the clear language of this subsection, in 1986 the Corps regulations 33 CFR 325.2(e) established an alternative procedure for non-permits called a Letter of Permission for Section 404 cases. In the Corps 1982 regulations, the Corps had specifically stated that Letters of Permission were not to be used for Section 404 cases. The Portland Corps District and Region 10 EPA has already issued a proposed Letter of Permission for wetland filling in Roseburg, OR, despite the lack of approval of the underlying wetland conservation plan by the Oregon Division of State Lands. (See Public Notice for Plan Approval & Alternative Procedure, Newton Creek Wetland Conservation Plan, Roseburg, OR, Portland Corps # 00-09499, Date: 26 March 1993). Should a Letter of Permission be adopted, it is likely that litigation over this issue will take place. Another example of permit avoidance is the Alaska Corps District which has just issued an Accelerated Individual Permit Processing Procedure for the Juneau Wetland Management Plan (See Special Public Notice 94-6, Alaska Corps District, 24 March 1994). At the end of six months, the Corps anticipates that a General Permit would be issued. It is likely that a lawsuit will be brought against the Alaska Corps' Accelerated Procedure. (See comments on subsection (e) below.)

ISSUE: notice and opportunity for public hearing
CONCERN: Corps decisions on granting public hearings are arbitrary and capricious (A&C). Public hearings should be held when requested by, say, twenty members of the public.

ISSUE: for the discharge of dredged of fill material into the navigable waters
CONCERN: The 404 program must be amended to incorporate other activities which impact wetlands, such as draining, dredging, excavation, channelization, flooding, clearing of vegetation, driving or pilings or placement of other obstructions, diversion of water, or other activities which impair the flow, reach, or circulation of surface water, or which result in a more than minimal change in the hydrologic regime, bottom contour, or configuration of such waters, or in the type, distribution, or diversity of vegetation, fish, and wildlife that depend on such waters. Congress should get it right, navigable waters are really "waters of the United States".

ISSUE: public notice issued fifteen days after an applicant submits all information required to complete an application
CONCERN: Public notices are often inadequate and contain insufficient information. 33 CFR 325.1(d)(9) states that an application is complete when sufficient information is received to issue a public notice. But Sec. 325.3 on Public Notices requirements uses the weasel word "should" not "shall". Under the Corps' regs, even the name and address of the applicant is optional on a public notice. The Corps refuses to accept public comments that public notices are incomplete and inadequate.

(b) Specification for disposal sites.

ISSUE: each disposal site shall be specified through the application of guidelines
CONCERN: The 404(b) "guidelines" have assumed the role of enforceable regulations and should so state.

ISSUE: if guidelines would prohibit specification of a site, the economic impact of the site on navigation and anchorage must be applied
CONCERN: In the absence of criteria, the Corps can make an A&C economic evaluation.

(c) Denial or restriction of use of defined areas as disposal sites.

ISSUE: Administrator is authorized to prohibit specification of any defined area as a disposal site
CONCERN: EPA Administrator has not delegated the 404(c) veto authority to Regional Offices. As a result, a District Engineer can issue a permit to destroy a wetland, but only the head of EPA can save it. Since the Federal Water Pollution Control Act (Clean Water Act) was passed in 1972, not a single acre of wetlands in EPA Region 10 has been protected through the 404(c) process. (see "Let's Call Them Watermeadows", Ortman, David E., Environmental Forum, Environmental Law Institute, January/February 1989.)

ISSUE: will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.
CONCERN: Does not list all the functions and values of wetlands, such as flood control.

(e) General permits on State, regional, or nationwide basis.

ISSUE: the Secretary may issue general permits on a State, regional, or nationwide basis
CONCERN: Congress only authorized general permits on a State, regional (multi-state), or nationwide basis. The Corps has no authority to issue a general permit for a geographical region smaller than a state. This issue was litigated by Friends of the Earth and other environmental groups against the Portland Corps District, but the Corps revoked the general permit, mooting the suit.

ISSUE: if the Secretary determines that the activities in such category are similar in nature
CONCERN: "Regional general permits" do not meet the definition of activities similar in nature. Neither do Nationwide Permit #26 for fills under 10 acres in isolated wetlands or above the headwaters, does not meet the Congressional requirement of activities "similar in nature". The U.S. Fish and Wildlife Service has done a review of the nationwide permit program in Colorado and determined that

> "Our data indicate that activities authorized under NWP 26 are as variable as those authorized under Individual Permits. In fact, the only

common feature of activities authorized under NWP 26 seems to be that they occur in small wetlands that are either above the headwaters or isolated. It seems unlikely that the effects of such variable activities can be shown in advance to be similar and insignificant." ("Section 404 and Wetland Alterations in the Platte River Basin of Colorado", U.S. F&WS, Resource Publication 178, 1992).

A note to all wetland developers who have received Nationwide Permit #26: It is extremely likely that this issue will be litigated in the Ninth Circuit during 1994.

ISSUE: will cause only minimal adverse environmental effects when performed separately and have only minimal cumulative adverse effect on the environment.
CONCERN: Because NWP #26 does not cover activities similar in nature, the Corps can not determine if such fills would cause adverse environmental effects either separately or cumulatively.

ISSUE: such general permit may be revoked or modified by the Secretary if the Secretary determines that the activities authorized by such general permit have an adverse impact
CONCERN: This decision is totally discretionary with the Corps. There is no mechanism for citizens to petition for a general permit review.

(f) Non-prohibited discharge of dredged or fill material.

ISSUE: Exemptions A-F
CONCERN: These permit exemptions, for normal farming, silviculture and ranching activities, as well as other purposes, were major concessions in the 1977 Clean Water Act Amendments. Normal farming, silviculture and ranching activities can take place without permit in wetlands or former wetlands. The big battle has been around the question of whether a permit is needed for development on wetlands converted to agriculture. Our position is that when development projects occur on ag land that was once wetland, a 404 permit should be required. If you want to save existing agricultural land in this country, support the Section 404 program.

(g) State administration
(h) Determination of State's authority
(i) Withdrawal of approval
(j) Transmittal of permit applications to Administrator
(k) Waiver
(l) Categories of discharges not subject to requirements

ISSUE: Under subsection (g), any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material may submit to the Administrator a full and complete description of the program.
CONCERN: Current weakening amendments to Section 404 ignore this subsection and subsection (h). Instead there are proposals to authorize state assumption of the 404 program through general permits. (see Section 705 of S. 1114 as approved by the Senate Committee on Environment and Public Works, February

1994). This is an inappropriate use of general permits. No other federal program is given to a state via a permit process.

(m) Comments on permit applications by U.S. Fish and Wildlife Service.

ISSUE: Fish and Wildlife Service comments to Corps due in 90 days after notice of application.
CONCERN: National Marine Fisheries Service is not specifically mentioned. There is no presumption that the comments of the resource agencies should be followed or incorporated as conditions. For example, on 7 March 1994, the Seattle Corps District issued an after-the-fact (for unauthorized work) Section 404 permit (Corps #92-4-00549-ATF) to the King County Fire District #16 to fill wetlands for a fire station adjacent to McAleer Creek in Lake Forest Park, WA. U.S. Fish and Wildlife Service objected to the project but indicated that their concerns could be addressed if the proposed wetland restoration project could be connected to the creek. The District Engineer concluded that fish strandings might occur, therefore the comments of the U.S. F&WS could be dismissed.

(o) Public availability of permits and permit applications.

ISSUE: Copy of each permit application and each permit issued under this section shall be available to the public.
CONCERN: There is no specific requirement that the public be notified of a permit decision. Despite 33 CFR 325.2(a)(8) which requires the District Engineer to publish monthly a list of permits issued or denied during the previous month, some Corps Districts do not comply with this regulation.

(q) Minimization of duplication.

ISSUE: Agreements shall be developed with Federal agencies to minimize duplication and delays and to assure that permit decisions will be made within ninty days after the public notice is issued.
CONCERN: The current 404(q) Memorandum of Agreement, imposed by the Corps on the resource agencies during the Bush Administration, unduly restrict Federal resource agencies from challenging a decision of a Corps District Engineer. The 404(q) MOA must be rescinded.

(s) Violation of permits.

ISSUE: Whenever on the basis of any information available to him the Secretary finds a violation of any condition set forth in a permit, the Secretary shall issue an order requiring compliance or bring a civil action.
CONCERN: The Corps does not take permit condition violations seriously. A self-monitoring reporting system is needed to assist citizens in enforcing this section of the Clean Water Act.

II. CLEAN WATER ACT REAUTHORIZATION

Congress last amended Section 404 of the Federal Clean Water Act in 1977. Since then, the Corps has concocted its own fantasy land of "regional general permits", "alternative procedures", "mitigation banking", "NW 26", etc. Meanwhile, the Environmental Protection Agency has shown almost complete political impotence by refusing to use its 404(c) veto authority. The tragedy is that in the real world, the disposal of dredged and fill material, and a whole lot of other activities, continue to degrade the waters of the United States.

Environmental and conservation groups are actively participating in the reauthorization of the Federal Clean Water Act, including Section 404. We have endorsed H.R. 350, the Wetlands Reform Act of 1993, introduced by Rep. Don Edwards (D-CA). Senator Boxer (D-CA) has introduced a companion bill in the Senate.

The Edwards bill would:

* require permits for a greater number of wetlands-destroying activities, including draining, dredging, flooding and excavating. Only filling requires a permit currently.

* make the Section 404 permit process more efficient by considering small permit applications within 60 days, and restating clear exemptions for normal farming practices.

* establish a scientific basis for delineation.

* create tax incentives for wetland conservation.

This last measure is found in Title IV, of H.R. 350. Proposed Sec. 401 would allow the Secretary of Interior to designate a nonprofit organization as a "Wetlands Stewardship Trust" if it has as a primary purpose the acquisition, preservation, restoration, or enhancement of wetlands, former wetlands, or riparian lands.

Proposed Section 402 would amend the Internal Revenue Code to allow donations of land to Wetlands Stewardship Trusts to be preserved in perpetuity to receive favorable tax treatment:

(1) The value of the donated land can be deducted from the donor's taxable income, provided that the deduction does not exceed 50% of his or her income for a given year.

(2) If the value of the donated land exceeds 50% of the donor's taxable income for a given year, the donor can carry forward the value of the donated land for up to 20 years (currently charitable donations can be carried forward a maximum of 5 years, which is too short a time)

(3) If a donor dies before the full value of the land has been deducted from

his or her taxes, the remaining value of the property may be used against the estate taxes of the taxpayer.

(4) Land swaps can be treated as income-neutral for up to three years (as opposed to 6 months under current rules) following the swap, allowing a land trust time to find an acceptable parcel for the trade.

Proposed Section 403 would exclude income received from "compatible uses of wetlanda" (defined by the Secretary of Interior) from gross income.

This is a significant new approach to preserving or restoring wetlands.

III. RECENT SECTION 404 LITIGATION

a) PORTLAND CORPS DISTRICT (CV-91-476-JE, D. of Oregon).

On 1 February 1991, the Portland Corps District declined to prepare an Environmental Impact Statement and issued a record of decision and Finding of No Significant Impact on a "regional general permit" (RGP) to the City of Portland, OR for a 2,800 acre area known as the Columbia South Slough in the eastern portion of the City in which 51 acres of wetlands could be filled.

Friends of the Earth objected strongly to the participation of the Corps in wetland planning studies which resulted in the loss by the public of individual permit review on wetland fill applications, particularly those which could not meet the avoidance test of Sec. 404(b)(1). In addition, the RGP was not issued for a State-wide area or larger or for activities similar in nature. We also objected to the Environmental Protection Agency participating in wetland planning studies which classified wetlands for filling, while refusing to use their 404(c) veto authority to protect wetland designated for preservation.

Had the Columbia South Slough "regional general permit" been allowed to stand, the public would not have received any notice of individual wetland fills, and the "preserved" wetlands would not have received any EPA protection.

On 23 May 1991, Friends of the Earth, the Northwest Environmental Defense Center and the East Portland District Coalition filed suit in Federal District Court (D. of Oregon) seeking to overturn the issuance of this "regional general permit"

The East Portland District Coalition successfully appealed the approval of the underlying Columbia South Slough wetland plan, leaving a naked Corps permit with no legitimate underlying wetland plan. However, the Corps took no action to withdraw the permit until February of 1992 when, with a Court date pending, the City of Portland requested that the Corps revoke the permit, which mooted the case.

85-427 95 – 27

b) SEATTLE CORPS DISTRICT. (Friends of the Earth, et. al v. Col. Walter J. Cunningham, Seattle District Corps of Engineers, et. al, U.S. Western District Court, No. C92-1761R].

In May of 1992, the Seattle District Corps of Engineers (Seattle Corps) iasued a Section 404 permit under the Federal Clean Water Act to the Port of Skagit County (the Port) to fill 37.5 acres of wetlands for an industrial park to help aite a Canadian manufactoring firm.

The Seattle Corpa issued the permit despite the absence of a detailed mitigation plan or an Environmental Impact Statement. Friends of the Earth, the Waahington Environmental Council, Skagit Audubon Society, North Cascades Audubon, Seattle Audubon Society, and People for Puget Sound (environmental groups) filed a 60-day notice letter and requested a meeting with the District Engineer.

At an October 1992 meeting, Col. Cunningham stated that he had issued the permit with a condition that a mitigation plan be prepared by 30 December 1992, because the Port was going to hit a funding deadline for which they needed an issued permit. Col. Cunningham made clear that his obligation was to the Port in assisting their wetland filling acheme, not to the requirements of the Federal Clean Water Act.

On 16 November 1992, the environmental groups filed suit against the Department of Army and the Environmental Protection Agency alleging violations of the Clean Water Act, the National Environmental Policy Act and the Administrative Procedures Act. John Arum of Ziontz, Chestnut represented the environmental groups.

The Corps suspended the permit on 30 December 1992 and revoked it on 26 April 1993. The case was dismissed as moot in May. However, despite the apparent presence of a new Administration with a kinder and gentler environmental policy, the Department of Army, EPA and the Department of Justice refused to agree to an award of attorney fees under the Equal Access to Justice Act.

The environmental groups where then forced back to the Western District Federal Court to apply for such an award which District Court Judge Barbara Rothstein granted on 18 November 1993 with particularly harsh and substantive language for the Corps of Engineers.

First, Judge Rothstein noted that on the very day of the filing, the Seattle District issued a memo to Corps Headquarters acknowledging that the mitigation being developed by the Port was neither specific enough nor adequate, but the Corps did not choose to revoke or even suspend the permit.

After the initial lawsuit was filed, the Corps waited up until 30 December hoping that the Port could produce a wetland mitigation plan. At that point, the Corps suspended the permit and the parties agree to a three month atay until 30 March 1993. However, by mid-March the Port was no closer to a mitigation plan. Rather than revoke the permit, the Corps requested an

additional three month delay, again with the hope that the Port might be able to produce a mitigation plan.

The environmental groups refused and the Corps desperately filed a motion for an extension of the stay which the Court denied. Finally, with a Court date pressing to answer for its permit decision, the Corps revoked the Port's permit on 26 April.

Despite this impressive showing of giving the Port every benefit of the doubt, the Seattle Corps District argued that its April revocation decision was not based on the citizen (plaintiff's) lawsuit. Judge Rothstein, in her powerful Equal Access to Justice Act decision found otherwise:

> "The court is convinced that plaintiffs' refusal to agree to an extension of the stay followed by the court's denial of defendants' motion for an extension clearly and inexorably led to the Corps' decision to revoke the permit in April of 1993 rather than to continue litigating the case." (p. 10)

Judge Rothstein was not amused by the Corps administration of the wetland regulatory program:

> "The court need look no further than the Corps' defense of its decision to issue a permit without an EIS in order to determine that the Corps' action lacked substantial justification. . .the Corps contends that an EIS was not required before the issuance of the permit because the Corps had determined that no significant impacts to the human environment would occur independent of whatever mitigation measures the Port might later propose. Far from being substantially justified, this position is wholly untenable." (p. 12)

She also found persuasive, critical comments on the draft mitigation plan from the U.S. Fish and Wildlife Service, EPA, and Washington State Department of Fisheries. In addition, the Judge noted that

> "EPA's Clean Water Act guidelines require the Corps to deny a wetland fill permit where the proposed project does not include 'all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem,' 40 C.F.R. Sec. 230.12(a)(3)(iii) and Sec. 230.10(d), or where insufficient information exists to make a reasoned judgment that all such measures have been taken. Id. Sec. 230.12(a)(3)(iv.)" (pp. 13-14)

and that

> "The Corps has failed to explain to the court's satisfaction how it could possibly have made the requisite findings under the Clean Water Act guidelines to support the issuance of a permit when the Port had not even proposed an acceptable compensation mitigation concept, much less a final approved plan." (p. 14)

The final crushing blow on the Corps fell like a load of dredge spoils

> "As to the justification for defendants' litigation position, little more needs to be said. Rather than seeking to delay the inevitable by ignoring plaintiffs' objections and attempting to obtain a stay, the Corps would have served the public interest better by taking a good, hard look at its legal arguments in light of the facts of the case and avoiding this unnecessary litigation." p. 14)

CONCLUSION

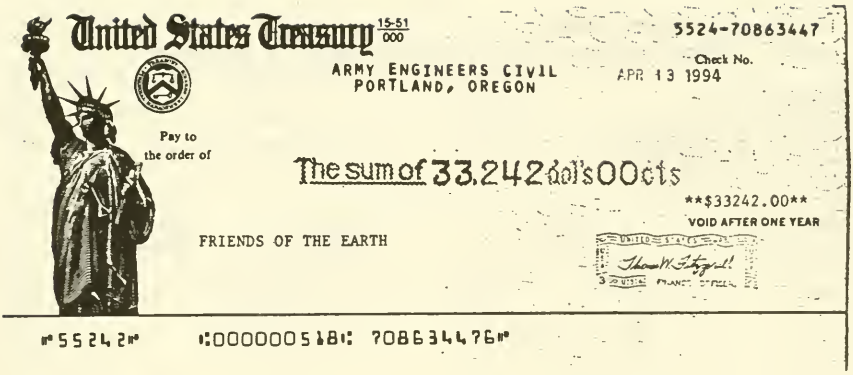
Several important points can be summarized:

* Thanks to Judge Rothstein's ruling, it should be clear to the Corps that it cannot issue a Section 404 permit under the Clean Water Act or a Finding of No Significant Impact under the National Environmental Policy Act while postponing the development by the applicant of an approved mitigation plan until after permit issuance.

* Both citizen suits could have been avoided had EPA stepped in and used its existing 404(c) veto authority under the Federal Clean Water Act. Instead, EPA continues its empty track record of never having protected a single acre of wetland in its four-state region through the 404(c) process.

* Planning is not a substitute for case-by-case permit review for wetland filling. Environmental groups will strongly oppose developer pressure to accelerate wetland losses by permitting any project in conformance to any area plan to receive an automatic fill permit.

* As wetland losses increase, so will efforts to preserve our nation's remaining wetlands.


United States Treasury 15-51 000

5524-70863447

Check No.

ARMY ENGINEERS CIVIL
PORTLAND, OREGON

APR 13 1994

Pay to the order of

The sum of 33,242 dol's 00 cts

$33242.00

VOID AFTER ONE YEAR

FRIENDS OF THE EARTH

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Figure 1. Friends of the Earth, et. al v. Col. Walter J. Cunningham, Seattle District Corps of Engineers, et. al, U.S. Western District Court, No. C92-1761R.

SECTION 404 PERMITS DENIED
(Source: Monthly Notice of Permits Issued, Denied Or Withdrawn

Prepared by
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PORTLAND DISTRICT	SEATTLE DISTRICT	OMAHA DISTRICT	WALLA-WALLA DISTRICT
1985			
Jan - 1	Jan - 0		
Feb - 1	Feb - -		
Mar - 1	Mar - -		
Apr - 0	Apr - 0	Apr - 0	
May - 1	May - 1	May - 0	
Jun - 0	Jun - 0	Jun - 2	
Jul - 0	Jul - -	Jul - 0	
Aug - 2	Aug - 0	Aug - 0	
Sep - 0	Sep - 0	Sep - 1	
Oct - 0	Oct - 0	Oct - 0	
Nov - 1	Nov - 0	Nov - 0	
Dec - 0	Dec - 0	Dec - 0	
1986			
Jan - 0	Jan - 0	Jan - 0	
Feb - 0	Feb - 1	Feb - 0	
Mar - 1	Mar - 1	Mar - 0	
Apr - 0	Apr - 1	Apr - 1	
May - 1	May - -	May - 1	
Jun - 0	Jun - 1	Jun - 0	
Jul - 0	Jul - 0	Jul - -	
Aug - 1	Aug - 0	Aug - 0	
Sep - 0	Sep - -	Sep - 0	
Oct - 0	Oct - -	Oct - -	
Nov - 0	Nov - -	Nov - 0	
Dec - 0	Dec - -	Dec - 3*	
1987			
Jan - 0	Jan - 0	Jan - 1	
Feb - 0	Feb - 0	Feb - 1	
Mar - 0	Mar - 0	Mar - 0	
Apr - 0	Apr - 1	Apr - 1	
May - 0	May - 0	May - 1	
Jun - 0	Jun - 0	Jun - 0	
Jul - 0	Jul - 0	Jul - 0	
Aug - 1	Aug - 0	Aug - 2	

Sep - 0	Sep - 0	Sep - 2	
Oct - 0	Oct - 1	Oct - 1	
Nov - 1	Nov - 0	Nov - 1	
Dec - 0	Dec - 0	Dec - 0	Dec - 0

1988

Jan - 0	Jan - 0	Jan - 2	Jan - 0
Feb - 0	Feb - 0	Feb - 1	Feb -1
Mar - 0	Mar - 0	Mar - 1	Mar - 0
Apr - 1	Apr - 0	Apr - 0	Apr. -0
May - 0	May - 1	May - 0	May -2
Jun - 0	Jun - 0	Jun - 0	Jun -0
Jul - 0	Jul - 0	Jul - 1	Jul -0
Aug - 0	Aug - 0	Aug - 4	Aug -1
Sep - 0	Sept -0	Sep - 1**	Sep - 1
Oct - 0	Oct - 0	Oct - 0	Oct - 0
Nov - 0	Nov - 0	Nov - 1	Nov - 1
Dec - 0	Dec - 0	Dec - 1	Dec - 0

1989

Jan - 2	Jan - 0	Jan - 0	Jan - 0
Feb - 0	Feb - 0	Feb - 0	Feb - 0
Mar - 1	Mar - 0	Mar -1	Mar -0
Apr - 0	Apr - 1	Apr - 0	Apr - 0
May - 0	May - 0	May - 0	May - 0
Jun - 0	Jun - 3	Jun - 0	Jun - 1
Jul - 1	Jul - 0	Jul - 0	Jul - 0
Aug - 0	Aug - 0	Aug - 0	Aug - 1
Sep - 0	Sep - 0	Sep - 0	Sept- 1
Oct - 2	Oct - 0	Oct - 0	Oct - -
Nov - 0	Nov - 1	Nov - 0	Nov - -
Dec - 0	Dec - 0	Dec - 0	Dec - 0

1990

Jan - 0	Jan - 0	Jan - 0	Jan - 0
Feb - 0	Feb - 0	Feb - 0	Feb - 1
Mar - 0	Mar - 0	Mar - 0	Mar - 0
Apr - 0	Apr - 1	Apr - 0	Apr - 1
May - 0	May - 0	May - 1	May - 0
Jun - 0	Jun - 0	Jun - 0	Jun - 0
Jul - 0	Jul - 0	Jul - 0	Jul - 0
Aug - 0	Aug - 0	Aug - 0	Aug - 0
Sep - 0	Sep- 0	Sep - 0	
Oct - 0	Oct - 0	Oct - 1	
Nov - 2	Nov - 0	Nov - 0	Nov - 0
Dec - 0	Dec - 0	Dec - 0	Dec - 0

1991

Jan - 0	Jan - 0	Jan - 0	
Feb - 1	Feb - 0 NW26=12	Feb - 0	Feb - 0
Mar - 1	Mar - 0	Mar - 0	Mar - 0
Apr - 1	Apr - 0	Apr - 0	Apr - 0
May - 2			May - 0
Jun - 2	Jun - 0	Jun - 0	
Jul - 2	Jul - 0	Jul - 0	Jul - 0
Aug - 2	Aug - 0	Aug - 0	Aug - 0
Sep - 0	Sep - 0		Sep - 1
Oct - 0	Oct - 0	Oct - 0	Oct - 0
Nov - 0	Nov - 0	Nov - 0	Nov
Dec - 0	Dec - 0	Dec - 0	Dec - 0

1992

Jan - 0	Jan - 0	Jan - 0	Jan - 1
Feb - 0	Feb - 0	Feb - 0	Feb - 0
Mar - 0	Mar - 0	Mar - 0	Mar - 0
Apr - 1	Apr - 0	Apr - 0	Apr - 0
May - 0	May - 0		May - 2
Jun - 0	Jun - 0		Jun - 1
Jul - 0		Jul - 0+	Jul - 0
Aug - 0		Aug - 0	Aug - 0
Sep - 0	Sep - 0	Sep - 0	Sep - 2
Oct - 0		Oct - 0	Oct - 0
Nov - 0	Nov - 0	Nov - 0	Nov- 0
Dec - 0		Dec - 0	Dec - 1

1993

Jan - 1 NW26=7	Jan - 0 NW26=9	Jan - 0	Jan - 0
Feb - 0 NW26=3	Feb - 0		Feb - 0
Mar - 0 NW26=5		Mar - 0	Mar - 2
Apr - 0 NW26=7	Apr - 0 NW26=6	Apr - 0	
May - 1 NW26=7			
Jun	Jun - 0 NW26=15	Jun - 0	
Jul	Jul - 0 NW26=12	Jul - 0	
Aug	Aug - 0 NW26=22	Aug - 0	
Sep	Sep - 0 NW26=14		Sep - 0 NW26=8
Oct	Oct - 0 NW26=17		Oct - 0 NW26=7
Nov - 1 NW26=8	Nov - 1 NW26=8	Nov - 0	Nov - 0 NW26=7
Dec 0 NW26=3	Dec - 0 NW26=9		Dec - 0 NW26=5

1994

Jan 0 NW26=5	Jan - 0 NW26=8	Jan - 0	Jan - 0 NW26=2
Feb 0 NW26=13		Feb - 0	
Mar 0 NW26=7	Mar - 0 NW26=10	Mar - 0	Mar - 0 NW26=14
Apr		Apr - 0	Apr - 0 NW26=8
PORTLAND	SEATTLE	OMAHA	WALLA-WALLA
36 Section	15 Section	33 Section	21 Section
404 denials	404 denials	404 denials	404 denials
out of 106	out of 95	out of 98	out of 64
recorded months	recorded months	recorded months	recorded months
		*For same project	
		**Permit Withdrawn	
		+Changed to MT waters only	

NOTE: Beginning in 1993 some Corps Districts included the nationwide permit decision information. Figures given for NW26 are those issued for that month.

WA Dept Of Ecology
18 May 1994

WASHINGTON'S WATER QUALITY GETS MIXED REVIEWS BY STATE

The health of Washington's rivers, coastal waters, estuaries and lakes received mixed reviews by Ecology in a preliminary list submitted to EPA last week. The listing of "troubled waters" -- required every two years by the Clean Water Act -- is used by the state to set environmental priorities for action and to chart trends. Water quality problems were revealed in portions of 445 waterbodies and in nearly every county in the state. The breakdown of the state's water quality problem for this year is:

- 7% of the 74,000 miles of rivers, streams and coastal waters
- 33% of the 3,000 miles of estuaries
- 34 of the 8,000 lakes

Ecology Director Mary Riveland described several actions being taken at the local and state levels to protect water quality, including watershed initiatives, stormwater control, and improving agricultural waste management practices.

CONTACT: Mike Llewelyn (206) 407-6405

- 30 -

FRIENDS OF THE EARTH
Northwest Office

9 June 1994

Subcommittee on Water Resources
Public Works Committee
U.S. House of Representatives
WA D.C. 20515

Dear Subcommittee:

Please add this material to the hearing record on the reauthorization of the Federal Clean Water Act for 24 and 26 May. Thank you.

Sincerely,

David E. Ortman
Director, Northwest Office

4512 University Way NE
Seattle, WA 98105
206-633-1661
206-633-1935 (FAX)
foewa (MCI Mail ID)
foewase (EcoNet ID)

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Seattle Post-Intelligencer
A HEARST NEWSPAPER
NING
MAY 31, 1994

Farm's only crop is dispute

Critics say exemption from county's wetland rules is a farce

By Rob Taylor
P-I Reporter

Contractor and developer Mario Segale has woo an exemption from wetland-protection rules for a tract in south King County using an unusual technique: cropless farming.

He calls it weed control, and key regulators agree. But his critics call it a sham. They say it's merely a way to destroy the wetlands and avoid restrictions that could thwart development.

By the banks of the Green River, on some of the last wetlands and open space between the malls of Tukwila and the industrial parks of Kent, Segale's employees have regularly dredged drainage ditches, sprayed herbicide and tilled-under the vegetation.

But for seven of the past eight years they have grown no crops in the 50-acre field. They sometimes till it — not with tractors but with bulldozers from Segale's contracting business, neighbors say.

Segale and his lawyer did not respond to requests from the Post-Intelligencer to discuss the issue. But Segale has told regulators that he is engaged in normal farming, which is exempt from rules that bar destruction of wetlands.

> **"(It's) a loophole that is more than big enough to drive a tractor through.**
> — Fletcher Shives, EPA wetlands analyst

His critics scoff at the notion.

Segale has found "a loophole that is more than big enough to drive a tractor through," contends Fletcher Shives, a wetlands analyst for the U.S. Environmental Protection Agency.

After months of talks, however, regulators have sided with Segale, granting him an exemption from wetlands protection rules. They note that the land was previously farmed and that farming methods vary. Last month, in fact, county leaders further broadened the exemption, throwing open the door to similar tactics on many other wetlands in King County.

The case sheds light on the difficulty of protecting dwindling wetlands, which are under development pressure around the Puget Sound and across the nation.

From cattail swamps to soggy fields, wetlands are the ugly ducklings of environmental protection. Once thought worthless, they are now prized as nurseries for fish and wildlife, filters of fresh water and safety valves for floodwater.

With more than half the original wetlands in the contiguous 48 states already gone — paved, filled or drained — federal, state and county governments have tried to stem further losses by blocking construction on wetlands or forcing developers to replace those they fill.

Last week a blue-ribbon federal committee reemphasized that point, calling for more reliance on wetlands rather than dikes to control flooding.

Still, landowners and developers fight wetland protections. They claim rules often take a property's development value for

See WETLANDS, Page A7

Wetlands: Owner helped pave valley

From Page 1

little or no environmental gain. In King County, they have helped elect opponents of land controls and shaken up regulators in the Department of Development and Environmental Services.

Landowner Segale is not new to wetland wars. He also owns the Auburn site where he and other investors propose to fill 17 acres of wetlands to make way for a horse-racing track. The Army Corps of Engineers is considering whether to permit the project.

Nor is he a novice developer. He has bought or built on much of the Green River's sprawling, flat-floored valley south of Seattle. Once the site of truck farms that supplied much of the Pike Place Market's produce, the northern end of the valley now is largely paved and covered with rails, warehouses and shopping centers.

Segale's critics complain that wetland protections are full of holes and that his farming is widening one of them.

"If Mr. Segale is allowed to do this, it's open season for the conversion of wetlands through agricultural practices," said Rob Lennihan, a University of Washington ecology graduate student.

Kenneth Dinsmore, chief of enforcement for King County's DDES, dismisses such claims. He can't recall the issue surfacing before. And he sees little change in Segale's land, which was farmed and drained before Segale bought it in 1985.

The subject of this damp debate is a table-flat field between South 200th and 204th streets, north of Kent. It stretches west from the Green River to the foot of a forested hill. One drainage ditch is fed by hillside streams where the state has found salmon and trout.

This marshy field still ponds up with water in the late winter and spring, neighbors say, but dries out by summer. Neighbors' photographs show some of it was once covered with wetland reeds.

Both SeaTac and Tukwila want to annex the property. Segale has said he wants it zoned for manufacturing and industrial uses, according to Tukwila city administrator John McFarland.

Though the county has mapped about 19 acres of wetlands there, they are shrinking under Segale's treatment, according to Mike Williams, an ecological consultant.

How? Wetland mappers look for three indicators: water-loving plants, seasonally wet soils and water. Segale's treatments eliminate the plants, improve drainage and erase signs past soil wetness, said the EPA's Shives.

First to protest Segale's techniques were Joel and Robert Bauer, whose childhood home sits on a hill west of Segale's field. Angry about the area's rapid development, they have charged since August 1992 that Segale's activities are illegal.

Among their supporters is Charles Williams, co-chair of the University of Washington's Environmental Law Society, who wrote King County that Segale's general failure to use the land for crops or pasture since 1986 "clearly demonstrates that the Segale wetland fails to qualify for an agricultural exemption."

The critics have won some minor battles, though they may have lost their war.

In December 1993, the Corps of Engineers declared Segale's discing improper and ordered him to stop. The county cited him for dredging ditches that held salmon.

And Jerry Balcom, chief DDES rule writer, agreed that tilling or discing aren't enough to qualify a tract for agricultural exemption unless they are clearly used "for pasture, food crop, grass seed or sod purposes."

But county enforcement authorities last year agreed, despite Balcom's view, that Segale is engaged in "normal farming." The Corps of Engineers reversed itself on May 10 and declared his activities exempt from wetlands rules.

Segale's counsel, Laurie Pinard, had declared to regulators that her client is controlling weeds, that he often hasn't planted because market demand was poor and he didn't need the income, anyway.

She also said development nearby and problems with Green River overflow had increased the seasonal flow of water and silt onto the site.

Pinard documented that the land was farmed in the 1930s and 1940s and produced hay as recently as 1986, the year after Segale bought it. She added letters from four people in farm-related businesses who said multiple years of discing without planting was normal to eradicate weeds.

In phone interviews, one of those letter-writers acknowledged that he was a longtime hunting partner of Segale's; another said her father was an acquaintance of Segale's family; a third said he is a paid consultant; and the fourth couldn't be reached.

Segale and Pinard declined to answer six telephone calls and a fax message from the Post-Intelligencer.

Three other farming experts reached by the Post-Intelligencer could think of no reason to leave land cropless for more than two years.

Washington State University extension service experts confirmed that some farmers disc and spray fields with herbicides without planting to reduce weeds. But doing it for more than a year or two is not economic, said Kassim Al-Khatib, the service's weed spe-

-Cont-

cialist for Western Washington.

"Beyond that, it is wasted," Khatib said. "Nobody does it here."

Bob Parker, an extension service weed scientist from Prosser, said flatly, "It's not a normal farming practice."

But federal and county regulators said experts they consulted were unwilling to say Segale's techniques aren't normal.

One was Rob Fox, the WSU agricultural extension agent in King County. He told the Post-Intelligencer that Segale's activity is "pretty weird" and "doesn't seem right."

> **"Half-acre wetland sites get put through the ringer. But not Segale.**
>
> — Mike Williams, consultant

"But legally," Fox added, "who can say?"

"There's been a lot of talk that he's a bad farmer," said Steve Wright, an enforcement officer with King County's DDES.

"I fully agree with that. But does that mean that the farm was abandoned? No."

Consultant Mike Williams, who is unrelated to the UW's Charles Williams, said regulators are reluctant to challenge such a rich, powerful developer.

"Half-acre wetland sites get put through the ringer," he said. "But not Segale."

Regulators denied bowing to pressure.

The Bauers appealed for help to County Executive Gary Locke, but in vain.

Locke recently told one Segale critic that there appears to be little he can do. But he has let four months pass without formally replying to a lengthy Jan. 18 letter seeking a review of the case. The critics await his letter as a final decision that they can appeal. Locke's office said last week it is imminent.

Rather than tightening the farming exemption, county leaders appear to have stretched it far wider. Last month, the Metropolitan King County Council approved "technical" amendments to the Sensitive Areas Ordinance that county officials say extend the exemption to all lands that have ever been used as farm or pasture.

Wetlands consultants say that includes most of the county's undeveloped, river-valley lowlands. Washington Wetlands Network, a wetland preservation group, protested to the EPA, warning the rule it "may result in the loss and degradation of many hundreds of acres of wetlands in King County."

DDES' Gordon Thomson said he wrote the amendment to match language in a pending new zoning code. He denies being pressed by anyone to make the change.

King County's Wright said the new language reflects the way he routinely interpreted the ordinance before it was amended.

"It was an error the way it was phrased before," he said. "The whole intent was to make sure that prior converted land" — wetlands converted to agricultural use — "could stay that way."

But Balcom, the head rule writer, disagreed. He said the new language had only confused the issue. Drafters never intended to exempt all land that has ever been farmed, he said.

"We're probably going to have to refine it (the ordinance) yet again," he said. "But that may take awhile."

CENPS-OP-RG (1145)

DECISION MEMORANDUM

SUBJECT: Overlake Fund 93-4-00595

1. Purpose: Document rationale for extending the original jurisdictional determination to May 3, 1996, and issue a new Nationwide Permit 26 verification.

2. Authority and Guidance:

a. The Seattle District is evaluating the applicant's December 15, 1993 request to honor the original nationwide permit verification in accordance with 33 CFR 325.7, which authorizes the District Engineer to reevaluate the circumstances of any permit at his own motion, or at the request of the permittee or a third party.

b. Regulatory Guidance Letter 94-1 (Expiration of Geographic Jurisdictional Determinations) states that while the District Engineer is not required to issue extensions, if requested to do so, he will normally extend the three year period to a total of five years unless new information warrants a new jurisdictional determination.

c. 33 CFR 330.5 (d) states that when deciding to exercise his discretionary authority (regarding nationwide permits), the District Engineer should consider the extent to which asserting discretionary authority would adversely affect plans, investments, and actions the permittee has made or taken in reliance on the permit; concerns for the environment including the aquatic environment; and revisions to statutory or regulatory authorities.

3. Background and Statements of Fact:

a. In a letter dated December 15, 1993, the applicant requested the Corps honor its original Nationwide Permit 26 verification and jurisdictional determination dated May 3, 1991. Seattle District issued the original verification based on a proposed wetland fill of 0.69 acres. The fill would have consisted of pilings and piling caps for a 9-story hotel. The applicant requested the extension because of the time it was taking to obtain shoreline, building and other permits from local authorities.

b. The original jurisdictional determination expired May 3, 1994.

c. The original nationwide permit verification expired on January 13, 1992 when all nationwide permits were revoked by the Department of the Army. However, since the proposed work

conformed to the reissued Nationwide Permit 26 (including regional conditions), the original verification was valid until May 3, 1993 (33 CFR 330.6 (a)(3)(ii)).

d. In his December 15, 1993 letter, the applicant claimed to have spent $156,381 in city, design consultant, other consultant and legal fees through the end of 1991 in reliance on the nationwide permit. The applicant spent a further $306,603 in 1992 and 1993 (total through 1993: $462,984)(see enclosure 1).

e. The applicant's Overlake Park Hotel Mitigation Plan indicates that a total of 0.82 acres would be adversely affected by shading.

4. Agency Comments: Although the Corps did not solicit comments, the following agencies have requested that the proposed work be reviewed through the individual permit process: Washington Department of Ecology (DOE)(letter dated May 25, 1994), U.S. Fish & Wildlife Service (telephone call May 10, 1994), and National Marine Fisheries Service (telephone call May 9, 1994). These agencies are concerned that the project would add incrementally to cumulative impacts caused by previous developments upon the Mercer Slough wetlands and Lake Washington, and proposed listed salmonid species. The DOE also believes that several significant issues associated with the project would best be resolved through public review and evaluation. These include that a bad precedent will be set for approving other projects for which nationwide authorizations/jurisdictional determinations have lapsed; that under current regulations, an individual permit would be required; that there might be better consistency for mitigation requirements between the Corps permit and the Substantial Shoreline Development Permit.

5. Findings:

a. The applicant invested at least $463,000 through May 1994 in reliance upon the original jurisdictional determination of "isolated" and Nationwide Permit 26 permit requirements (including regional conditions effective February 11, 1992, Special Public Notice, Seattle District).

b. By using pilings and keeping the proposed fill area under 1 acre, the applicant has minimized and avoided adversely affecting wetland functions for flood attenuation and sediment and nutrient entrapment to the maximum extent practicable.

c. The functional value of the wetlands for flood attenuation and sediment and nutrient entrapment may be moderate to high because of its low lying position upstream of road berms and its organic soils. Its value for biological productivity and diversity is currently low because monotypic reed canarygrass and blackberry community dominate the site and adjacent areas. Restoration potential may be high because this wetland is part of a much larger wetland complex.

J. Smith

d. While the impacts are minimal, development of wetland and upland portions of this site will contribute to the cumulative adverse impact of urban development on waters, remaining wetlands, and fisheries in the Lake Washington basin.

e. Permitting development of a small portion of the wetland would allow a private property owner beneficial use of a property which otherwise is subject to considerable development constraints.

f. The November 22, 1991 nationwide permit regulatory guidance (33 CFR 330) warrants making a new jurisdictional determination that the subject property is "adjacent" to Mercer Slough and Lake Washington (see memorandum at enclosure 2)

g. Based on our institutional knowledge, at most only a few dozen isolated/above the headwaters jurisdictional determinations made prior to January 1992 would be changed to adjacent under the reissued nationwide permit regulatory guidance.

6. Determinations: After considering agency views and various public interest factors including wetlands protection, property ownership, economics, cumulative environmental effects, and equity and fairness principles, I have concluded that it is in the public interest to extend the previous wetland jurisdictional determination and Nationwide Permit 26 verification to May 3, 1996.

Ann R. Uhrich 6/3/94

Ann R. Uhrich
Chief, Environmental
& Processing Section

Enclosures

SUMMARY OF EXPENSES INCURRED IN CONNECTION
WITH OVERLAKE HOTEL

May 3, 1991 - October 31, 1993*

City fees

$ 1,650	(1991)
$ 3,901	(1992)
$ 15,434	(1993)
$ 20,985	

Design consultants' fees

$ 43,057	(1991)
$ 39,912	(1992)
$ 32,835	(1993)
115,804	

Other consultants' fees

$ 70,137	(1991)
$ 57,403	(1992)
$ 47,452	(1993)
$174,992	

Legal fees

$ 40,272	(1991)
$ 85,438	(1992)
$ 22,432	(1993)
$148,142	

Other costs

$ 1,265	(1991)
$ 902	(1992)
$ 894	(1993)
$ 3,061	

TOTAL $462,984

*1991 sums represent charges billed after May 3, 1991
1993 sums include only work billed through October 31, 1993

MEMORANDUM FOR RECORD: FIELD REVIEW AND JURISDICTIONAL SUMMARY

APPLICANT: Overlake Fund

FILE #: 93-4-00595

CONSULTANT: Shapiro and Associates

LOCATION (QUAD.MAP, S,T,R., CITY, COUNTY, DRAINAGE): Bellevue, Washington, in King County, (Section 32, Township 25N, Range 5E).

SITE VISIT (DATE OF/WHO: Jonathan Freedman, Debbie Knaub August 11, 1993

PROJECT PURPOSE/SITE DESCRIPTION, NWI: Site is seven acres, primarily flat with a rise to the east in the northeastern portion. The site is bisected north to south by Sturtevant Creek.

WETLAND REPORT (YES/NO/DATE): Shapiro Report, Jurisdictional Wetland Determination for the Overlake Hotel Project, December, 1990.

INDICATORS, (VEGETATION, SOILS AND HYDROLOGY): The northern half of the property consists primarily of reed canarygrass with scattered willows and black cottonwoods and is bounded to the east by a dense cover of blackberries. The southern half of the site consists primarily of scrub/shrub species, including hardhack spiraea, willow, and black cottonwood. The NWI map shows wetland on the site to the west of Sturtevant Creek. The wetland, however, extends east of the creek. SCS has mapped the site as Tukwilla muck and Seattle muck, both classified as hydric. There are distinctive wetland boundaries on the eastern and northern edges of the site because of road construction and associated fill. Much of the wetland complex that this wetland is associated with used to be lake bed before the water level in Lake Washington was lowered in the early 1900's. For additional discussion, refer to MFR dated 23 August 1993 (copy attached).

CONFIRM DELINEATION (YES/NO): Yes

JURISDICTIONAL DETERMINATION AND DISCUSSIONS (ISOLATED, ABOVE HEADWATERS, ADJACENCY, INDIVIDUAL PERMIT OR NATIONWIDE PERMIT): In a letter dated December 15, 1993, the applicant requested the Corps honor its original Nationwide Permit 26 verification and jurisdictional determination dated May 3, 1991. The original delineation expired May 3, 1994. The purpose of the site visit was to review the original jurisdictional determination that the site was "isolated" in light of regulatory guidance changes that occurred November 22, 1991. Under 33 CFR 325.7, the District Engineer is authorized to reevaluate the circumstances of any permit at his own motion, or at the request of the permittee or a third party.

Our current determination is that the site is an integral part of the Mercer Slough wetland system which is adjacent to Mercer Slough in Lake Washington. The reason for this is that the wetlands are continuous and contiguous from the site to Mercer Slough/Lake Washington, except for roadfills and other fills that are acting as artificial berms. There is very little or no topographic break between the site and Mercer Slough.

The changed jurisdictional call is made based on regulatory guidance issued on November 22, 1991 at 33 CFR 330 (preamble and definitions at paragraph 330.2) which clarified the meaning of the terms "adjacent", "isolated", "above the headwaters", and how to identify these conditions in the field. The changed determination is not based on any change in the geomorphic character of the wetlands. No such changes have been observed since 1991.

Jonathan Smith

JONATHAN SMITH June 1, 1994
PROJECT MANAGER

Ann R. Uhrich

for DEBBIE KNAUB June 3, 1994
ENVIRONMENTAL ANALYST

Ann R. Uhrich

ANN R. UHRICH June 3, 1994
CHIEF, ENVIRONMENTAL
& PROCESSING SECTION

23 August 93

Field Visit and subsequent conversation w/ Debbie Knaub and Chris McAuliffe:

1. Our field visit of 11 August 93 to the Overlake Site was to determine adjacency. Gaining access to the site was very difficult, but there was no question that it was on wetlands contiguous topographically with Mercer Slough. We took a few measurements at Sturtevant Creek just north of the culvert at S.E. 6th Street. It clearly is a headwaters stream.

2. We then walked west on S.E. 6th to 112 St. S.E. and south to Lincoln Plaza and Gateway Office Park. Both are fills in the same contiguous wetlands, both issued as NW 26. They were both surrounded on three sides by water, and Lincoln Plaza is pile supported.

3. Mercer Slough begins at some point south of SE 8th Street, about .2 -.3 miles. The only breaks in the wetlands are the roads and the office complexes.

4. Chris had been given a note from Ann at some point late last year to check the Overlake site for adjacency. He recalls checking it with Tina Tong around the date of the inaugural storm 20 Jan 93 but he didn't have the file with him. He remembers the park and ride lot, but still isn't sure he was in the right place (proposed fill site). Still, he is fairly certain that the site is adjacent to Mercer Slough.

5. The reasons Debbie and Chris give are straightforward. Chris emphasized that there is no topographic break between the proposed fill site and the slough, and that the wetlands are continuous and contiguous from the site to the slough, except for previous fills (Gateway and Lincoln Plazas), and the roads that run east-west, acting as artificial berms (S.E. 8th and S.E. 6th). We referred to branch guidance on adjacency, and the preamble to the new nationwides as we talked.

6. I referred to my previous conversation with Marc Boule (memo of 19 August 1993. We all discussed point "b" of the preamble (part of a large continuum of wetlands), where it states that the "waterbody having the largest hydrologic influence or exchange with the wetland is the one to which it is considered adjacent." Debbie said she finds it hard to believe that Sturtevant Creek could support such a large wetland as what we found north of S.E. 8th Street. I said that if Marc's assertion were true, the

influence could not be through surface water, although we haven't yet seen his data. Chris said that the influence is undoubtedly through groundwater, which is in a tightly confined basin in the slough and has to be very high, and that's hydrologic influence enough. In addition, they both agreed that topography (see above item) is the overriding factor in their opinion, and data on surface and groundwater to establish hydrologic influence would not likely have any effect on the determination.

Jonathan Freedman

MERCER ISLAND CITY
Newport Shores
Newport
Barnabia Point
Beaux Arts
Calkins Point
Burbank Boys Sch
Groat Point
Meydenbauer Bay
Mercer
Slough
Sturtevant

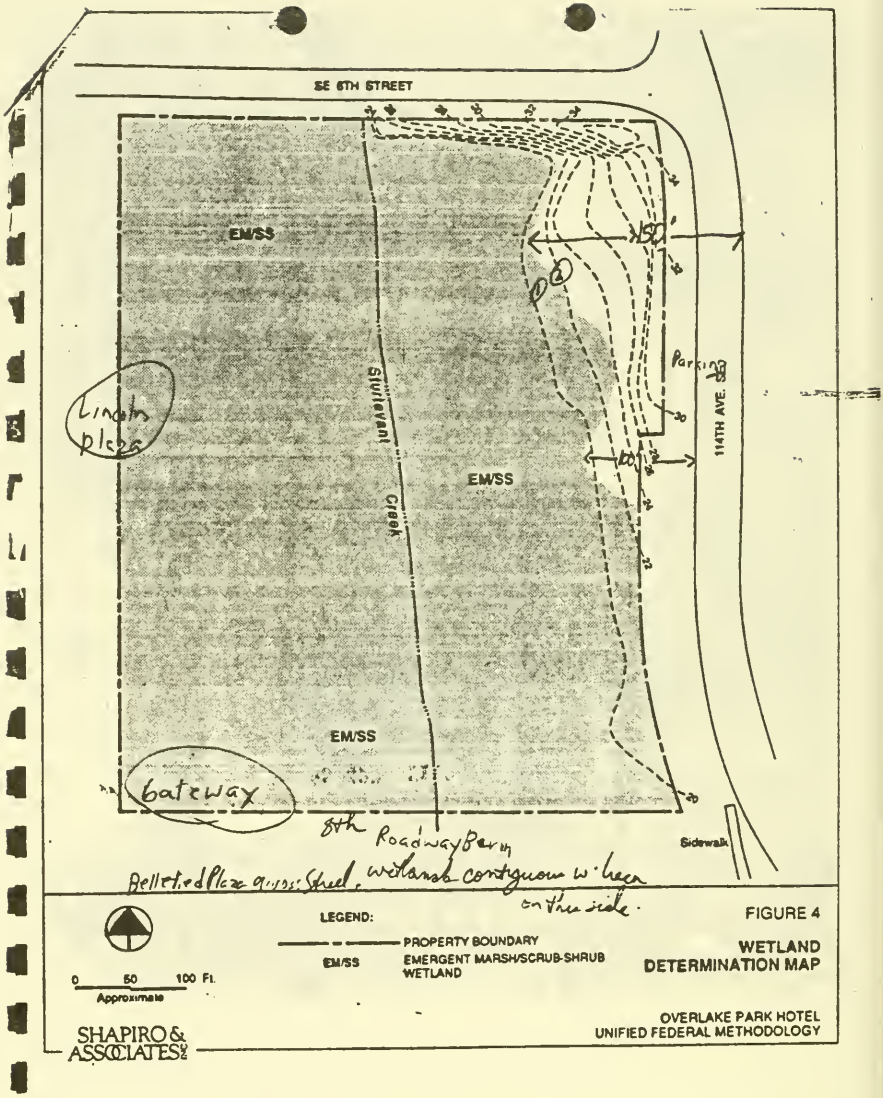

FIGURE 4

WETLAND DETERMINATION MAP

OVERLAKE PARK HOTEL
UNIFIED FEDERAL METHODOLOGY

DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-2255

REPLY TO ATTENTION OF

JUN 6 1994

Regulatory Branch

David Fluke
The Overlake Fund
c/o Fluke Capital Management, L.P.
11400 S.E. Sixth Street, Suite 230
Bellevue, Washington 98004

Reference: 93-4-00595
Overlake Fund

Dear Mr. Fluke:

We received the letter of December 15, 1993 from your attorney, Mr. Stephen O. Kenyon regarding the referenced permit application. Our response to his letter is provided below and supplements nationwide permit (NWP) expiration date and other information contained in our letter of June 28, 1993 to your development consultant, Mr. Theodore M. Shultz.

Based upon our review of the circumstances attending the expiration of your May 3, 1991 NWP 26 verification (reference: OYB-4-014537) for constructing a hotel in wetlands along Sturtevant Creek, Bellevue, Washington, we find that the current NWP 26 (enclosure 1) authorizes the construction of a hotel and associated parking on pilings on 0.8 acres of wetland. We are also extending the expiration date of the original wetland jurisdictional determination from May 3, 1994 to May 3, 1996. In making this determination, we considered the relatively small size of the adversely affected area, the effort to minimize adverse effects to aquatic life and flood attenuation functions by pile construction techniques, and the fact that you committed substantial resources (over $460,000) to this development in reliance upon the May 3, 1991 NWP verification letter which stated the wetland determination would be valid until May 3, 1994.

The work must comply with the permit's regional, general, and special conditions described at enclosure 2. Read them carefully. You must comply with all of the conditions and requirements.

Once your project construction activities meet all of the above criteria for authorization by NWP 26, then you need no further permission from us. You must still comply with other state and local requirements which pertain to the work.

If this piling work is not completed by May 3, 1996, a new wetland delineation would be required. In any new delineation we would consider your wetland as part of a broad continuum of wetlands adjacent to Mercer Slough and Lake Washington. This revised interpretation is due to changes issued on November 22, 1991 in the Code of Federal Regulations at 33 CFR Part 330 clarifying the issue of adjacency. As a result of this clarification, any re-submitted application would be subject to review as an individual rather than nationwide permit.

If you have any questions, please contact my project manager, Jonathan Smith, telephone (206) 764-6910.

Sincerely,

Ann R. Uhrich
Chief, Environmental and
Processing Section

Enclosures

Copy Furnished w/o encls:

Mr. Stephen O. Kenyon
Stoel, Rives, Boley, Jones & Grey
36th Floor
One Union Square
600 University Street
Seattle Washington 98101-3197

Copy Furnished w/o encls:

Mr. Stephen O. Kenyon
Stoel, Rives, Boley, Jones & Grey
36th Floor
One Union Square
600 University Street
Seattle Washington 98101-3197

cc: Washington State Department of Ecology Nationwide Permit Coordinator

Washington State Department of Ecology ATTN: Erik Stockdale, Shorelines & Coastal Zone Mgt. Program

David Ortman, Friends of the Earth
(4512 University Way NE, Seattle WA 98105)

5272380N

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JUDY A. BLACK
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STATEMENT

OF THE

INTERNATIONAL COUNCIL OF SHOPPING CENTERS

ON

THE WATER QUALITY ACT OF 1994, H.R. 3948

PRESENTED BY

CHARLES H. SAIN

TO THE

SUBCOMMITTEE ON WATER RESOURCE AND ENVIRONMENT

OF THE

HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

MAY 24, 1994

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Appendix - Letter to Chairman Mineta, May 2, 1994

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STATEMENT
OF THE
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ON
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CHARLES H. SAIN
TO THE
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OF THE
HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
MAY 24, 1994

I. Introduction

I am Charles H. Sain, P.E., the Chief Operating Officer of Sain Associates, Inc. of Birmingham, Alabama. I am Chairman of the Task Force on Water Quality of the International Council of Shopping Centers (ICSC), and I am presenting the views of ICSC to the Subcommittee in regard to its hearings on H.R. 3948 and the proposed amendments to it.

ICSC is the trade association of the shopping center industry. Its 25,000 members represent owners, developers, retailers, lenders and all others having a professional interest in the shopping center industry. Its 22,000 U.S. members

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represent almost all of the 40,000 shopping centers in the United States. In 1992 these centers accounted for $830 billion in retail sales, over 55% of all non-automotive retail sales. In addition, shopping centers employed 10 million people, about one of every nine non-farm jobs in the United States.

ICSC welcomes and appreciates the efforts, as expressed in H.R. 3948, the Amendment in the Nature of a Substitute to H.R. 3948 released by Chairman Mineta on April 21, 1994, and the Bipartisan Alternative to H.R. 3948 released on May 17, 1994, to deal with the current problems of water pollution in the United States, and in particular, the problems of non-point source pollution (NPS pollution) and wetlands regulation.

ICSC is gratified by and appreciates the efforts of Chairman Mineta in expanding the scope of H.R. 3948 by offering a substitute (Substitute) which expands its coverage by addressing the problems of wetlands regulation and the efforts of the sponsors of the Bipartisan Alternative in putting forth a broad based alternative to H.R. 3948 which includes important contributions to the reform and revision of the Clean Water Act, including wetlands regulation.

ICSC members have had extensive experience in dealing with the provisions of the Clean Water Act and wetlands regulation, and, based on the hard earned knowledge gained from such

experience, ICSC offers the following comments and suggestions regarding the different proposals before the Subcommittee.

II. Non-Wetlands Provisions

A. H.R. 3948 and Its Substitute

1. Positive Aspects

ICSC agrees with the emphasis on watershed planning and management contained in H.R. 3948 and its Substitute because of the potential effectiveness and fairness of such an approach. The inclusion of all sources of NPS pollution, including agricultural and municipal runoff, and the fair application of controls on such sources are necessary components of such an approach, as is the combination of the impacts of NPS and point source (PS) water pollution.

ICSC strongly supports an effective and workable mechanism for the transfer of credits for water pollution clean-up between sources within a watershed similar to that contained in the Clean Air Act and is gratified that the Substitute includes such a provision as promised by the Chairman and the Ranking Member of the Subcommittee in their statement on the introduction of H.R. 3948.

ICSC supports the efforts in the legislation to enhance the funding of water pollution control activities, including the increase in funding and the increased flexibility in the use by municipalities of funds from state revolving funds for combined sewer overflow work and otherwise.

2. Concerns

ICSC has serious concerns about the potential negative impact of the broad new regulatory authority granted by the legislation and the imposition of heavy enforcement provisions, including increased penalties, criminal and civil, and expanded authority for citizen suits. These provisions have the potential for creating heavy new regulatory burdens and increased litigation, which unless limited in scope and tempered by the requirements for risk assessments and cost-benefit analysis will overwhelm and cancel out the positive aspects of the legislation.

Watershed planning and management will only be effective and acceptable if it is done fairly and evenly regarding all of the pollution sources within a watershed. ICSC is concerned about the possibility for selective regulation of shopping centers and other large retail parking facilities. Because of these concerns ICSC believes that watershed size should not be less than 50,000 acres, monitoring should be at receiving waters (except in arid areas without receiving waters where it should be at the stream itself), and large retail

parking facilities should only be required to add water quality features if similar and parallel requirements are imposed on public streets and smaller parking areas and on agriculture within a watershed.

While ICSC supports the encouragement of the implementation of improved NPS management practices for new facilities, it is concerned about the arbitrary imposition of such requirements for the retrofitting of existing shopping centers.

B. Bipartisan Alternative

Like H.R. 3948 and its Substitute, the Bipartisan Alternative wisely emphasizes watershed planning and management. In addition, the Bipartisan Alternative contains a number of non-wetlands provisions which supplement and/or improve upon the provisions of H.R. 3948 and its Substitute and which the Subcommittee should adopt in its markup of H.R. 3948. These include:

1. Risk Assessment and Cost-Benefit Analysis - Section 304 requires that a risk assessment be done for each standard, effluent limitation, or other regulatory requirement (except for the issuance of permits and purely procedural requirements), and related guidance under the Clean Water Act. No regulatory requirement or guidance could be established where social,

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environmental, and economic benefits are not reasonably related to anticipated costs. EPA is required to issue guidelines for conducting such risk assessments and cost benefit analysis, and such assessments and analyses shall be subject to public notice and comment.

2. Pollution Transfers - As part of the incentives for states to adopt state watershed management programs, Section 312 of the Bipartisan Alternative allows for the adoption of "Pollutant Transfer Pilot Projects", provides for incentive grants for such programs, and requires a report on the results of such projects within 18 months. ICSC prefers this version to the pollutant transfer provisions of the substitute as potentially more effective and workable because of its procedural safeguards, relative simplicity and workability, and timeline for actions.

3. Adequately Funded Mandates - Section 506 provides that prior to issuing final regulations or other requirements pursuant to the Clean Water Act, EPA is required to provide an analysis of the costs of implementation, estimates of Federal authorized and appropriated funds, an estimate of other sources of funding, and an estimate of the adequacy of federal financial assistance based on projected funding levels and prior appropriations. If estimated federal financial assistance needed to implement and comply with federal requirements is less than 90% of estimated costs, EPA must report to Congress on the reasons for and the consequences of such shortfall.

III. Wetlands Provisions

ICSC does not believe that the current problems of water pollution control and its impact on the day-to-day activities of citizens, the private economy, and the governments, local, state, and federal, of the United States can be adequately and effectively addressed without addressing the serious problems involved in the regulation of wetlands. Congress has been unwilling and/or unable to face and deal with the excesses, inefficiencies, and overreaching of wetlands regulation for too long and to the detriment of the interests of the public, the economy, and the effective and efficient management, protection and regulation of wetlands. ICSC is encouraged that the Substitute for H.R. 3948 and the Bipartisan Alternative both propose comprehensive revisions of the current system of regulating wetlands.

ICSC members have had extensive experience with wetlands regulations in the development, expansion, and operation of their shopping centers and have found that substantive and procedural defects in current wetlands regulations have resulted in unnecessary increased costs and delays in development and have stopped some projects altogether. Because of these experiences, ICSC supports the following goals in changing wetland regulation:

1. In attaining the national goal of "no net loss of wetlands", federal wetlands policy should ensure the

prompt approval of projects which provide both environmental and socioeconomic benefits by removing or reducing delays, uncertainties, and inequities in the wetlands permit process.

2. Procedural reforms should be made regarding timely permit decisions, early economic determinations, and other measures regarding permit review and timetables.

3. Substantive reforms should be made to take into account the value and functionality of wetlands, to limit the demands of federal agencies for disproportionate amounts of mitigation based on the value and function of the wetlands, and to define circumstances, through congressional action, where the landowner would be entitled to compensation when a permit is not obtained.

A. Substitute for H.R. 3948

The wetland provisions of the Substitute for H.R. 3948 released by Chairman Mineta attempt to deal with many of the issues of concern regarding the current system of wetlands regulation and take a comprehensive approach to changing such system. A number of these provisions will have a positive effect on wetlands regulation. These include: the modification of the alternative site analysis in connection with a permit application to require that such review be commensurate with the severity of

the impact of the activity on the environment, consider the functions of the wetlands, to the extent practicable, and consider the relative importance of the wetlands in the watershed; the establishment of a deadline for decisions by the Corps of Engineers on completed individual permit applications of 90 days after the notice of the application is published (albeit with too many exceptions, no presumed granting of the permit if no action is taken and no protection against delay and inaction by regulators in determining that applications are "complete"); the specification of a well designed administrative appeals process to be adopted within one year; and the provision of positive incentives for state adoption of wetlands and watershed management plans.

However, many of the provisions of the Substitute do not sufficiently improve the system of wetlands regulation and, some, in fact, exacerbate current problems with the system. Some of ICSC's specific concerns about the wetlands provisions of the Substitute were set forth in the attached letter of May 2, 1994 from ICSC and a number of other concerned organizations to Chairman Mineta.

As indicated, some of these concerns include: problems with the definition of wetlands and the lack of a satisfactory process for resolving the controversy over the definition and description of wetlands; the failure to streamline the permitting process by continuing the EPA veto over individual permit decisions by the

Corps of Engineers; the expansion of the activities to be regulated; the undue restriction of mitigation banking; the failure to facilitate the delegation of wetlands regulation to the states and the maintenance of EPA's power to veto individual permit decisions even after state assumption of such regulation; the failure to include "due process" protections such as the mapping of Federal jurisdictional wetlands and providing notice to landowners and potential purchasers of land; the failure to adopt a wetlands classification system that distinguishes between wetlands based on their value and function; and the failure to establish a reasonable and effective process for providing compensation to private citizens who have lost the use and value of their property through wetlands regulation.

B. Bipartisan Alternative

In regard to wetlands, the Bipartisan Alternative includes the provisions of the H.R. 1330, The Comprehensive Wetlands Conservation and Management Act of 1993. The provisions of this legislation are consistent with ICSC's goals for changing the system for regulating wetlands, and ICSC urges that the Subcommittee model its wetlands provision on this Bill.

This legislation replaces existing §404 of the Clean Water Act with a new comprehensive wetlands protection program which would continue to require permits for certain activities

wetlands functions and values, procedural rights, and private property rights.

It expands the types of activities which would require a permit while exempting some wetland areas from the permit requirement. Agricultural, timber, aquaculture, and certain other such farming activities would be exempt as under present law. It builds on the definition of wetlands used by the Corps of Engineers, but would require that all three criteria (hydric soils, hydrology, and vegetation) must be met rather than just one and would tighten the use of vegetation criteria. Prior converted croplands are not included as wetlands.

H.R. 1330 classifies jurisdictional wetlands into three categories: Type A, Type B, and Type C, with Type A being the most ecologically valuable and Type C having the least wetlands values. It requires a ten year mapping process to be conducted by the U.S. Fish and Wildlife Service, with the concurrence of the Soil Conservation Service, and public hearings in the local areas covered by the mapping. This advanced determination (mapping) creates a rebuttable presumption that the land is wetlands, but the Corps would make the final decision on a case by case basis regarding each application during the permit process.

The Bill includes 5 criteria which must be met before land can be classified as Type A. If the property is classified as

Type A, it will receive the greatest protections. Classification as Type A may be considered a "taking" warranting just compensation. This would be the landowner's option, who may choose cash or some other type of compensation, such as land exchange, if agreed to by all parties.

It provides that Type B wetlands also require protection, but allows permits to be obtained for uses which may in some way alter the wetlands values. The Corps may require the minimization of impacts or mitigation through a number of methods, including land or cash contributions to a mitigation bank, individual project mitigation, contributions to the Land and Water Conservation Fund (to be used for wetlands acquisition) or some other contribution mechanism which may be created.

The legislation provides that Type C wetland are those with very low values and functions. Type C wetlands include isolated small acreage wetlands or wetlands in industrial or commercially zoned and developed areas which serve no wetlands functions. No permit would be required for such wetlands.

It requires general or nationwide permits to be issued for certain activities as provided under existing law and establishes a mitigation banking program to be developed on a state-by-state basis.

H.R. 1330 consolidates §404 program administration within the Corps of Engineers and encourages states and local governments to administer management programs.

It prohibits permit application fees and wetlands delineation fees from exceeding amounts set on January 1, 1990; and amends §502 of the Clean Water Act to include definitions of key terms such as wetlands, prior converted cropland, normal farming, and mitigation banks.

IV. Conclusion

ICSC believes that it is vital that the Congress move forward with changes in the Clean Water Act and the regulation of wetlands to address the serious problems with the law and related regulations that have become apparent over the years and which impose heavy burdens on those who come within their ambit, including private parties and the federal, state, and local governments. ICSC urges the Subcommittee to act promptly on this legislation and asks that its comments and suggestions be taken into account in such action.

May 2, 1994

The Honorable Norman Y. Mineta
Chairman, House Public Works and
Transportation Committee
2221 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Mineta:

We are writing to express our overall disappointment with the wetlands provisions contained in the draft amendment in the nature of a substitute to H.R. 3948, the comprehensive Clean Water Act reauthorization legislation, both of which you have sponsored. When the Public Works and Transportation Committee marks up H.R. 3948, we encourage you to support amendments that will truly make meaningful reform of the wetlands regulatory program.

The Section 404 permitting program was established in 1972 as a very specific point source regulatory program covering the "discharge of dredged or fill material" into navigable waters. The program was last debated extensively by Congress in 1977 when both the Senate and the House came very close to restricting the program to traditional navigable waters. Throughout its entire 22 year history, the Section 404 program has expanded tremendously through judicial decision and agency interpretation. Today, the program applies, not to the narrow activity designated by Congress in 1972, but to a broad range of activities that occur seventy-five percent of the time on privately owned property that the Federal government considers to be "wetlands" and, particularly in the last few years, has become extremely controversial.

The amendment in the nature of a substitute that was released on April 21st contains some positive provisions. The direction in Section 405(b) that the EPA modify the rigid requirements of the permit review process to take into account the severity of the impact of the proposed activity on the environment, the functions of the wetlands in question, and the relative importance of the wetlands to the watershed area is a step in the right direction. In addition, the administrative appeals process in Section 405(h) appears to be well designed.

When taken as a whole, however, the draft amendment does not sufficiently improve the Section 404 program and in fact exacerbates some of the current problems with the program. Some of our specific concerns include:

- **The legislation does not provide a realistic definition of "wetlands"** that are to be regulated by the Federal government and does not provide a satisfactory process for resolving the ongoing controversy over the definition and description of "wetlands."

- **The legislation does not streamline the permitting process by addressing the current problem of too many Federal agencies implementing the Section 404 program.** The Corps continues to implement the program in accordance not only with its own regulations, but also with regulations issued by the EPA. The EPA continues to have the power to veto individual permit decisions by the Corps. In fact, rather than take advantage of the opportunity to streamline the program, the legislation expands the role of both the EPA and the U.S. Fish and Wildlife Service. The effort to provide meaningful deadlines for action fails to achieve its objective due to the numerous exceptions to the 90-day deadline rule.

- **The legislation broadly expands the activities to be regulated under Section 404.** Section 405(d)(1) contains the broadest definition yet of activities to be regulated. In defining the activities that will be regulated, the definition employs broad terms like "any addition of dredged or fill material", "incidental to any activity" and "has or is likely to have".

- **The legislation is unduly restrictive with respect to the role of mitigation banking**, restricting these banks to a narrow class of "restoration and enhancement" projects only. Mitigation banking should be defined to include restoration, enhancement, creation and preservation projects, as allowed under the President's proposal, and should be defined specifically to include contemporaneous mitigation as well as advanced mitigation.

- **The legislation does not provide an appropriate role for the states and local governments in wetlands regulation.** Despite the fact that Congress directed in 1977 that the Section 404 program should be delegated to the states, only two states have received the program. Even when a state has assumed the program, the EPA retains the power to veto every permit decision made by the state.

- **The legislation fails to adequately address the needs of agriculture, specifically, farmed wetlands, prior converted cropland, normal farming practices and a role for the Soil Conservation Service.** In fact, this legislation, perhaps due to concerns over jurisdiction, contains fewer provisions addressing the concerns of agriculture than perhaps any other wetlands legislative proposal.

- **The legislation does not address the special needs of certain areas of the nation, such as Alaska**, where the dominant geographic feature is wetlands and where enormous wetland acreage is already protected through other Federal or state programs.

- **Despite the fact that the Section 404 permitting program is sometimes compared to zoning programs, this legislation does not include basic "due process" protections of zoning programs** such as mapping Federal jurisdictional wetlands, providing notice to landowners and potential land purchasers and other such elements that are fundamental to this type of land use program.

- **This legislation does not contain an adequate wetland classification system.** While some wetlands provide enormously important ecological functions and values, other are so marginal or plentiful that their ecological importance may not be as great as certain non-wetlands. National wetlands regulatory program requirements should be tailored on a nationwide basis to reflect the reality that "not all wetlands are created equal."

- **Finally, with 75 million acres of privately owned wetlands subject to this Federal regulatory program, this legislation perpetuates the conflicts over private property rights** and does not establish a reasonable process for providing compensation to private citizens that have lost the use and value of their property under this program. In fact, restating in statute the Fifth Amendment prohibition against unconstitutional takings may create, rather than resolve, uncertainty in this area of the law.

We agree that the nation needs a workable and reasonable program for conserving and enhancing our nation's wetlands, most of which are privately owned. However, neither the current Section 404 program nor the program contained in the draft amendment in the nature of a substitute constitutes such a program.

We continue to believe a reasonable Federal wetlands regulatory program is best represented by H.R. 1330, the Comprehensive Wetlands Conservation and Management Act of 1993, that was authored by Congressman Hayes and has been cosponsored by over 160 Members of the House. We encourage you to ensure that the Clean Water Act legislation that is reported by the Committee incorporates the concepts of H.R. 1330 in order to correct the problems with the current Federal wetlands regulatory program.

Sincerely,

AMERICAN FARM BUREAU FEDERATION

AMERICAN MINING CONGRESS

AMERICAN PETROLEUM INSTITUTE

AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION

ASSOCIATED GENERAL CONTRACTORS OF AMERICA

ASSOCIATED GENERAL CONTRACTORS OF MINNESOTA

ASSOCIATED PENNSYLVANIA CONSTRUCTORS

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COALITION OF COASTAL PARISHES (LOUISIANA)

COALITION FOR ENVIRONMENTAL AND ECONOMIC BALANCE

CONCERNED CITIZENS FOR PROPERTY RIGHTS

CONSTRUCTION INDUSTRIES OF MASSACHUSETTS

CONSTRUCTION INDUSTRIES OF RHODE ISLAND

D.C. ROAD BUILDERS ASSOCIATION

FLORIDA TRANSPORTATION BUILDERS ASSOCIATION

ILLINOIS ROAD BUILDERS ASSOCIATION

INTERNATIONAL COUNCIL OF SHOPPING CENTERS

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

LOUISIANA LANDOWNERS ASSOCIATION

LOUISIANA MID-CONTINENT OIL & GAS ASSOCIATION

MARYLAND HIGHWAY CONTRACTOR ASSOCIATION

MISSISSIPPI WETLANDS COALITION

NAIOP, THE ASSOCIATION FOR COMMERCIAL REAL ESTATE

NATIONAL CATTLEMAN'S ASSOCIATION

NATIONAL COTTON COUNCIL

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NATIONAL INDUSTRIAL SAND ASSOCIATION

NATIONAL AGGREGATES ASSOCIATION

NATIONAL ASSOCIATION OF HOME BUILDERS

NATIONAL ASSOCIATION OF REALTORS

NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE

NATIONAL STONE ASSOCIATION

NATIONAL WATER RESOURCES ASSOCIATION

THE NATIONAL WETLANDS COALITION

PENINSULA HOUSING AND BUILDERS ASSOCIATION

PENNSYLVANIA LANDOWNERS ASSOCIATION

TENNESSEE ROAD BUILDERS ASSOCIATION

UTILITY AND TRANSPORTATION CONTRACTORS ASSOCIATION OF NEW JERSEY

VIRGINIA PENINSULA CHAMBER OF COMMERCE

U.S. CHAMBER OF COMMERCE

WATER RESOURCES CONGRESS

May 24, 1994

Subcommittee on Water Resources
Public Works Committee
U. S. House of Representatives
WA D. C. 20515

Dear Chairman:

I would ask that this letter and the enclosed material be made part of the hearing record of 24th May on the reauthorization of the Federal Clean Water Act

The Seattle Corps District issued a permit to fill wetlands to the City of Kent for a water line project which crossed my property. My wetlands were not returned to pre-construction conditions but the Corps refused to enforce the law against the City of Kent because the Corps failed to properly condition the permit which was issued. In my view the Corps failed to consider my views as a private property owner concerned about protecting my wetlands and simply gave the applicant what they wanted.

For this reason I am opposed to H. R. 3948 because it weakens Section 404 of the Clean Water Act and would give more authority to irresponsible local jurisdictions such as the City of Kent. Local governments too often give into development pressures. We need a strong federal wetlands program as found in H R. 350, introduced by Rep Edwards of California.

Thank you for listening to a private property owner who supports strong wetlands protection. Please send me a copy of the hearing record when it is published.

Sincerely,

Charlie Kiefer

Charles Kiefer
10926 SE 274th St.
Kent, Wa 98031

Enclosures:

Kristina G. Tong memorandum, Sep. 1993
Letter to Colonel W. Cunningham, Oct. 1993
Seattle District Corps of Engineers letter, Dec. 20, 1993
Letter to Dean Falkner from Seattle District Corps of Engineers
Letter from King County Surface Water Management Division, Nov 30, 1993

SEP 30 1993

CENPS-OP-RG

MEMORANDUM FOR RECORD

29 September 1993

RE: Site investigation of a portion of the City of Kent's project

In response to several complaints from Charlie Kiefer, I inspected the portion of the City of Kent's project which is located south of SE 274th Street (the portion near Mr. Kiefer's property, see attached photos and map) on 21 September 1993. I was not able to go on site because the area was surrounded by barbed wire. I took photos of the site from the road. It appears that the area has been revegetated. I could not determine if the original grade has been restored as I had not seen the site prior to construction. However, the existing grade does not appear to have any adverse effects on the environment. Based on my observations and the inspection by Department of Ecology, I consider this portion of the City of Kent's project to meet the conditions of the permit and there is no deviation or violation of permit conditions.

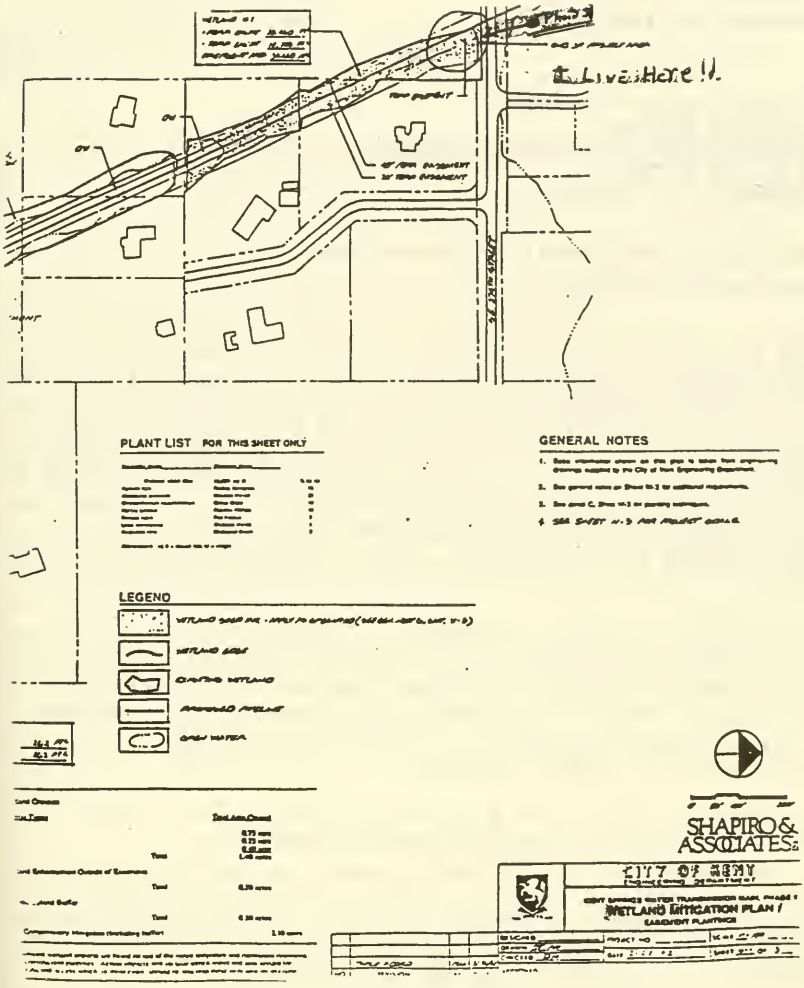
Kristina G. Tong

Kristina G. Tong
Biologist
Enforcement Section

Attachments

cc: Charlie Kiefer, 10926 SE 274th Street, Kent, WA 98031

City of Kent, ATTN: Dean Faulkner


PLANT LIST FOR THIS SHEET ONLY
GENERAL NOTES
LEGEND
SHAPIRO & ASSOCIATES
CITY OF ALBANY
WETLAND MITIGATION PLAN I

October 12, 1993

Colonel Walter Cunningham
District Engineer
Seattle District, Corps of Engineers
P.O. Box C-3755
Seattle, WA 98124-2255

Re: City of Kent permit NO. OYB-4-014362

Dear Colonel Cunningham:

This is a request for the Corps to reevaluate its decision to issue the above referenced permit. The City of Kent provided inaccurate and incomplete information to your office in its permit application resulting in unmitigated damage to my property in the project area. Specifically, the City of Kent identifies my property as a Class II wetland to be impacted by its project in its Jurisdictional Wetland Determination for Kent Springs Water Transmission Main. Phase II Project report, dated March 1991 (pages 8, 16, 19, 22, and figure 2a). However, the City of Kent failed to include my property in its Wetland Mitigation Planting Plans dated 2-22-92 (figure W-1) thus wrongfully excluding this property from mitigation requirements spelled out in the Special Conditions section of the permit.

Last August the City of Kent began construction of the Kent Springs Transmission Main Rebuild Project Phase II. This project left my back yard in shambles and greatly degraded a sensitive area. Since then, numerous inquiries have been made as to when restoration of my property would occur. Responses to these inquiries include:

1.) King County claimed that as Kent is the lead agency under SEPA, they would be the ones to contact.

2.) The City of Kent had promised that when it stops raining, and the area dries out, they would begin restoration.

3.) The Dept. of Ecology told me that the Army Corps has the responsibility to enforce water quality certification conditions. The Corps, however, claimed the inverse is true. Then, the DOE permit coordinator, Rick Vining, said that because my property was not shown as a wetland on the map circulated with the public notice of April 17, 1991, that they had no jurisdiction.

On 9-21-93, Kristina Tong from the Army Corps Enforcement Section responded to my complaints by making a site investigation. In her report (Memorandum For Record) dated 9-29-93 Ms. Tong concludes that the City of Kent has complied with the conditions of the permit and that no violations exist. Ms. Tong's conclusions baffled me as my property was still a mess and no restoration had

taken place. Upon examining the Wetland Mitigation Plan map (W-1) that Ms. Tong relied upon in making her determination, it suddenly became quite clear to me what had happened - incredibly, the City of Kent had omitted my property from its mitigation plans in spite of the undeniable impacts to it. Therefore, Ms. Tong is correct in claiming that the City of Kent appears to have met permit conditions, but, as previously mentioned, this permit was obtained with inaccurate and incomplete information - namely, the absence of mitigation for wetland impacts on my property.

After reviewing the file with Ms. Tong on October 4, 1993, I was told that it appears that the City of Kent was permitted to fill my property (wetlands) but was not required to mitigate the impacts. This statement is totally unacceptable - how can wetlands be filled without mitigation, particularly when the end result is degradation of personal property?

Had the public been able to properly comment on this permit application I believe the aforementioned situation would have been avoided. On April 17, 1991 the Corps issued a Public Notice of Application for the subject permit. Between April 17 and May 17 of 1991 nine requests were made for a public hearing challenging the adequacy of the mitigation plan submitted by the City of Kent. No public hearings were held. However, due to comments tendered by the U.S. Fish and Wildlife Service and the EPA, the City was required to prepare a more comprehensive mitigation plan. The public was not afforded the opportunity to review and comment on this new mitigation plan, and on July 6, 1992 the aforemenctioned requests for public hearings were denied by the Corps. The end result of this lack of public involvement in the permitting process is that the City of Kent was allowed to degrade a sensitive area without mitigation.

Earlier this year an attempt to submit a reasonable restoration plan to the City of Kent was rejected. As far as the City is concerned the permit is closed and restoration is complete.

In summary, I respectfully request that permit NO. OYB-4-014362 be reevaluated and steps be taken to insure the restoration of any and all properties impacted by this project. Enclosed for your review is documentation to support my claims. An opportunity to discuss a restoration plan with you would be greatly appreciated. Thank you.

Colonel Walter Cunningham
October 12, 1993
Page Three

Sincerely,

Charles Kiefer
10926 SE 274th St.
Kent, WA 98031
(206) 854-5889

Enclosures:

CC: (without enclosures)
Linda Storm, Environmental Protection Agency
David Frederick, U.S. Fish and Wildlife Service
Mary Ribland, Dept. of Ecology
The Honorable Patty Murray, U.S. Senator
The Honorable Jennifer Dunn, U.S. Congresswoman
The Honorable Mike Kreidler, U.S. Congressman
The Honorable Pam Roach, State Senator
The Honorable Kent Pullen, King County Councilman
The Seattle Times
The Seattle Post Intelligencer
The Valley Daily News
Wetnet

DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-2255

REPLY TO ATTENTION OF

DEC 20 1993

Regulatory Branch

Mr. Charlie Kiefer
10926 Southeast 274th Street
Kent, WA 98031

Reference: OYB-4-014362
Kent, City of

Dear Mr. Kiefer:

We have reviewed all the information regarding your complaint about the impact of the above referenced project on your property at Kent, Washington. You stated that your property was not returned to pre-construction conditions, specifically, a stream bed was not restored to pre-project [redacted].

Although restoration of impacted areas back to pre-project elevations was discussed in our Decision Document, the issued permit does not have a condition requiring topographic restoration. Therefore, we cannot require the City of Kent to restore the stream in that easement back to the same [redacted] as existed prior to impact. We can only require [redacted].

Based on several site inspections, we have determined that the wetland has been revegetated and that the site has been adequately restored in accordance with the issued Department of the Army permit. We will take no further action on this matter. If you have questions, please contact Ms. Kristina Tong or Mr. Jack Gossett, telephone (206) 764-3495.

Sincerely,

Ann L. Uhrich

for Thomas F. Mueller
Chief, Regulatory Branch

Copy furnished:

Dean Falkner
City of Kent
220 4th Avenue South
Kent, WA 98032-5895

DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-2255

REPLY TO ATTENTION OF

Regulatory Branch

Mr. Dean Faulkner
City of Kent
220 - 4th Avenue South
Kent, Washington 98032-5895

Reference: 0YB-4-014362
Kent, City of

Dear Mr. Faulkner

Inspection of permitted work and a review of our files revealed a deviation from the approved permit plans of the above referenced project. The beginning of the transmission line, north of Southeast 274th Street (known as Charlie Kiefer's property), was not identified on permit drawings as wetlands.

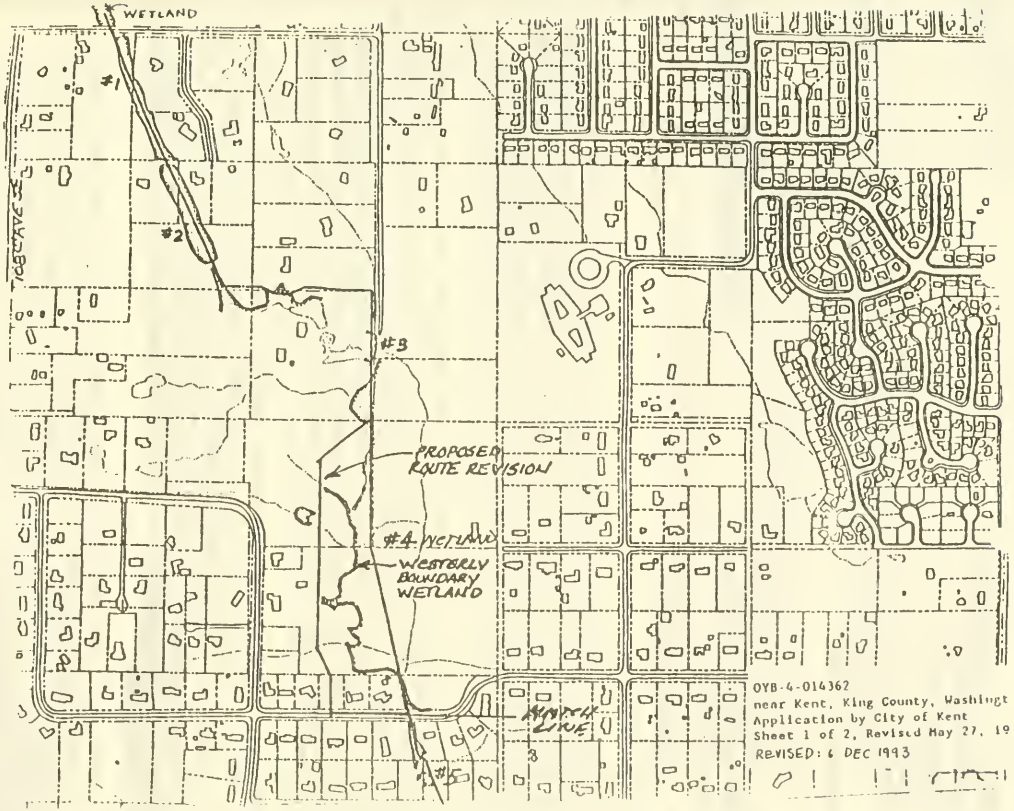
This deviation is considered to be minor because although this area was identified as wetlands on the delineation report submitted to the Corps at the time of permit application, permit drawings did not show the area as wetlands. However, you, as the applicant, must ensure that permit drawings include all areas in our jurisdiction impacted by a project. Because we consider this deviation to be minor, no legal action will be taken at this time. You are cautioned that any future deviations or violations may be referred for legal action, which could include an appropriate fine. A copy of your permit drawing has been marked to reflect the wetland area. This approved drawing supercedes plans authorized on July 8, 1992, and is enclosed for your information. If you have any questions, please contact Ms. Kristina Tong, telephone (206) 764-3495.

Sincerely,

Thomas F. Mueller
Chief, Regulatory Branch

Enclosure

CF: Mr. Charlie Kiefer
10926 Southeast 274th Street
Kent, Washington 98031


WETLAND
#1
#2
#3
PROPOSED ROUTE REVISION
#4 WETLAND
WESTERLY BOUNDARY WETLAND
#5
OYB-4-014362
near Kent, King County, Washingt
Application by City of Kent
Sheet 1 of 2, Revised May 27, 19
REVISED: 6 DEC 1993

King County
Surface Water Management Division
Department of Public Works
700 Fifth Avenue Suite 2200
Seattle, WA 98104
(206) 296-6519
(206) 296-0192 FAX

November 30, 1993

Mr. Charlie Kiefer
10926 Southeast 274th Street
Kent, WA 98031

RE: SWM-DIR File 93-0523

Dear Mr. Kiefer:

Thank you for your letter concerning the construction of the Kent Springs Transmission Water Main. Ruth Schaefer, Basin Planning Unit Senior Ecologist, has forwarded your letter to the Surface Water Management Division's Drainage Investigation and Regulation (DIR) Unit for a response. Please excuse our delay in responding in writing to your concerns. We have investigated the water quality problem you reported and have made the following determinations.

The oily film found on the water in the wetland/creek area of your property is caused by the natural breakdown of vegetation/organics. During construction of the water main project, the City of Kent used a large amount of straw mulch as erosion control. The deterioration of the mulch appears to have created high total organic carbon (TOC) levels, which would account for the white and brown foam at the downstream end of the cross-culvert under Southeast 274th Street. Barbara Badger, Metro Water Quality Inspector, visited the site and concurred with these findings.

The water exiting the water main valve casing was tested with an in-field test kit and low levels of chlorine were detected. To verify that this was not due to a leak or break in the water main line, we requested the City of Kent also test the water at the valve casing. Samples were taken and analyzed by Water Management Laboratories of Tacoma. Free Chlorine Residual was less than 0.1 [redacted] was less than 0.2 mg/l, which is within state water [redacted].

The contours of the construction site appeared in need of additional grading and channelization to comply with the conditions of the Environmental Impact Statement (EIS) in respect to restoring existing/preconstruction contours. [redacted]ndings were based on 1986 data from a survey completed by Eastside [redacted]nts Inc., a private engineering and survey firm that completed the [redacted]rty. These findings were directed to Chris Tiffany, Site Development Specialist with the Department of Development and Environmental Services (DDES), as the construction was being completed under an active grading permit. Any response to the EIS conditions will have to be addressed by DDES.

Mr. Charlie Kiefer
November 30, 1993
Page Two

Enclosed are the photographs you sent to Ruth Schaefer documenting the construction in your backyard. As discussed with Susan Clarke, DIR Unit Water Quality Engineer, we have kept photos that we feel adequately reflect your concerns surrounding the water main project.

The DIR Unit has found no enforceable violation of the Water Quality Ordinance. Therefore, we suggest you continue your conversations with the City of Kent, DOES, and the Army Corps of Engineers to find an amenable solution to the [redacted]

Thank you again for writing. If you have any questions or concerns, please call me at 296-8329 or Susan Clarke at 296-8311.

Sincerely,

Curt W. Crawford

Curt W. Crawford, P.E.
Supervising Engineer, Drainage
Investigation and Regulation Unit

CC:SC:bg
D/WP5:LT8

Enclosures

cc: Dean Faulkner, Design Engineer, City of Kent
Chris Tiffany, Site Development Specialist, Clearing/Grading and Sensitive Areas Section, Land Use Services Division
Jim Kramer, Manager, Surface Water Management Division
ATTN: Ken Guy, Assistant Manager
Keith Hinman, Manager, Basin Planning Unit
Ruth Schaefer, Senior Ecologist
Dick Thiel, Manager, Engineering and Environmental Services Section
Larry Gettle, Senior Engineer, Drainage Investigation and Regulation Unit
Susan Clarke, Water Quality Engineer

TESTIMONY OF
JAY J. VROOM
PRESIDENT
NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION

FOR THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON PUBLIC WORKS & TRANSPORTATION
SUBCOMMITTEE ON WATER RESOURCES & ENVIRONMENT

NONPOINT SOURCE POLLUTION ON AGRICULTURAL LANDS
MAY 24, 1994

Mr. Chairman and Members of the Subcommittee, I appreciate this opportunity to provide written comments on nonpoint source (NPS) impact of agricultural pesticides on surface water and groundwater quality as they pertain to the reauthorization of the Clean Water Act (CWA).

I represent the National Agricultural Chemicals Association (NACA), a not-for-profit trade organization of manufacturers and formulators of pest control products employed in agricultural production. NACA's membership is composed of the companies which produce and sell virtually all of the active ingredients found in crop protection materials and a large percentage of the formulated products registered for use in the United States.

We also represent an affiliated membership category of non-agricultural pesticides, which operates under the name RISE (Responsible Industry for a Sound Environment). Together, NACA and RISE address key pesticide issues, including the subject of today's hearing.

Agriculture, Nonpoint Source Pollution and CWA Reauthorization

Protecting our water resources is a critical role for our farmer customers. Agriculture, by necessity, involves the disturbance of soil and native species, the addition of various production inputs, and use of large quantities of water. Reconciling these requirements with the need to simultaneously protect water resources, aquatic species and the rest of the ecosystem has become one of the most important challenges facing agriculture.

We welcome this subcommittee's decision to hold an additional hearing on the reauthorization process, providing Congress with much needed perspective on the Mineta - Boehlert bill, HR 3948. Critical to these discussions is the recognition of the serious potential impacts on agriculture of the NPS provisions in HR 3948 and the components needed to more reasonably balance food production needs with those of environmental protection.

My comments today will examine three aspects of CWA reauthorization:

(I) agriculture and pesticides in the NPS pollution debate;
(II) state pesticide management plans protect ground water;
(III) important considerations for successful NPS legislation;

I. Agriculture and Pesticides in the NPS Pollution Debate

For twenty years, controlling toxics and water pollution has been primarily an end-of-pipe strategy, and clean water for human health and environmental reasons was a key driver. Many tens of billions of dollars were spent restricting releases to the environment. It was a successful effort - much progress has been made in water quality in America.

Now the focus has turned to nonpoint sources of pollution, and rightly or wrongly, agriculture is squarely in the spotlight. "Toxic" has been redefined to include a range of effects caused by clean soil sediment, nutrients and low levels of pesticides on various species of the food chain. "Impairment" has been redefined to include real and potential adverse impacts on water quality, aquatic species, habitat and other factors. And "navigable waters" has been redefined to include "groundwater", as well as many other waters no boat could ever navigate.

Both the House and Senate reauthorization bills have attempted to legislate complex bureaucratic programs to control nonpoint source pollution coming from agriculture and other sources. Those of us in agriculture have expressed significant concerns about these bills, for both HR 3948 and S 1114 would severely impact both existing and new crop and livestock producers. Production costs would increase, affecting what crops and production locations are economically, and production technology would be forced to change, influencing availability, quality and cost of food. Indeed, this reauthorization could well be as important to the future of agriculture as the Farm Bill, affecting present and future agricultural policy and competitiveness.

Today, expectations for environmental protection reach far beyond agriculture's traditional aggressive commitment to soil and water conservation. Many now speak of restoration and protection of water resources at levels approaching pristine conditions as though this could be accomplished easily, quickly and without significant social and economic sacrifice. It is not clear that the current situation justifies such a dramatic approach.

As CWA reauthorization has turned to NPS and agriculture, legislative language has been introduced that gives us pause, for it may move farmers into a regulated system of farming-by-permit by the end of the century. Enforcement measures, penalties and citizen suits are not part of the traditional concerns of producers facing the uncertainties of the typical growing season. And concepts such as integrated watershed planning, biodiversity protection, ecosystem criteria and national management measures are new concepts which everyone is struggling to understand, including ag producers.

Surely there are effective solutions to managing NPS runoff which producers can enthusiastically support, solutions which take a more individualized, performance-based approach. Recently the States and governors have developed model language which embraces the concepts agriculture believes are critical in any reauthorization process. We need to carefully consider which of these concepts are right for agriculture and how they may be used to reach agreement on Clean Water Act reauthorization.

II. State Pesticide Management Plans Protect Groundwater

The groundwater protection provision in HR 3948 has given agriculture, industry and many other groups particular concern. The Clean Water Act establishes programs for protection of the nation's surface waters. Protection of groundwater, on the other hand, is the province of other statutes that regulate activities having the potential for groundwater contamination. These existing State and Federal programs are sufficient to protect aquifers in a manner consistent with their intended uses. There is no demonstrated need for another federal groundwater law, nor a massive new regulatory program that would duplicate existing state or federal programs.

When the Act was first debated, groundwater was purposely excluded from the definition of "waters of the U.S." in recognition of State rights to deal with local groundwater issues. The proposed expansion of the Act to address groundwater would (a) preempt and federalize existing and planned state and local groundwater programs, (b) require major state expenditures on duplicative groundwater assessment and protection efforts, (c) institute an unwarranted National Pollutant Discharge Elimination System (NPDES) permit program for dischargers, and (d) jeopardize traditional agricultural and industrial activities due to undetermined linkages to antidegradation, enforcement and other provisions of HR 3948 and current law.

Protection of groundwater from agricultural pesticide contamination is already the subject/focus of several regulatory programs. In particular, EPA's October 1991 "Pesticides and Ground Water Strategy" was designed to help states protect groundwater resources through enhanced pesticide management practices in critical areas. Recognizing that labeled uses of some pesticides may be inappropriate in some highly vulnerable

locations or extraordinary situations, states may further restrict the use of those pesticides, through the implementation of State Management Plans, (SMPs) that might otherwise pose an unreasonable risk to groundwater resources. Through SMPs, States will address pesticide use in all areas, including urban and rural areas, golf courses, rights-of-way, and federal lands.

EPA intends to require SMPs for specific pesticides ("Pesticide SMPs") through a chemical-specific regulatory action, but has encouraged States to take the initiative voluntarily to develop generic SMPs which establish the framework for pesticide-specific SMPs. EPA has developed guidance to help states develop appropriate SMPs, integrate these with existing State groundwater programs, and establish the needed assessment, prevention, monitoring and response authorities to implement the expected pesticide SMPs. EPA approval of pesticide SMPs will be mandatory, and review of generic SMPs by EPA is designed to help identify and correct deficiencies, and allow time for consensus building and authority granting where necessary within a state.

EPA encouraged states to coordinate and, where appropriate, integrate all groundwater-related programs, enforcement authorities and statutes into a comprehensive program of strategic activities which address their distinctive local needs and conditions. For a number of states, SMPs will also include surface water and watershed protections. Overall, this means that SMP activities and prevention measures will be coordinated and integrated with programs such as:

- wellhead protection and sole source aquifer programs under the Safe Drinking Water Act (SDWA). These programs include State assessment of hydrologic vulnerability and sources of contamination around public water supplies.

- National Primary Drinking Water Regulations under the SDWA. EPA has developed enforceable MCLs for 18 pesticides for public drinking water systems.

- Underground Injection Control Program under the SDWA. This regulates injection well operations, including ag drainage wells and some irrigation return flow drains.

- Nonpoint source (NPS) programs under Section 319 of the Clean Water Act (CWA), in which states have developed management plans to protect surface and groundwaters from all types of ag and non-ag NPS pollution.

- State Ground Water Protection Grants under Section 106 of the CWA. These grants promote state inter-agency coordination for the assessment, classification, and protection of groundwater.

- Coastal NPS Programs under Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990, in which states are to develop State programs to ensure implementation of NPS management measures for "coastal" waters.

- USDA water quality and conservation initiatives, designed to provide farmers and land managers with the information necessary to voluntarily adopt BMPs.

Generic SMPs: EPA regional offices have been working with states to develop generic SMPs as a learning process prior to implementation of Pesticide SMPs. Although each state will prepare a unique SMP, to be a useful precursor to the Pesticide SMP required in 1996, they need to address 12 component parts: (1) state goals and philosophy, (2) roles and responsibilities, (3) legal authority available, (4) resources available, (5) assessment and planning activities, (6) monitoring to be conducted, (7) contamination prevention measures planned, (8) triggers and response mechanisms to be used, (9) enforcement mechanisms, (10 public awareness and participation, (11) information dissemination, and (12) records and reporting. Both generic and Pesticide SMPs will need these components, with additional chemical-specific data added to the generic SMP to tailor the specifics of a given Pesticide SMP. Pesticide SMPs will reflect each state's goals, protection philosophy and approach.

The EPA's schedule for SMP implementation is:

December 1993	SMP guidance released
March 1994	Guidance appendixes released for assessing aquifer sensitivity, groundwater vulnerability, monitoring procedures and response components of SMPs;
Summer 1994	Proposed SMP Rule to be issued (listing specific pesticides for which SMPs have to be developed)
Summer 1995	Final SMP Rule to be issued
Summer 1996	States submit pesticide-specific SMPs for approval, for those pesticides included in the Rule
February 1997	EPA Regions finalize SMP approvals
May 1997	End of three month phase-in of SMPs; enforceable

Consequences of Nonapproval of Pesticide SMP: EPA's concurrence with the generic SMP is not required, however, gaining it will facilitate approval of the Pesticide SMPs when they are required. If a State can't gain EPA approval of a Pesticide-SMP, legal sales and use of that pesticide within the state will not be permitted. Those chemicals are protected from national cancellation by States' assumption of management of the pesticide in sensitive areas to address their contamination risk.

State Prevention and Response Actions: Use of pesticide products will be directly influenced by the general management approaches states apply to prevent groundwater contamination. Generally these will be strongly influenced by the state's philosophy, but will also be influenced by EPA criteria. Preventive management approaches may vary based on groundwater vulnerability, groundwater use and value, and social and economic factors. The Prevention Measures may range from education efforts to use restriction or prohibitions in some areas. This will also overlap with the Response Measures when detections are found.

Both generic and pesticide SMPs must address the types of increasingly stringent preventive measures that a state will use in the absence of actual detections of pesticides in groundwater which the state has deemed to be valuable or vulnerable. The SMP must indicate the factors and rationale considered in choosing these measures and the triggers that would lead to a state's implementation of more stringent measures, including regulatory approaches such as enforceable use limitations, as detections of contamination increase toward the reference point.

When a pesticide has or is considered likely to reach MCL or other established reference point (EPA believes that reaching the point marks a failure of the water protection goal), the SMP must outline stringent actions to stop further contamination. These actions can range from enforcement actions to modification of the way a pesticide is managed.

III. Important Considerations for Successful NPS Legislation

For several years, NACA has participated in the Clean Water Working Group (CWWG), a coalition of 37 agricultural and soil and water conservation organizations representing American farmers, ranchers, livestock producers, water suppliers and conservation workers. I would like to comment on several of these considerations in the current context of CWA reauthorization.

1. Risk/benefit Considerations: Agriculture and NACA share the public's respect and concern for the environment and are committed to our role in its protection. However, it is essential that risk based decision making form the basis of clean water protection strategies. The Administration's Executive Order on Regulatory Planning and Review (E.O. 12866) recognizes the importance of risk analysis as a cornerstone of regulatory policy development.

Risk analysis is a way of organizing what we know about a particular risk; for each there may be several courses of action, each with its own costs and benefits. It takes into account the frequency with which adverse impacts will occur and the likely magnitude of the impact. It also provides a mechanism for estimating the relative costs, and it provides decision makers with the tools to make more informed, science-based decisions.

Such a risk assessment process, supplemented with an effective cost-benefit analysis, will help focus limited resources on essential programs and requirements, while also going a long way to foster awareness and understanding among agricultural producers.

2. Targeted Response: HR 3948 would apply mandatory NPS programs nationwide, with no targeting of resources and funds to impaired waters. While it is true that NPS programs work best when they are locally developed, and site-specific in design and implementation, severe resource and manpower limitations quickly appear when one considers the development and nationwide implementation of complex, multi-year programs. For this reason, it is most appropriate that NPS programs embodied in a reauthorized CWA be targeted to impaired watersheds that are identified on the basis of sound monitoring and scientific assessment of water quality.

3. Adequate Timelines: Identification of impaired waters, development and approval of NPS plans, coordination of efforts and funds, and effective installation and maintenance of NPS management measures will take almost a decade, barring severe climatic setbacks. After that, another five years probably will be necessary before significant water quality improvement will be observed. Thus, effective NPS policy should allow 10 years for planning and installation, and another 5 years for assessment of effectiveness.

4. Adequate Funding: Section 319 programs established by the 1987 Amendments to the Clean Water Act have been significantly underfunded. Through 1993 only $186.3 million was appropriated for this effort. Both HR 3948 and S 1114 recognize the importance of Section 319's site-specific approach to solving problems of critical watersheds and threatened ecosystems. We endorse the CWA's Section 319 as our national NPS policy and urge that the necessary funds be made available to the EPA and the states to strengthen and advance this valuable program.

5. Coordination with Existing Programs: Agriculture today faces a growing matrix of overlapping requirements dealing with water quality and aquatic species protection: Farm Bill programs such as Conservation Compliance, the Clean Water Act's wetlands provisions, FIFRA's state pesticide management plans, the Safe Drinking Water Act's groundwater protection programs, and the upcoming county-specific requirements of the Endangered Species Act, the Coastal Zone Management Act's enforceable management measures, and the upcoming Phase II NPS requirements of the Great Lakes Critical Program Act. In as much as several of these are the jurisdiction of this Committee, we support efforts to ensure that the goals, strategies and requirements, as well as timelines and funding, for these various statutes are carefully coordinated.

6. Improved Monitoring and Assessment: State 305(b) reports are today the principal source of data driving legislative and regulatory decision making on clean water. But they have been a highly-varied, statistical sampling of the waters, assessing only a small percentage of rivers, lakes, estuaries and other waters. In addition, these data are further limited because there are no set criteria under which states collect data. This hampers efforts to accurately identify impaired waters and apply risk-based prioritization of responses. We support a significantly increased attention to quality monitoring and scientific assessment of surface waters and groundwater.

It is estimated that there are 10.5 million rural domestic wells and 95,000 community water system wells in America. In recent years, EPA has conducted national surveys of these wells to determine the frequency and extent of contamination by pesticides and other pollutants. The recent EPA National Survey of 126 pesticides and breakdown products in drinking water wells nationwide demonstrated that 96% of our nation's rural wells are free of measurable traces of any pesticide. From this survey, EPA estimated that more than 99% of all wells in the country contain no pesticides exceeding EPA standards for lifetime, safe consumption in drinking water. With this and other groundwater baseline in place, it is important that continued assessment form the basis for risk assessment decisions.

7. Incorporation of USDA Expertise, Technology and Programs: There are no explicit roles for USDA in the NPS management provisions of HR 3948, nor is the Conservation Compliance Program recognized as a qualified alternative to mandatory management measures. We believe that USDA field and technical experience, and successful conservation and water quality programs must be integral parts of any NPS program in a reauthorized CWA.

8. Flexibility for States and Local Groups to Incorporate Innovation, Growth of Operations and Climatic Setbacks: As experience implementing the Conservation Compliance Program has shown, flexibility is essential given the highly variable nature of specific sites, resource availability and climate. Therefore, we support the inclusion of program choices, opportunities for innovation, and provisions for economic hardship waivers, appeal processes and renegotiation of plans if warranted.

9. Defer to FIFRA for Pesticide Use Provisions: The development and use of pesticides in America are highly regulated through FIFRA, which also grants EPA extremely broad authority to minimize pesticide contamination of ground water and surface water through product labeling requirements governing use. A series of management options are used by EPA, including: (a) requirement of regional or nationwide water monitoring studies; (b) reduction of product use rates, methods or frequency; (c) cancellation or suspension of product registration at the national level. The previously described state pesticide management plans are an integral part of this strategy.

It is appropriate that FIFRA, and not CWA, regulate pesticide data collection and use, and that ongoing water quality programs not be compromised by NPS management strategies of the CWA. FIFRA's required tests of toxicity, ecological effects and environmental fate provide the basis for effective pesticide regulation and water quality protection.

CONCLUSION

Mr. Chairman and Members of the Subcommittee, I appreciate this opportunity to provide written comments on nonpoint source (NPS) impact of agricultural pesticides on surface water and groundwater quality as they pertain to the reauthorization of the Clean Water Act (CWA). Agriculture and the pesticide industry recognize our roles in protecting America's waters from contamination and we will remain active participants in the reauthorization process, as we work to balance food production needs with environmental protection.

Water Environment Federation
Preserving & Enhancing the Global Water Environment

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Statement of the
WATER ENVIRONMENT FEDERATION

On
HR 3948, THE WATER QUALITY ACT OF 1994
And
REAUTHORIZATION OF THE CLEAN WATER ACT

Before the
Subcommittee on Water Resources and Environment
Committee on Public Works and Transportation
U.S. House of Representatives
Washington, D.C.

May 24, 1994

The Water Environment Federation (WEF) submits the following comments on HR 3948, the Water Quality Act of 1994. These comment summarize WEF's views on a number of provisions contained in the bill, as well as additional issues which need to be addressed during reauthorization of the Clean Water Act.

The Water Environment Federation is a not-for-profit technical, educational, and professional organization devoted to providing leadership and guidance in the preservation and enhancement of the global water environment. Founded in 1928, our more than 40,000 members include engineers, scientists, wastewater treatment plant operators and managers, and others working in state and local government, federal agencies, academia, industry, and private practice. In short, our members are the professionals involved directly in restoring and protecting the nation's water quality.

WEF supports reauthorization of the Clean Water Act and the overall direction of HR 3948. We believe it will help ensure continued progress under the Clean Water Act in preserving and improving water quality. WEF strongly urges Congress to reauthorize the Clean Water Act during this session of Congress. Water quality programs, including funding assistance, combined sewer overflow abatement, and water quality research will suffer unless consensus can be reached on reauthorization.

Our comments are divided into three sections: Provisions supported by the Federation; provisions with which we are concerned; and, additional issues which WEF believes should be addressed before mark-up. Section notations refer to the substitute version of HR 3948 put forth by Chairman Mineta on April 20.

1. PROVISIONS IN HR 3948 SUPPORTED BY THE WATER ENVIRONMENT FEDERATION

Title I - Research and Related Goals

* WEF supports the addition of pollution prevention, water reclamation, and beneficial reuse of effluent, residuals and by-products as goals of the Clean Water Act. These are increasingly important elements of water quality improvement programs and should be recognized as such by the Act. [SECTION 101]

Title III - Standards and Enforcement

* WEF supports the extension of time frames for testing innovative treatment technologies for meeting effluent guidelines from two years to three years. Up to three years may be needed to evaluate fully some technologies. [SECTION 301]

* WEF supports development of guidance on water quality standards for arid areas. Water quality standards should reflect the local and regional character of the water body. However, Congress should also consider authorizing development of criteria or guidance for other unique water quality conditions, such as those that occur during wet weather events. [SECTION 305]

* WEF believes nonpoint sources of pollution should be controlled through pollution prevention and use of Best Management Practices. These sources, by their nature, are diffuse and have site-specific, highly variable impacts on water quality. Nonpoint source pollution can best be addressed by utilizing practices which take these factors into account. [SECTION 313]

* WEF supports using a watershed management approach to water quality. Many water quality professionals believe this is the best approach to water quality management because it takes into account multiple sources of pollutants, environmental benefits, attainability, cross-media impacts, and naturally-occurring conditions. [SECTION 316]

Title IV - Permits and Licenses

* WEF supports the inclusion of the term "biosolids" in the Clean Water Act, as well as other provisions in this bill designed to encourage beneficial use of biosolids. These provisions will provide EPA and water quality professionals with much-needed additional tools to promote the environmental, agronomic and other benefits of properly managed and treated biosolids. [SECTION 406]

Title V - General Provisions

* WEF supports an appropriate level of funding for federal water quality programs. EPA in general, and the Office of Water in particular, is being squeezed by ever-increasing responsibilities and mandates while their financial resources are being reduced. [SECTION 505]

Title VI - State Water Pollution Control Revolving Funds

* WEF supports the continuation of federal capitalization grants to SRFs. Funding far above the SRF authorization levels set forth in this bill will be needed, however, to meet the $145 billion in water quality management needs identified by EPA in its 1992 Needs Survey. Additional sources of financial support need to be identified. [SECTION 605]

* WEF supports efforts to address the special needs of small or disadvantaged communities. This includes extending the loan payback period for hardship communities to 30 years, providing technical assistance and guidance for small communities on their application for financial assistance, and providing financial assistance to hardship communities. [SECTIONS 602, 603]

2. PROVISIONS IN HR 3948 OF CONCERN TO THE WATER ENVIRONMENT FEDERATION

Title III - Standards and Enforcement

* WEF believes the use of mixing zones is a scientifically sound technique which has proven effective in protecting human health and the environment. The current method of establishing mixing zones based on site-specific characteristics, for purposes of evaluating permit compliance, should remain a site-specific decision. [SECTION 304]

* WEF supports increasing the amount of data and information on which to base water quality management decisions. The methods used to sample water quality and collect data, however, are crucial to ensuring its scientific validity and credibility. Because environmental and financial policies and priorities are based to a large degree on assessments of water quality, any program which authorizes collection of information and data by private citizens must adequately provide for quality assurance and quality control measures to ensure the veracity of the data. [SECTION 307]

* WEF believes the standard-setting process, and environmental policy in general, must be based on the best scientific and technical information available. Therefore, we oppose replacing the "substantial evidence" standard for judicial review of toxic effluent standards with a standard which allows review only if the standard development process is found to have been "arbitrary and capricious." EPA should be held accountable for the scientific and technical basis of its work. Merely having followed proper procedure should not constitute de facto evidence

of the technical merit of a regulation. [SECTION 309(b)]

* WEF believes federally-set criteria should not automatically become enforceable standards. States need flexibility to implement numeric limits which recognize local and regional variables. [SECTION 309(d)]

* WEF believes EPA already has sufficient authority to enforce local pretreatment limits when a local authority fails to do so. The reasoning behind granting explicit authority to EPA for enforcing local pretreatment limits needs to be further clarified. Local authorities should remain, except under specific circumstances, the primary enforcement authority. [SECTION 310(c)]

* WEF supports requiring site-specific pollution prevention planning, but believes the focus should be on stimulating and encouraging pollution prevention through economic and regulatory incentives, rather than establishing an arbitrary threshold for which affected facilities would have to meet national requirements. Site-specific flexibility is needed to address each facility's individual needs. For example, pollution prevention requirements must take into account pollutants which can be treated by a POTW. Some POTWs actually are designed to treat certain industrial pollutants, and changes in the pollutant load in their influent can upset the biological treatment processes. [SECTION 315]

* WEF believes the requirements for the issuance of "regulations" to implement controls on combined sewer overflows (CSOs) is inconsistent with the agreement on CSOs which EPA and affected parties negotiated. EPA has promulgated a policy document providing guidance for addressing CSOs. This approach should remain the primary CSO management strategy. [SECTION 403]

3. ADDITIONAL ISSUES WHICH THE WATER ENVIRONMENT FEDERATION BELIEVES NEED TO BE ADDRESSED DURING CLEAN WATER ACT REAUTHORIZATION:

There are a number of issues not specifically addressed in HR 3948 which should be considered as part of any comprehensive Clean Water Act reauthorization:

* WEF believes specific reauthorization for basic (non-regulatory) water quality research is needed. Research is critical to better understanding water quality problems and developing improved clean-up and protection technologies and policies. Congress specifically should authorize an appropriate level of funding for research as EPA and the water quality community work together to meet the nation's water quality research needs.

* WEF believes provisions encouraging the development of innovative and alternative treatment technologies should be added.

* WEF believes setting priorities for action under the CWA and consideration of the cross-media impacts of pollution should be added as goals to the Act.

* WEF believes all new and revised water quality criteria, effluent guidelines, and pretreatment standards should be subject to peer review. Peer review is needed to ensure the scientific and technical soundness, as well as the credibility, of proposed criteria, guidelines, and standards

* In addition to giving states authority to provide targeted technical and financial assistance to small communities, WEF believes states should be given authority to allow alternative wastewater treatment and water quality management technologies to be utilized by small communities when doing so would provide an equivalent level of protection.

The Water Environment Federation appreciates this opportunity to provide input into the Clean Water Act reauthorization process. We support continuance of a strong and viable national water quality program, and would be happy to provide additional comments or technical assistance on proposed amendments to the Act. Any questions should be directed to John Thorner, Director of Public Affairs, or Steve Bagwell, Manager of Legislative Affairs at (703) 684-2416.

STATEMENT OF THE WESTERN REGIONAL COUNCIL

SUBMITTED TO THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

REGARDING H.R.3948, THE WATER QUALITY ACT OF 1994

MAY 24, 1994

The Western Regional Council (WRC) appreciates the opportunity to submit testimony regarding the Mineta substitute to H.R.3948, the Water Quality Act of 1994.

The Western Regional Council is an organization of the chief executive officers of approximately forty companies with significant business activities in the Western United States, including financial, manufacturing, utility, construction, mining, transportation, oil and gas, forest product, agriculture, accounting and other enterprises. The purpose of the WRC is to protect the quality of life in our region recognizing the need for both a safe and clean environment and a healthy economy.

WRC is concerned about a number of provisions in H.R.3948 which would have a particular impact on the West. We look forward to working with the Committee to address these critical issues as the Clean Water Act reauthorization process moves forward.

Ephemeral Streams and Arid Western Areas

Such factors as geography, climate, demographics, geology, hydrology and water rights separate the West from other regions of the country. For example, many Western states are dominated by ephemeral streams that are dry most of the year except in cases of occasional rainstorms. These ephemeral streams support a unique, but limited, biological community. EPA water quality criteria, however, have been established based on the characteristics of perennial streams, which support year-round, varied biological communities. Thus, these criteria may be inappropriate and may be significantly overprotective or significantly underprotective of the existing biological systems in ephemeral streams.

Section 304 of the Mineta substitute requires EPA to promulgate guidance to the states on developing water quality standards for arid areas within two years of enactment. This is an important first step toward recognizing that these factors present unique challenges for water quality management in the arid West. WRC recommends that H.R.3948 be further amended, however, to more adequately address these challenges.

WRC recommends that the House adopt provisions contained in Section 608 of S.2093 (formerly S.1114) which was reported out of the Senate Environment and Public Works Committee. WRC supports the Senate language because it includes provisions which (1) emphasize the primary role of states in developing water quality criteria appropriate to waters within their boundaries; (2) authorizes and funds research into the development of appropriate water quality criteria for ephemeral streams in the arid West; and (3) encourages research that will help to determine appropriate water quality criteria for ephemeral streams. The House may wish to expand the Senate definition of ephemeral streams, however, to ensure that the provision adequately addresses the type of stream in the arid and semi-arid West for which the provision was intended.

WRC is encouraged that a number of Committee members, including Representatives Coppersmith, Menendez and Shepherd have indicated an interest in offering an amendment regarding ephemeral streams during the Committee's markup of H.R.3948. We welcome

the opportunity to continue working with these members, and other member of the Committee, in fashioning an amendment that will appropriately deal with the water quality challenges facing the arid West.

Outstanding National Resource Waters

Current EPA regulations allow the states to designate high quality outstanding national resource waters (ONRW) and to limit development activities in order to protect water quality. ONRW designation is usually reserved for exceptional quality, pristine waters such as those in wilderness areas. The states have carefully and selectively used this authority because ONRW designation effectively prohibits any human activity in these areas.

The original version of H.R.3948 would have established a presumptive federal requirement mandating that states designate and implement a program to protect all waters within national parks and wilderness areas as ONRWs subject to the highest degree of antidegradation protection. This provision has been modified somewhat in the Mineta substitute. However, WRC continues to have concerns about the ONRW provisions because of the tremendous and disproportionate impact it would have on the West.

The Mineta substitute maintains the presumption that all waters within national parks or national wilderness areas are ONRWS. A state may refuse to make such a designation only if it shows that the designation would result in important social and economic harms and if the appropriate federal land manager has been consulted. EPA must also publish within one year of the enactment of H.R.3948 guidance to assist states in designating ONRWs, including guidance on when to allow short-term or temporary exceedences of water quality.

WRC believes that the states should retain flexibility in designating ONRWs since ONRW designation can severely hamper development of water resources. This provision would have a severe and disproportionate impact on the West because most national parks and wilderness areas are located in our region, and stretch across millions of acres. Those of us who live and work in the region are proud of the beauty that surrounds us and we strive to protect and preserve it. ONRW designation, however, would not only prohibit development of the water within parks and wilderness areas but will effectively prohibit development of water resources hundreds of miles upstream.

WRC believes that the states are in the best position to make decisions regarding the use and allocation of water resources. We recommend that the ONRW provisions be removed from the bill in order to maintain the states' current flexibility to best protect and preserve the water within their boundaries.

Groundwater

The Mineta substitute marks a significant departure from existing law by expressly extending Clean Water jurisdiction over ground water. Historically, ground water generally has not been considered to be "waters of the United States" and discharges to ground water have not been regulated under the Act. The Mineta substitute would require that all discharges

to the ground or to ground water be covered by an NPDES permit, if there is (1) a "direct hydrologic connection between the ground waters and surface waters;" (2) more than a de minimis quantity of pollutants will reach the surface waters; and (3) such discharges are not otherwise regulated under federal law.

WRC believes Clean Water Act jurisdiction should not be extended to ground water and that these provisions should be deleted, for a variety of reasons including the following:

(a) Because of the uniquely local nature of ground water, regulation of discharges to ground water is best left to the states, many of which have enacted or are actively pursuing the development of ground water protection programs. For example, Arizona has adopted an "Aquifer Protection Permit Program" which provides for stringent discharge limitations and technology-based standards to limit the discharge to all ground water (regardless of its connection to surface waters). There is no reason for the federal government to intrude on an area of regulation traditionally reserved to the states.

(b) by expanding the Clean Water Act into a ground water protection statute, EPA will be placing a significantly new permitting burden on itself and on authorized state programs. There are currently lengthy delays in obtaining NPDES permits; addition of ground water protection requirements will only add to the delay. In addition, EPA will be required to develop effluent limitations for discharges to ground water, which will require an inordinate amount of agency resources. (This has been the case with the development of effluent limitations for discharges to surface waters.)

(c) While the standard for establishing jurisdiction over ground water discharges (i.e., the "reasonably foreseeable and demonstrable direct hydrologic connection") initially appears relatively straightforward, the standard is likely to be the source of controversy for years to come. It may take years or even centuries for water within a given aquifer to reach a surface water body, but the connection could nevertheless be viewed as "direct". Given the way that such apparently obvious terms (such as "point source" or "navigable waters") have been stretched far beyond their common meaning by judicial and agency interpretation of the Act, it is inevitable that if jurisdiction is established in the Act over any class of ground water (i.e. only ground water with a direct connection to surface water), in practice, virtually all ground water will fall under the Act.

Mining Provisions

Sections 302 and 407 of the Mineta substitute would impose requirements on the mining industry that are unattainable and would effectively ban any ongoing or future exploration, mining, or beneficiation of metallic minerals. If these provisions are enacted, thousands of jobs would be lost and yet would result in little or no corresponding environmental benefit. WRC opposes these provisions because of the negative impact they would have on the economy of our region.

The mining industry is already subject to stringent requirements under the Clean Water Act, including the National Pollutant Discharge Elimination System (NPDES) permit program and the stormwater permit program. Additional mining-specific permitting requirements, as proposed in section 302 and 407, should not be imposed under the Clean Water Act. Section 407, for example, would establish a new, duplicative, federal permitting program for exploration, mining, and beneficiation of metallic minerals. This new permit would be required in addition to the discharge permits that are already required of mining operations under the CWA. Under this provision a permit would be required for exploration activities that never even touch the ground (eg. satellite reconnaissance and airborne geophysical surveys) and hence cannot disturb the hydrologic balance of an area. Permits would also be required regardless of whether exploration, mining, or beneficiation activities affect a water of the United States.

Under section 407 a federal mining operating permit could be denied if any contamination of ground water results from exploration, extraction, or beneficiation. Ground water contamination would be deemed to occur if there is any increase above background levels. This zero tolerance for ground water contamination would be an impossible standard to meet since all metallic mineral mining will entail some increase of contaminants including non toxic substances, as well as metals and other naturally occurring elements. The increases are often temporary and impose no significant adverse effect on human health or the environment. WRC believes these new requirements are inappropriate and are inconsistent with existing state ground water protection programs. WRC believes that the states should continue to have the authority to regulate and manage ground water resources within their boundaries.

The Mineta substitute also imposes additional requirements on the mining industry such as contingency planning to abate any contamination of groundwater, degradation of water quality, or damage to aquatic life; a prohibition against acidic or other toxic drainage; and a bonding requirement that would ensure financial responsibility for long-term treatment and perpetual compliance. Congress is currently addressing these issues in the context of mining law reform where the economic, social, and environmental implications of such measures will be taken into consideration. Additional measures are not needed to address these issues through the Clean Water Act reauthorization process.

Wetlands

WRC believes the Mineta substitute makes a number of positive changes to the nation's wetlands regulatory program such as the establishment of an administrative appeals process; permit deadlines; permit shields; and the use of mitigation banks. WRC believes further amendments are needed, however, including the need for a classification system to provide varying levels of protection depending on the function, value and abundance of wetlands; a mechanism to compensate landowners in exchange for restrictions on their ability to develop more valuable wetlands; and consolidation of the 404 program in one federal agency.

WRC believes several other clarifying amendments are needed. For example, WRC supports exempting artificial wetlands, such as those used in irrigation, from the 404 program. The exemption should be expanded, however, to include artificial wetlands used in industrial activities such as tailings ponds, storage ponds, etc. In addition, WRC is concerned about the proposal to regulate incidental discharges since it could severely expand wetlands regulation. Mining activities, for example, involve excavation which can result in incidental discharges into wetlands, such as dry washes. The incidental discharges result from drippings that fall from a dragline bucket as the overburden is removed. Such incidental discharges are merely the result of soil falling back into the area from which it came. Regulating these discharges would result in little or no environmental benefit and should be deleted.

Beneficial Reuse of Wastewater

WRC supports the goal contained in the Mineta substitute to encourage the beneficial reuse of water. This goal makes a great deal of sense for the West where water is such a scarce and carefully allocated resource.

Stormwater

H.R.3948 should include language clarifying the scope of EPA's effluent guidelines permit program and storm water permit program for discharges of storm water at active mining operations. Historically, process waste water and mine drainage have been subject to the effluent guidelines program and associated permits. EPA has deferred regulation of discharges of storm water runoff at mine sites, unless the storm water was commingled with process water or mine drainage, pending development of the storm water permit program.

Recently, EPA has proposed to address virtually all stormwater runoff at mine sites under the effluent guideline program. This means that for certain mines the storm water will either be classified as mine drainage, subject to numerical effluent limits, or as process waste water subject to a zero discharge standard. When EPA developed the numerical effluent standards and the zero discharge requirement for mines the agency did not take into account the total volumes of storm water runoff at mine sites and the cost of containing and treating such volumes of water. (EPA did consider the volumes of storm water that are likely to be commingled with process water and mine drainage). To impose a zero discharge requirement now on all storm water at active mines would be extremely burdensome economically.

An amendment should be included in H.R.3948 which provides that discharges of storm water, unless they are commingled with process waste water or mine drainage, will be subject to the storm water permit program, which requires the preparation of pollution prevention plans and the implementation of best management practices to reduce storm water pollution. Storm water that is commingled with process waste water or mine drainage will be subject to the current effluent guidelines permit program. The terms "process waste

water" and "mine drainage" should be defined in the statute so that they cannot be construed to cover all storm water falling on the active areas of a mine.

Mixing Zones

Mixing zones are areas at the end of the pipe where water quality standards do not have to be met. Applicable water quality standards must be met at the edge of the mixing zone, but do not apply within the zone. Without mixing zones, dischargers would be forced to meet extremely restrictive -- or technically infeasible -- water quality standards at the point of discharge. Section 304 of the Mineta substitute recognizes the use of mixing zones while at the same time placing some limitations on their use. As drafted, section 304 would restrict discharges of certain pollutants, however, without regard to the actual exposure. Under these circumstances, it is possible that discharges would be prohibited even there is little or no measurable adverse impact or potential exposure to aquatic or human life.

WRC appreciates the recognition of mixing zones, at least under some circumstances. However, we believe policy decisions of when and under what conditions mixing zones are appropriate should be left up to the states, since the states are in the best position to make such decisions with regard to waters within their boundaries.

Pollution Prevention Planning

Section 314 of the Mineta substitute requires "major nonmunicipal dischargers of pollutants" and "significant industrial users" to develop and submit to EPA or the state a plan to prevent or reduce pollution of navigable waters. These entities are defined as persons subject to the reporting requirements under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) and who discharge toxic chemicals in excess of 200,000 pounds per year to a publicly owned treatment works or directly to waters of the U.S. While this provisions is similar to the pollution prevention provision in S. 2093, as reported by the Senate Environment and Public Works Committee, the House legislation makes one notable improvement. It would require pollution prevention plans to prevent or reduce pollution of navigable waters by EPCRA reporting facilities that have Clean Water Act discharges. By contrast, the Senate legislation would require plans of EPCRA facilities regardless of whether they have a Clean Water Act discharge, and the plans would not be specifically directed to reducing pollution of navigable waters. This means that an industrial facility may be required to develop a pollution prevention plan even if it is a zero discharge facility for purposes of the Clean Water Act. WRC supports the House language and hopes that it will be adopted by the conference committee.

There is a growing number of states, including several Western states, that have adopted pollution prevention planning requirements. The House bill should avoid duplicating or superseding state requirements and should allow, where possible, the use of a state-mandated plan to satisfy the federal requirements.

Conclusion

In conclusion, WRC believes that, for the most part, the Clean Water Act has worked well for over two decades to clean up and protect the nation's water resources. H.R.3948 goes beyond current Clean Water Act jurisdiction in a number of areas, however, such as ground water, Outstanding National Resource Waters, and mining activities. If enacted, these provisions could have a very serious and detrimental impact on the West and the economy of our region while providing no real environmental benefit. In addition, there are a number of amendments regarding ephemeral streams in the arid West and stormwater provisions, which should be added to enhance and improve on the existing Clean Water Act.

WRC appreciates the opportunity to submit this testimony regarding the Mineta substitute to H.R.3948 and we look forward to continue working with the Committee to fashion a bill to reauthorize the Clean Water Act this Congress.

THE WATER QUALITY ACT OF 1994, AND ISSUES RELATED TO CLEAN WATER ACT REAUTHORIZATION

THURSDAY, MAY 26, 1994

HOUSE OF REPRESENTATIVES,
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION,
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT,
Washington, DC.

The subcommittee met, pursuant to call, at 9:40 a.m., in room 2167, Rayburn House Office Building, Hon. Norman Y. Mineta presiding.

The CHAIR. The Subcommittee on Water Resources and Environment will please come to order.

This morning in the words of someone very, very famous who said I am taking over, because my cousin is here, Leon Panetta, I have decided to usurp the Chair temporarily from Mr. Applegate so I could be here to have Mr. Panetta testifying here, and I do appreciate your taking the time to be here, and so I will yield to Mr. Clinger for the unanimous consent request and then go straight to our witness because we have a very long list of panelists and witnesses today. So Mr. Clinger.

[Mr. Mineta's prepared statement follows:]

OPENING STATEMENT
HONORABLE NORMAN Y. MINETA, CHAIR

COMMITTEE ON
PUBLIC WORKS AND TRANSPORTATION

HEARING ON H.R. 3948, THE WATER QUALITY ACT OF 1994
MAY 26, 1994

TODAY IS THE SECOND OF TWO DAYS OF HEARINGS ON H.R. 3948, THE WATER QUALITY ACT OF 1994, AND ISSUES RELATED TO CLEAN WATER ACT REAUTHORIZATION.

TODAY WE ARE PRIVILEGED TO HAVE AS OUR FIRST WITNESS LEON PANETTA, DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET AND OUR FORMER COLLEAGUE IN THE HOUSE. HE WILL FOCUS HIS REMARKS ON THE ISSUES OF TAKINGS, UNFUNDED MANDATES, AND RISK ASSESSMENT. MR. PANETTA WILL BE FOLLOWED BY A SPOKESPERSON FROM ORGANIZED

LABOR WHO WILL ALSO DISCUSS THOSE ISSUES. THEN WE WILL HEAR FROM REPRESENTATIVES OF STATE AND LOCAL GOVERNMENTS, AND FROM A PANEL ON LAND USE ISSUES.

I SPEAK ON BEHALF OF ALL MEMBERS OF THE SUBCOMMITTEE WHEN I STATE THAT I GREATLY APPRECIATE THE WITNESSES GIVING OF THEIR TIME AND EXPERTISE ON THESE IMPORTANT ISSUES. WITNESSES ARE REMINDED TO LIMIT THEIR REMARKS. IN VIEW OF OUR AMBITIOUS SCHEDULE THE ONLY WAY TO ENSURE ADEQUATE TIME FOR ALL PANELS WILL BE FOR WITNESSES AND MEMBERS TO STAY WITHIN A 5 MINUTE TIMEFRAME.

BEFORE WE BEGIN WITH OUR FIRST WITNESS, I YIELD TO MY DISTINGUISHED COLLEAGUE, THE RANKING REPUBLICAN MEMBER OF THE SUBCOMMITTEE, SHERRY BOEHLERT OF NEW YORK.

Mr. CLINGER. I have a unanimous consent request, Mr. Chairman, that a statement that I have be submitted into the record.

The CHAIR. Without objection, so ordered.

[The prepared statements of Mr. Clinger, Mr. Applegate, Mr. Tucker, Mr. Barcia and Mr. Hamburg follow:]

For Record

By Mr. Clinger of Pennsylvania:

MR. CHAIRMAN, I would like to draw the Subcommittees' attention to the excellent work being undertaken in the area of turfgrass management and its use in water and runoff filtration and purification.

Dr. Thomas L. Watschke, Professor of turfgrass management at Penn State University and a constituent of mine, has devoted his considerable talents to better understanding the relationship of turfgrass to properly applied pesticides, their solubility, filtration and runoff.

As my colleagues know, this is an issue of great interest to us as we consider Section 311, The Nonpoint Source Management Program of the legislation currently before us.

Dr. Watschke has concluded in extensive studies sponsored by the Environmental Resources Research Institute and Penn State for the Geological Survey of the U.S. Department of the Interior that, "...the impact of well managed turfgrass on water quality appears to be positive in nature. The results indicate that dense, high quality turfgrass, regardless of establishment method, affect the overland flow process to such a degree that runoff is insignificant."

His studies have gone on to demonstrate that the effect nutrients and pesticides applied to lawn-type turf have in runoff and leachate is negligible and, in fact, properly maintained turfgrass buffer strips can have considerable filtration benefits to minimize non-point pollution and toxic runoff at construction, agricultural and urban storm sewer sites.

I would like to ask unanimous consent, Mr. Chairman, that a recent article in the February, 1994 issue of TURF SOUTH on Dr. Watschke entitled "Environmental Good Guy" be reprinted as part of this hearing record.

And I would also like to ask my colleagues to consider the possibility of encouraging, as a cost efficient means of trapping and purifying ground water, well maintained turfgrass and sod. As Dr. Watschke has demonstrated, turfgrass can serve as a source for preventing runoff, and acting as a medium for water purification as it infiltrates into the ground.

Thank you.

PESTICIDES
by PATRICIA D. STROUP

Environmental Good Guy

Researcher says turf chemicals seldom pollute runoff

Dr. Tom Watschke, professor of turfgrass management at Pennsylvania State University has been researching pesticide runoff for eight years.
P. Stroup photos

Increasing public concern over water contamination and implementation of the Nutrient Management Act have many agricultural enterprises scrambling for solutions. But, turf growers are already in good shape and may even benefit from environmental concerns. These are the findings of Dr. Tom Watschke, professor of turfgrass management at Penn State University.

"In general," he said, "pesticides that have been properly applied to turf, have low solubility, and are chemically bound [illegible]oil and organic matter, don't move [illegible]n at all."

Turf provides a very dense ground cover. Compared to ground covers without thatch, turf has a greater capacity for absorbing and holding water and results in minimum movement off-site, he said. In fact, Watschke had to apply six inches of water per hour to test plots just to get sufficient runoff to examine.

"At three inches per hour," he said, "I couldn't get enough runoff to look at. How realistic is six inches per hour." Not very real."

RUNOFF SHOWS LITTLE CONTAMINATION

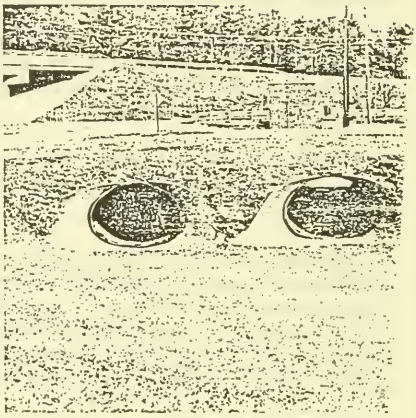
Even so, runoff from about a dozen test plots was nearly free of contaminants. Over 65 percent of the samples showed no substances at all, and the remaining indicated only trace amounts.

"The important thing to remember is that we are talking about parts per *billion*," Watschke said. "The generalization is that the detectability of a chemical, if it is there at all, occurs in the most recent sampling time frame, like within 24 hours after application.

"The fact that you find some traces with forced runoff directly at the curb is pretty safe. I don't think people are going to be drinking out of the gutter. If they are, they have more problems than just pesticides."

Even those samples, collected in a weir (gutter) straight off the plots and not filtered through turf, were within drinking water standards.

The author is a freelance writer.



A sodded swale such as this functions as an "infiltrating conveyance," Watschke says – filtering and cleansing ru[illegible]

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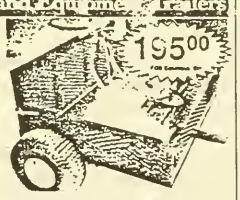

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Researching Pesticide Runoff

Watschke has been studying pesticide runoff and leachate in turf since 1986 at Penn State's Landscape Management Center in State College. His test plots include four 1,300-square-foot turf areas managed like fairways. Grasses there include perennial ryegrass and creeping bentgrass.

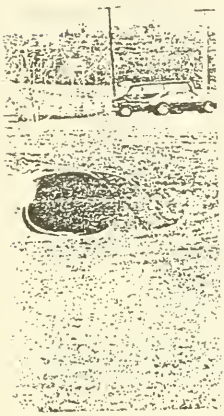
He also collects runoff from several lawn plots that contain bluegrass, fine fescue, and rye mixtures. The runoff from these sloping plots is collected in 23 foot long weirs and funneled into sheds where the water is continuously monitored for both quantity and quality.

Some of his research is on chemicals seeking reregistration and on products seeking new registration. But his work is useful to everyone from the pesticide applicator to local planning commissions, he said.

"The research reports have been reprinted multiple times because of the level of request," he said. "It's useful for golf course superintendents and lawn care operators because it gives them information to refer to when asked questions about off-site runoff. The information is being used by the practitioner, but also by regulatory commissions like planning and zoning boards."

And the importance of his research goes well beyond defending turf fertilizer and pesticide application. It is also pointing out the contribution of sod to actual pollution reduction.

"In agriculture," Watschke said, "the use of grass buffer strips to minimize nonpoint pollution from farmland is a common practice. The grass slows the movement of water, allowing eroded sediment to settle. This practice works well because contaminants are absorbed into the soil where they are degraded. All that emerges from the strip is just water. The transport of polluting substances is substantially reduced."



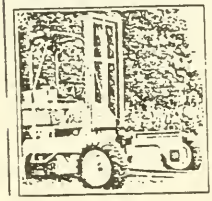
Turf In Storm Water Management

An emerging use of turf for pollution control may be through the U.S. Environmental Protection Agency's storm water management program. The program must be implemented by cities of

The tube Watschke is holding connects to an underground catch ba... that collects leachate from s... below grassroots.

> *"The grass slows the movement of water, allowing eroded sediment to settle."*

The Grasshopper Forklift



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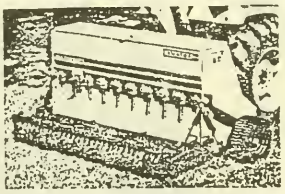

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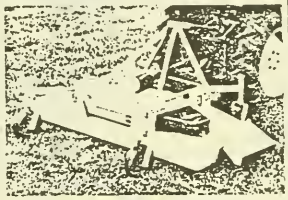

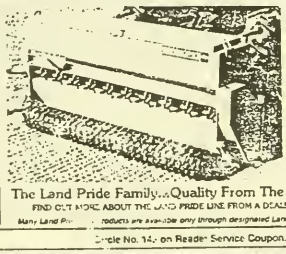

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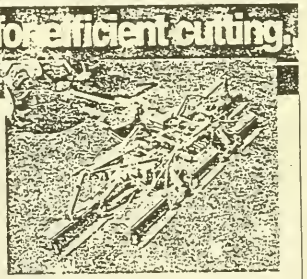

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over 100,000 people, which includes five municipal areas in Pennsylvania, to deal with storm water runoff.

"For the most part, water volume is now served by storm pipes," Watschke said. "Water leaving the area through those pipes is lost to that watershed forever."

By using grass strips, termed "infiltrating conveyances," a swaled area may be sodded with dense turf and used as part of a water management program. "Water is saved for the watershed and naturally filtrated.

"That water which goes beyond the infiltrating conveyance has had an opportunity to interact with a biological system, the grass," Watschke explained. "The water that emerges is in a purer state than when it entered the system. It's a good way to deal with heavy metal and petrochemical pollutants from streets and parking lots."

Simplistically, he said, an infiltrating conveyance is grass with an active microbiological population.

"That's the beauty of the soil microbiological population," Watschke said. "... degrade these materials. Nature pr... an excellent toxic cleanup method. ... one of the hottest areas in research now is the use of microbes in toxic cleanup.

> *"There should be little reason to subject the environment to improper use of pesticides. There's just no excuse."*

"It's a paradox to say that turf w... a problem as far as runoff quality ... cerned when it is a solution eve... else."

DON'T SHIRK RESPON... MANAGEMENT

But, Watschke says, the pot... ings on turf runoff don't excus... from maintaining good manage... tices.

"First of all," he warned, "ca... the labels for all pesticides ... know the appropriate rate. M... your equipment is function... and is calibrated properly. I... sion office in every state has ... erature, including videos, ... aids, available for people ... sprayers."

He recommends using a site specific approach. When working with very fine-textured soil, such as clay that has low infiltration rates or has been compacted by equipment, the potential for runoff is higher. This increases when the pesticide is relatively soluble.

"Low infiltration plus high solubility may be a problem," Watschke said. "It's up to the individual practitioner to identify the potential for movement. When the situation is sensitive, use those products that are tightly attenuated to soil and have low solubility. And, never apply to any soil that is saturated.

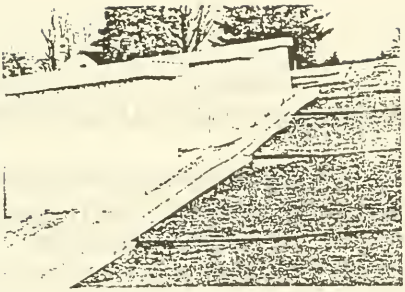
"Also, flat surfaces won't have as much runoff as slopes, but once you go over five percent slope, there's really not much difference."

Besides runoff, applicators also have to be aware of leachate, he said. Soluble materials should not be used in extremely sandy soils and be careful of irrigation practices.

"Use sound irrigation management practices," he cautioned. "Watch the rate, as well as the duration. Only irrigate the root zone. There's no point watering five feet down — there are no roots there. Watching irrigation is also important when the soil is compacted because it won't accept water, and the potential for runoff is greater."

Watschke recommends taking advantage of advice and information from extension offices, pesticide and chemical companies, and sprayer manufacturers.

"With the technology we have today," he emphasized, "we have no reason to be imprecise when applying chemicals. Accuracy can be finite. There should be little reason to subject the environment to improper use of pesticides. There's just no excuse." ■



Runoff from turf test plots is collected in weirs and funneled into sheds where it is monitored.

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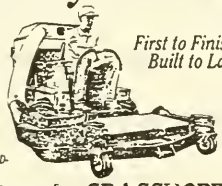

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OPENING STATEMENT
HONORABLE DOUGLAS APPLEGATE, CHAIR

SUBCOMMITTEE ON
WATER RESOURCES AND ENVIRONMENT
COMMITTEE ON
PUBLIC WORKS AND TRANSPORTATION

HEARING ON H.R. 3948, THE WATER QUALITY ACT OF 1994
MAY 26, 1994

TODAY IS THE SECOND OF TWO DAYS OF HEARINGS ON H.R. 3948, THE WATER QUALITY ACT OF 1994, AND ISSUES RELATED TO CLEAN WATER ACT REAUTHORIZATION.

TODAY WE ARE PRIVILEGED TO HAVE AS OUR FIRST WITNESS LEON PANETTA, DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET AND OUR FORMER COLLEAGUE IN THE HOUSE. HE WILL FOCUS HIS REMARKS ON THE ISSUES OF TAKINGS, UNFUNDED MANDATES, AND RISK ASSESSMENT. MR. PANETTA WILL BE FOLLOWED BY A SPOKESPERSON FROM

ORGANIZED LABOR WHO WILL ALSO DISCUSS THOSE ISSUES. THEN WE WILL HEAR FROM REPRESENTATIVES OF STATE AND LOCAL GOVERNMENTS, AND FROM A PANEL ON LAND USE ISSUES.

I SPEAK ON BEHALF OF ALL MEMBERS OF THE SUBCOMMITTEE WHEN I STATE THAT I GREATLY APPRECIATE THE WITNESSES GIVING OF THEIR TIME AND EXPERTISE ON THESE IMPORTANT ISSUES. WITNESSES ARE REMINDED TO LIMIT THEIR REMARKS. IN VIEW OF OUR AMBITIOUS SCHEDULE THE ONLY WAY TO ENSURE ADEQUATE TIME FOR ALL PANELS WILL BE FOR WITNESSES AND MEMBERS TO STAY WITHIN A 5 MINUTE TIMEFRAME.

BEFORE WE BEGIN WITH OUR FIRST WITNESS, I YIELD TO MY DISTINGUISHED COLLEAGUE, THE RANKING REPUBLICAN MEMBER OF THE SUBCOMMITTEE, SHERRY BOEHLERT OF NEW YORK.

Opening Statement of Congressman Walter Tucker
Subcommittee on Water Resources and Environment
May 26, 1994

I WOULD LIKE TO THANK BOTH CHAIRMAN APPLEGATE AND THE FULL COMMITTEE CHAIRMAN NORM MINETA FOR RECOGNIZING THE NEED TO CONDUCT THESE VERY IMPORTANT HEARINGS ON THE BILL TO REAUTHORIZE TO CLEAN WATER ACT. AS I HAVE STATED BEFORE, THIS BILL IS OF GREAT CONCERN TO A WIDE ARRAY OF GROUPS INCLUDING ENVIRONMENTALISTS, MUNICIPAL, STATE, AND FEDERAL GOVERNMENTS, SMALL BUSINESSES AS WELL AS INDUSTRY, NOT TO MENTION THE IMPORTANCE THIS BILL HAS ON THE INDIVIDUAL PERSON SUCH AS YOU AND I. WE HEARD ON TUESDAY FROM ADMINISTRATOR BROWNER, CITIZEN GROUPS, INDUSTRY, AND FROM PEOPLE WITH DIFFERING POINTS OF VIEW ON WETLANDS. TODAY AS WE CONCLUDE THESE VERY IMPORTANT HEARINGS ON THE REAUTHORIZATION OF THE CLEAN WATER ACT, I HOPE WE ARE ABLE TO BRING THESE VARIOUS INTERESTS TOGETHER TO SUPPORT CHAIRMAN MINETA'S SUBSTITUTE TO THE CLEAN WATER BILL.

I THANK TODAY'S DISTINGUISHED PANEL FOR COMING IN TO

TESTIFY THIS TODAY, I THANK MY COLLEAGUES FOR TAKING PART IN THIS HEARING AND I THANK BOTH THE SUBCOMMITTEE AND FULL COMMITTEE CHAIRMEN FOR HAVING THESE VERY IMPORTANT HEARINGS ON THE CLEAN WATER ACT REAUTHORIZATION.

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Opening Statement
Honorable James A. Barcia
Hearing of the Water Resources and Environment Subcommittee
on Reauthorization of the Clean Water Act
May 26, 1994

MR. CHAIRMAN, I would again like to thank you and Chairman Mineta for holding further hearings on this critical issue. When I came to Washington last year, I was congratulated by many on my assignment to this Committee. Each of these well-wishers commented not only on the importance of the work I would do under your leadership, but on this Committee's history of bipartisanship and consensus. Your willingness to listen to the concerns of our colleagues and the witnesses in these hearings confirms this. I can think of no piece of legislation on which this spirit of cooperation is more critical.

Mr. Chairman, I firmly believe that economic and environmental health are not mutually exclusive. We must make every possible effort to balance these concerns, or as Congressman Frank testified before this subcommittee last year, we risk losing the support of the public which is so critical to our success in meeting our water quality goals.

At a time when we are striving to cut the deficit, and therefore, the resources available to the government, I think we must carefully weigh the potential outcome of increasing EPA's responsibilities. As I expressed to Administrator Browner on Tuesday, I have been waiting since my arrival in Washington 17 months ago, and my predecessor waited before me, for approval of a waste disposal process that will address a grave pollution problem in my district.

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She commented that this problem related more directly to superfund. However, all water pollution, regardless of jurisdiction or program, is being used as a basis for enacting tougher standards in the Clean Water Act. If we allow large problems to slip by unaddressed, how can we justify asking lesser contributors to meet ever tightening standards.

When the federal government seems incapable of carrying out existing responsibilities, I feel that we must concentrate on maximizing the effect of existing law and resources. While such efforts as Watershed Plans, Pollution Prevention Plans, and the Non-Point Source Pollution program are worthy endeavors, we have an opportunity to enhance our efforts by relying upon the states, local governments and private sector at a time when they are clamoring for such responsibility. In so doing, we stand a better chance of meeting our water quality goals, and satisfy their need for more flexibility and autonomy.

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OPENING STATEMENT OF CONGRESSMAN DAN HAMBURG
PUBLIC WORKS AND TRANSPORTATION SUBCOMMITTEE ON
WATER RESOURCES AND ENVIRONMENT
HEARING ON CLEAN WATER ACT REAUTHORIZATION

May 26, 1994

Good morning Mr. Chairman, colleagues and witnesses. Thank you for this opportunity to address questions surrounding the re-authorization of the Clean Water Act.

When Congress passed the original Clean Water Act in 1972, it began one of the most ambitious efforts of the environmental age: to restore and maintain the chemical, physical and biological integrity of our nation's waters. Since that time, most of our efforts have focused on the cleanup of decades of industrial pollution and the improvement of municipal sewage treatment plants. As a result, considerable progress has been made in controlling conventional pollutants such as suspended solids, bacteria and oxygen consuming materials.

Unfortunately, much work remains to be done before we can let our guard down. Progress has been mixed in controlling the discharges of toxic pollutants, such as heavy metals, inorganic and organic chemicals, which have a greater potential to harm human health and the environment, even when present in minute amounts. And, our efforts to control pollution from diffuse sources, such as rainfall runoff, have only recently begun.

While it is apparent that there are a number of issues we must address as we re-authorize the Clean Water Act, I would like to take this opportunity to highlight a few of them.

Wetlands

Mr. Chairman, wetlands constitute some of our most precious natural resources. Long seen as waste lands to be drained and converted to a "more productive use," wetlands are now appreciated for their intrinsic value and the critical role they play in our environment when left in their natural state. The role of wetlands in providing wildlife habitat, assisting in flood control, reducing the level of pollutants in coastal waters and replenishing our groundwater supplies can not be overstated.

Unfortunately, our nation continues to lose approximately 300,000 acres of wetlands each year. Although Section 404 of the Clean Water Act addresses the protection of wetlands, it needs to be strengthened to prevent the further destruction of these critical habitats. We must bring our man-made laws in line with the laws of hydrology and ecology. Otherwise, the health of our people, our communities and our futures, along with the health of numerous wetland dependent species, will be jeopardized beyond our comprehension.

Mr. Chairman, because of my strong commitment to wetlands protection, I have cosponsored H.R. 350, the Wetlands Reform Act of 1993. This bill explicitly regulates activities such as draining, ditching, land clearing, and pumping, activities which cause the destruction of our wetlands. H.R. 350 streamlines the Section 404 permitting process by

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establishing a "Fast Track Team" to process applications dealing with wetlands of one acre or less within a 60 day period. This bill further protects farmers by maintaining the laws that allow special exemptions for agricultural uses of wetlands, and clarifying that artificial wetlands and abandoned cropland will remain free from regulation. Lastly, H.R. 350 promotes conservation and restoration by creating a Wetland Stewardship Trust which will encourage private holders of wetlands to preserve their lands as wetlands.

I firmly believe that as we re-authorize the Clean Water Act, we must ensure that wetland protection is one of our highest priorities. I encourage our Committee to include the provisions of H.R. 350 in the final form of H.R. 3948.

Nonpoint Source Pollution

Some of our most serious water pollution is a result of nonpoint source pollution, both surface runoff and groundwater seepage, from a variety of land activities. Runoff and seepage originate in rain and melted snow washing off city streets, farmlands, logged forests, and mining sites. Until now, the Clean Water Act has focused primarily on the control of point sources of pollution, allowing the various contaminants carried by polluted runoff to enter our rivers, lakes and coastal waters unregulated and untreated.

H.R. 3948 takes a good first step in addressing the problems of nonpoint source pollution by amending the Clean Water Act to require statewide, watershed-based approaches to controlling runoff from all nonpoint sources in each state. I would encourage the Committee to strengthen the nonpoint source provisions even further by requiring State programs to have a targeted watershed approach, thereby allowing the limited funds to be directed at the water bodies that have the most serious problems.

Mr. Chairman, I am concerned with the exemption clause in the Section 319 amendments. As this clause is currently written, it would give States permission to grant wholesale exemptions to "any category of land owners...class of activities, or areas" from implementing the necessary measures and practices. I believe this would allow a great deal of room for politics, rather than environmental concerns, to determine who gets the exemptions. I encourage the Committee to allow exemptions only for cases where it can be shown that the source has only a "de minimis" effect on water quality in the State. This will not only close the loopholes in the program as currently written, but will make it fairer to those parties that do not wield the political influence that would enable a few to obtain exemptions under the currently proposed provisions.

Groundwater Protection

The Clean Water Act currently focuses primarily on surface water, with goals for "fishable and swimmable" waters as well as provisions for "navigable" waters. As a member of this committee, I was pleased to see that H.R. 3948 includes some very important provisions for the protection of groundwater.

Although we cannot fish in, swim in, or even see groundwater as it moves slowly beneath our feet, half of the United States population depends on groundwater for drinking water supplies. Groundwater is often the only source of water in rural areas, and nationwide, 40% of all irrigation water is drawn from wells.

Mr. Chairman, your bill recognizes that certain point and nonpoint sources release pollutants into groundwater. Agricultural fertilizers and pesticides, nutrients and pathogens from animal waste, and industrial chemicals migrate through the soil into the underlying groundwater. Where this groundwater is hydrologically connected to surface water, it has

85-427 95 – 30

the potential to act as a source of pollution to our rivers, lakes, wetlands and coastal waters. If we are to pass a Clean Water bill that will truly protect these surface waters, we must ensure that we finally address the problems caused by the contamination of groundwater.

With the inclusion of groundwater under existing Clean Water Act programs, the current loophole that allows for surface water contamination via groundwater discharges will finally be closed. These provisions will allow us to have a national policy for integrated water protection that will facilitate the meeting of the Clean Water Act's intended purposes. I applaud your efforts to protect our nation's groundwater, and pledge to support the these provisions as we markup H.R. 3948.

Toxic Chemicals

One area that we must address as we re-authorize the Clean Water Act is the release of toxic pollutants into our nation's waters. Over the past few years, new data have linked some very serious human health and wildlife impacts to the exposure to toxic chemicals. Organochlorides are one family of chemicals that illustrate some of the potential threats posed by the release of toxic chemicals into our waters.

Even tiny doses of these chemicals pose threats to our health that are far-reaching. Studies have indicated that if present during the critical stages of fetal development, organochlorides can cause damaging biochemical changes that affect the development of the endocrine, reproductive, immune, and nervous systems. These changes have been associated with increased incidence of testicular cancer, dramatic reductions in sperm count, abnormal sexual development, reduced learning ability, and failure of the immune system.

Mr. Chairman, while it is true that there is much we do not know about the effect of these toxic chemicals on the development of wildlife and humans, the evidence we do possess demands that we act now to reduce these hazards. It is imperative that we use the information provided by ongoing studies as the basis for creating new and more effective approaches for dealing with these chemicals.

It is clear that the answer lies in preventing these toxic chemicals from entering the environment. The Administration has already called for a task force on chlorine that would develop a national strategy for substituting, reducing, or prohibiting the use of chlorinated compounds. H.R. 2898, the Chlorine Zero Discharge Act of 1993, goes further by amending the Clean Water Act to phase out over five years the discharge or release into water of any organochlorides formed as a result of chlorine-based bleaching in the pulp and paper manufacturing process, and I intend to offer an amendment that will incorporate the provisions of this bill into H.R. 3948.

Is this an unrealistic and unattainable goal? No. In my district, in the town of Samoa, California, the Louisiana-Pacific pulp mill is in the process of converting its manufacturing process to one that is chlorine-free. By 1995, the mill will produce paper and paper products without releasing any of the toxic organochlorides into the nearby lakes and rivers. This conversion can and will work, proving that the health of the environment and of our economy are not mutually exclusive.

Mr. Chairman, thank you for consideration of these concerns and for your continuing efforts to develop a comprehensive approach to improving the condition of our waters.

The CHAIR. At this time let me indicate that we are privileged to have as our first witness this morning, the Director of OMB, who really needs no introduction. He really deserves one, but because of the time element this morning we will just go ahead and go straight to your testimony, Mr. Panetta.

Please, if you would go ahead and proceed in your own fashion.

TESTIMONY OF LEON E. PANETTA, DIRECTOR, U.S. OFFICE OF MANAGEMENT AND BUDGET

Mr. PANETTA. Thank you, Mr. Chairman. I would ask that my testimony be made part of the record.

The CHAIR. Without objection.

Mr. PANETTA. And I will try to summarize as much as I can of it as I go through it.

First of all, thank you for the invitation to appear here and try to discuss with you some of the critical issues that will have a direct impact on the Federal Government, on State and local government, on the private industry, on families and individuals, and I really come here with an expression of commitment to work with you as we try to deal with what are some very tough issues as you try to work your way through the reauthorization of the Clean Water Act.

First of all, let me express the administration's strong support for the reauthorization of this act. It is extremely important that we extend this funding program to try to assist the State resolving funds so that they, in turn, can assist communities in the effort to clean up the Nation's water.

The specific issues you have asked me to address today, unfunded mandates, takings, risk analysis, are very important, important to your ability to move this kind of legislation forward, important to the administration, very important, I might say, to the President of the United States. As a former Governor, he is well aware of the impact that these matters have outside the beltway. He has spoken about them both publicly as well as privately. He has already acted within the Executive Branch to try to make those within the Executive Branch more sensitive to these problems.

As a former Member, I personally, as all of you today, personally witness the concerns that you feel within your own districts on this issue. Local governments that are burdened with mandates and few resources, citizens as well as businesses worried about costs, the need to try to develop a better partnership between Federal, State, and local government as you deal with these issues.

I can recall whether it was a disaster in my district we were impacted by the Loma Prieta earthquake, or whether it was dealing with problems of floods, or whether it was dealing with problems related to agriculture, that it was always essential if I was going to get anything done, to put everybody from the Federal, State, and local government in one room so that we could try to confront these issues, because there was so much concern, so much lack of communication between those various entities as they tried to solve these problems. So I am very familiar with the kind of concerns that all of you have with regard to these areas.

Obviously, there is a lot of rhetoric surrounding these matters, and the challenge, just as when it comes to the budget and dealing with the deficit, the challenge is to try to get beyond the rhetoric and try to find real and workable solutions that recognize the legitimate concerns that are here and then try to balance those concerns.

Unfortunately, what you are facing here is that we sometimes are trying to pit in the rhetoric the values that involve State and local sovereignty, private property concerns, rational decision-making against the need for legislative, and regulatory actions that oftentimes play a very crucial part in improving the lives of our citizens in terms of health and safety, protection of workers and the environment, there is an effort to pit one against the other.

But our responsibility, your responsibility as elected leaders in this country, our responsibility as an elected administration is to try to work to ensure that we deal with both concerns, and that we not sacrifice one for the other.

As we seek to improve the process to deal with these concerns, we must be sure not to adopt legislation that would increase the gridlock that the American people have been determined to eliminate. We must not make it impossible for the Congress or the President to do the work of the Nation.

The country needs and deserves a balanced approach to this issue that does not prevent us from fulfilling our responsibility to serve the public interest. And that is the challenge, and it is not an easy balance to find but that is the fundamental challenge that faces us.

In achieving that balance, the one thing that is clear for each of these issues is that there is not a silver bullet here. There is no one-size-fits-all solution to all of these concerns. These are matters that will take a lot of work, a lot of consultation, a lot of cooperation to try to resolve.

The good news is that we have already started this process. We have made significant real progress in each of these areas that I want to describe to you briefly, and we can and we will do more.

On unfunded mandates, we are well aware of and are listening to the deep-felt concerns raised by State, local, and tribal governments about complying with federally unfunded mandates. The reality is that many Governors, many government heads are working with increasingly limited resources. They are feeling a crunch and so it is more difficult for them to meet competing concerns.

Unfortunately, the Federal Government is also dealing with limited resources, and so we are feeling the same kind of crunch at the Federal level. So at a time when all of us are concerned about trying to deal with these problems, we have a resource crisis, both at the local and at the Federal level.

Where the Federal Government has provided direction or imposed requirements, the States, as well as the local and tribal governments, are the entities that, in most cases, have to tailor the implementation of Federal programs to serve local needs and priorities. Like the debate over so many issues today in this era of fiscal constraints, this has now become a debate over costs and resources.

The President believes that to solve these problems there has to be a partnership here. This is not a situation where one side can

point its finger to the other, where one can try to escape responsibility for the challenges that are here. It really does require a full partnership between the Federal, State, and local governments to try to deal with these challenges.

Within the Executive Branch, we have taken several steps to try to fulfill the commitment of the President to address the issue of unfunded mandates. Let me just describe two of those important steps which relate to executive orders that have been issued within the administration.

The first is the Executive Order on Regulatory Planning and Review, Executive Order 12866 that was signed by the President on September 30, 1993. It states that the American people are entitled to regulatory approaches that respect the role of State, local and tribal governments and it requires that whenever feasible, agencies are to seek the views of appropriate State, local, and tribal officials before, before, imposing regulatory requirements that might significantly or uniquely affect these entities.

Perhaps even more important, in developing regulations, agencies are expressly instructed to assess the effects of Federal regulations on State, local, and tribal governments, including specifically, specifically, the availability of resources to carry out Federal mandates.

Now, as appropriate, agencies are to seek harmonization between Federal regulatory actions and related State and local government functions. And, finally, agencies are to strive to minimize the burdens that uniquely and significantly affect those other levels of government.

It calls for quarterly meetings with representatives from OMB's Office of Information and Regulatory Affairs, or IRA, and representatives of State, local, and tribal governments, and we have had several meetings with local and State officials to try to focus on this problem.

Second, the President also signed the Executive Order on Enhancing Intergovernmental Partnership, Executive Order 12875, which was signed last October. This order asserts that the cumulative effect of unfunded mandates that strained State, local, and tribal budgets, and that complex waiver processes have hindered flexibility.

The President states that to the extent feasible and permitted by law, no regulation should impose a mandate on a State, local, or tribal government that is not required by statute, unless either, one, funds are provided by the Federal Government to pay the direct costs of compliance. The Executive Order basically states, again, that we are not to move forward unless either funds are provided by the Federal Government to pay the direct costs of compliance, or, two, the promulgating agency describes for OMB the extent of prior consultation with State, local, and tribal representatives; the nature of their concerns; any written communications received by government entities; and the agency's position in support of a mandate notwithstanding those expressed concerns.

So we are forcing the process to basically tell OMB as the regulations are going through, A, provide the funds to support this regulation, and if you are not going to provide the funds to support this regulation, you better tell us what kinds of consultation you went

through and you better tell us why you think we should do this notwithstanding the fact that we are not providing sufficient funding. So that for the public record and for public discussion, we know the issues before us at the time that these regulations are going through.

The Executive Order also instructed each agency to develop an effective process of meaningful and timely communication with local governments and State governments on regulatory proposals that contain significant nonstatutory unfunded mandates.

And to increase local flexibility in achieving these Federal policy objectives, the Executive Order orders each agency to develop a streamlined process for receipt and review of applications for waivers from statutory or regulatory requirements, and it requires these agencies to render these decisions on waiver applications within 120 days of their receipt.

I think, as a result of this, we have taken a number of steps, at least on the executive side, the nonstatutory side, which is an area, obviously, we can deal with through these executive orders, we have taken a number of steps to implement this.

On January 11 of this year, I sent a memo to all heads of departments and agencies suggesting that the consultation required by this Executive Order occur as early as feasible and involve not only local program officials that are responsible for administering the Federal program, but also those more directly responsible for the funding of compliance with these Federal mandates.

We have taken, as I said, a number of steps to try to improve the communications and consultations that go on as we develop these kinds of proposals. We have already begun, I think, to see some positive results from these effects. If you look at some of the regulatory proposals that are going through, we have increased State and local flexibility as a result of it.

There is a proposal by the Department of Health and Human Services, for example, related to the tracking of children in foster care. A Department of Education proposal provides more flexibility and more flexible regulatory standards in assessing children who receive certain services and the Environmental Protection Agency policy provides greater flexibility to municipalities in the control of certain sewer outflows. We will insist on providing such flexibility when it is appropriate in these kinds of regulatory proposals.

All of the above, as I said, relate to the nonstatutory side and we are making good progress here. We are reviewing, as well, proposals that flow legislatively through the Executive Branch that are to move here to the Congress on the same basis.

We have looked, for example, at the administration's Clean Water Act initiative. We have looked at the control of storm water runoff for large cities, and it incorporates a great deal of flexibility for storm water management programs. Our safe drinking water initiative provides greater funding and more flexibility as well.

So we are trying as we review each piece of legislation that goes to the Hill to review it on the same basis that we are required to review regulations. How does it impact on State and local governments? Can we provide greater flexibility? Can we provide greater opportunity to try to meet these requirements without the burden of an unfunded mandate?

While we have made some progress, obviously, Congress and the administration need to do more. Many in Congress have proposed, as you know, Mr. Chairman and Members, across-the-board, rather than specific, reauthorization legislation, which falls into three general approaches with regards to unfunded mandates.

The first requires the Federal Government to fund some or all of the costs to State and local governments for compliance with Federal mandates. Another approach is to require estimation of the costs of implementing a mandate before the decision is made to implement that mandate. And the third approach blends some of these two approaches with regard to planning and funding.

The administration is sympathetic to the concerns motivating these bills, as made obvious by our own Executive Order within the Executive Branch to confront these same issues. It is important, though, that the legislation that you move forward in this area go to the heart of the problem and not have the kind of adverse, unintended consequences that would further undermine trust in government.

What do you mean by that? In brief, my biggest concern is that as we try to lay out an information base for Members and as we try to estimate the costs and the unfunded mandates that are associated with legislation, which we think is justified, ought to be part of the legislative process, we ought not to create a bureaucracy or a maze of process here that suddenly then grinds everything to a halt as we try to move legislation forward. That is the concern.

We do support information being made available to Members so that we can hold Members' accountable for their decisions in this area. That is important.

We think that the bills that would require that information with respect to the extent of unfunded mandates to be provided to Members before they vote is a useful step. It is important, however, that the data provided be useful and that the process by which it is made, as I said, does not create gridlock. Not every bill should require this elaborate process or this elaborate analysis. For example, if we are going to go to CBO—as you may know, right now CBO is supposedly supposed to provide some of this information on bills. They do not. CBO testified it would be very difficult for them to provide this kind of information.

So one of the things we have suggested, as we have discussed with some of the authors of this legislation, is that committees are going to have to develop their own expertise to make some of these assumptions and then CBO can review those numbers. We have to be able to establish a base here. You cannot just suddenly send a bill over to CBO cold without getting some numbers within the committee process established.

The information that is generated, I think, on the bills, you have to again look at the impacts on the economy. There should be some flesh holds established.

In the Executive Order, we have a $100 million threshold established and we think that threshold should be consistent with regard to the legislative initiatives we have so that you are not looking at every bill, every resolution, every small approach that is suggested in every committee, which clearly is going to clog the process. So we would recommend very strongly that some kind of

threshold must be established and we would recommend the threshold in the Executive Order.

The information should also focus on State and local governments and the impact on mandates. Now, private sector costs or so-called macroeconomic concerns, I mean I do not want to underestimate the importance of also looking at the private sector, looking at the macroeconomic effects, but I think our first step here is to look at State and local governments' effects.

When you start doing private sector analysis, when you start doing macroeconomic analysis, you are asking for a bill that ultimately is going to be a foot and a half high with all of the different estimates there, and it is going to take months to estimate all of these impacts. So I guess my recommendation is that you really ought to focus first and foremost on the State and local government impact.

Also, we believe it is necessary to better define what is meant by a mandate. I mean, everybody in their own mind can define what they think is a mandate. Well, we need to have some kind of consensus about the definition of what a mandate is and what will work, what work must be done to establish the protocols, the databases so that CBO and the Members can carry out the multiple responsibilities that will be involved here.

We are also working with the authors of this legislation, so we have suggested several things. We have suggested a threshold. We have suggested that it be tied to State and local government. We have suggested that we have within the committees a base of information so that when you are dealing with the bill, you can establish cost estimates on unfunded mandates within the committee process that can then be reviewed by the CBO. We have suggested that we try to better define what a mandate is, and we think that these same kinds of requirements ought to be applied to the Executive Branch with regard to our process of reviewing these requirements.

It is a complex issue, but I want to tell you that in the discussions we have had with the authors of this legislation, particularly on the Senate side, because the Senate is moving towards a markup on unfunded mandate legislation, we think some time in mid June, our hope is to achieve a consensus bill.

We are talking to Senator Kempthorne, we are talking to Senator Glenn, and the other authors of the legislation, and we have had a number of sessions trying to move towards a consensus on this. We think we can get there but it is taking some work. It is taking obviously a lot of sessions between staffs to try to come to that point, but the best approach for us to take is to develop a consensus bill, and we think we are making some progress in that effort. As I said, the Government Affairs Committee, we expect, will mark up legislation. We think we can have a condition census bill by that time.

On takings; again, with respect to takings, the administration firmly believes that private ownership and the use of property is a cornerstone for this country's constitutional heritage and its historical tradition as well as our economic strength. First and foremost, the takings requirements of the Just Compensation Clause

of the Constitution must be recognized and must be fulfilled by the Federal Government at all times.

The administration strongly believes that the Federal Government has a fundamental responsibility to aggressively protect property owners from government action that imposes unwarranted burdens on private property, whether or not such action would result in a taking under the Constitution. In other words, we need to be aware of this. We need to be sensitive to this problem.

Again, this is something that I have experienced as a Member of Congress, and I know it is something that all of you experience in representing your areas. Again, this responsibility, however, cannot be fulfilled through a single action or piece of legislation. I think it requires constant vigilance by both Congress and the administration to ensure that the laws and regulations properly protect public health safety and welfare concerns and the rights of private property owners.

Before the committee takes up legislative proposals on this subject, let me urge you to step back and try to look at the broader concepts when it comes to the takings issues because this is not an easy issue to deal with. Jim Hayes, who has a proposal in this area, others who have proposals, I think know what I am talking about. This is not just a simple answer solution. You have to look at the broad context when you are talking about takings.

First, virtually everything that the government does, virtually everything the government does in some way affects the value of things as it tries to navigate a careful course in balancing the rights of private individuals and the public good. Almost everything we do in some way impacts on the value of things. Whether it is managing access to the airwaves, ruling on patents and trademarks, ensuring the safety of our foods, our drugs, in constructing and maintaining our interstate transportation network, protecting the integrity of our financial and banking system, almost every daily decision of government in some way affects the economic value of almost everything we touch in our daily lives. Let us understand that.

The question is not whether our activities affect value; they affect value all the time. The question is whether the activities in question properly protect both private rights and public obligations.

Second, several of the legislative propositions before you are very attractive in their simplicity. It is understandable why a Member would want to approach it on that basis. But they could raise serious fiscal and constitutional problems. Some establish compensation schemes which we think go beyond that required by the Constitution and in that they would require even greater compensation than currently provided by the law and the decisions in this area. Not only does this go beyond the Constitution but it would obviously create a tremendous taxation on the taxpayers who would have to pick up the bill. We are talking about, if we use a broad definition of takings here, we are talking about a very big bill we are going to be handing the taxpayers in this country. So while we are helping them on one hand, we are taking it with the other. Let us understand that consequence.

Gone is any notion of balance, which I think is essential. So I would urge the committee to be very cautious before choosing to embark on a simple approach here.

The implications are enormous. You are the Public Works Committee, you know exactly what I am talking about. I do not have to explain the impact that your decisions have in these areas.

Should we pay, for example, citizens, should we pay citizens in a community when we close a military base? Because you can bet your life that the value of their property is diminished when we close a military base. Nobody knows it better than me because I have been through a base closure in my district. It impacts on everybody, every business, every property owner. Are we going to compensate all of them for the impact of that decision? That is the kind of question you have to ask yourself.

Second, when a highway is constructed, even if it does not destroy the view, if it just interferes with the view of somebody, are we going to compensate everybody whose view is interfered with in the process of building a highway or an interstate? What about adjacent property to a Superfund site? Obviously, it impacts on their view. Are we going to compensate all the people in the area near a Superfund site?

Those are the kinds of questions you need to ask yourself. If a federally licensed activity diminishes a person's livelihood, a fisherman, for example, impacted by decisions, myriad of decisions that impact the fishing industry, are they going to be compensated? The potential cost implications of such policies are enormous and virtually impossible to meet on the current and future budget constraints that face us. So those are some of the questions I ask you to consider.

We have, on this basis also consulted some Members, particularly on the Senate side, when they were dealing with the Safe Drinking Water Act last week. I think the discussions have been useful. What the Senate adopted last week does provide for a takings impact analysis. We worked with them with regard to that approach. It does require that the takings be in line with what is required by the Constitution. We think that is an important step in the right direction. We still have some serious concerns about some of the provisions that were adopted on the Senate side, but it is my hope we should continue to consult together to try to find a way through this maze.

Again, as with unfunded mandates, there is no silver bullet approach to trying to deal with this issue. We have got to try to find the proper balance.

Last, on risk analysis, Mr. Chairman and Members of the committee, again, we are committed to sound and effective regulatory policy here as well. All of our Executive Orders require that we look at the risk analysis side of these issues.

We are, in fact, emphasizing the importance of developing good data on this approach. We have made a number of efforts to develop and implement risk policy through the Executive Branch.

The question of timing, I think, is an important one. While there is a lot of discussion and attention focused on risk analysis, particularly in the last two years, there is no agreement as to what

role it should play in public policy decision-making, and specifically when it is appropriate to use.

Nevertheless, we have also been in discussions with many Members interested in this issue and, again on the Safe Drinking Water Act, we consulted with a number of interested Senators. We worked with them. The proposal that was adopted by the Senate does adopt a $100 million threshold, which was incorporated in our regulations. We think that preserves the integrity of the Executive Order and makes it more workable.

The language also calls for a cost-benefit analysis to be tracked, to track with the Executive Order. We think that makes sense as well.

So we made good progress. We did not object to the final product that was offered on the Senate Floor. We think it could be made better. We think there is greater fairness and balance that could be established and we will continue to work in that direction.

So, Mr. Chairman, I want to thank the committee for this opportunity to testify. These are tough issues. They are not easy. And the interests need to be balanced. We cannot be satisfied with the status quo.

I am not here to tell you that we ought to defend the status quo, because there are some problems. At the same time, we cannot be panicked into a solution that creates even greater problems. The worst thing we can do is create a maze of bureaucracy in order to correct another maze of bureaucracy. That is the worst thing we can do. And so what we have to do is to try to find good process approaches here that can try to provide to Members the information base that they and the public need to make good decisions in this area. That is what we are all after and that is what the administration wants to work towards. This is a common challenge. I want to work with you in the efforts to resolve it.

The CHAIR. Thank you very much, Mr. Director.

As you heard from the bells, we do have a call to the House.

Mr. PANETTA. I know the bells.

The CHAIR. And we will take a recess at this point and come back and resume questioning at that point. Thank you.

[Brief Recess.]

The CHAIR. The committee will please come to order. I apologize, but I think in the essence of time, but with Mr. Boehlert not being here, I will go ahead and proceed.

Mr. Panetta, as you were saying when you were rudely interrupted by the bells, on Pages 5 and 6 you go into this whole issue of takings and your comments there are very helpful.

As you are very well aware, we do have several bills advocating that the Federal Government be required to compensate landowners who claim the value of their land has been reduced from what it would be without any wetlands regulation. Now, these include the Hayes wetlands bill, the Hayes-Shuster substitute and the Tauzin bill. All of these would get us into an area of requiring compensation where property values were reduced not from what the property owner paid for it, nor not what the property was worth in the open market, but from what it would have been worth, in someone's estimate, if there had been no public interest regulation.

What is the administration's position on that legal theory and what is the administration's position on the three bills that I did mention?

Mr. PANETTA. Well, again, Mr. Chairman, the administration, in looking to protecting private property rights at the same time that we implement these requirements are basically guided, and believe we ought to be guided, by the constitutional test with regard to compensation.

The proposals that you mention go beyond the level of compensation required by the Constitution and, for that reason, at least as they are presently designed, we would not be able to support them.

The CHAIR. If this theory of takings takes hold and spreads to other areas, what does that do to the Federal Government's ability to act to protect the public? For example, if we regulate the airlines to modify their aircraft for safety reasons, would we not have to pay them?

Mr. PANETTA. Under the broader interpretation, I do not think there is any question that, as I said, government almost in every area of decision-making, and Congress in almost every area of law making, in some way impacts on the value of something, somewhere, somehow. And as a consequence, I think if you take the broad interpretation, you are into a situation where you are going to be into wholesale competition or certainly wholesale litigation on this issue with the result being that, I think ultimately, it is going to create chaos.

We have a responsibility. You have a responsibility to try to deal with those kinds of issues. That is why we are elected. That is why we have government, is to deal with those issues. And in that process you have to find a balance between the interests of the public in general and the interests of a few individuals that may be affected. That is the nature of it, and I just think you have to be very careful that we do not prevent government from having to respond when necessary in those kinds of situations. That is why I think you need to find the right balance.

The CHAIR. You mention on Page 6 of your testimony relative to—you give the example of highway construction. Today, we pay for the cost of acquiring land that we need for highway construction. Under this new takings theory, we would also be vulnerable to paying compensation to landowners who felt their property values declined because the highway affected their view. Is that not going to make it more difficult to build highways or do other kinds of construction in the future?

Mr. PANETTA. I think there would be less work for this committee, that is for sure.

The CHAIR. Now, this also raises the question of things the Federal Government does which raises the property values of these owners. Should that be factored in?

For example, let us assume I own some low-lying property in Louisiana, just to pick a State. I bought the property at $1,000 per acre, it is now worth $3,000 an acre. I think I should be able to sell it to a shopping mall developer for $20,000 per acre but it is a wetland. Under these bills we have talked about, I suppose I could get $20,000 per acre even though I bought it for $1,000 knowing that there was Federal regulation for wetlands development.

Then on top of this, you add to the example that the Federal Government has spent billions of dollars to build the levies that keeps the Mississippi from flooding my property. And without those levies my property would not be worth $20,000 or $3,000 or even $1,000. Should the taxpayers be required to compensate me for wetlands protection and not get any credit, but for the amounts that they have already spent, I would not have any property worth developing?

Mr. PANETTA. Again, those are the kinds of complications I think you get into when you deal with this issue.

I strongly recommend to the committee that you have a 200-year history involved here with regard to compensation. Our forefathers dealt with this issue, the Constitution deals with this issue, the Supreme Court dealt with this issue. I would strongly urge you to try to stand by the tradition and the decisions that have been established in this area because they, that history basically, has tried to weigh these interests. The courts have tried to weigh these interests, and I think we have good guidance as a result of that, and I would urge you to stick to that guidance because it has really been pretty good in trying to deal with these issues.

The CHAIR. On Page 3 you talk about the Executive Order signed in October 1993. Under this Executive Order 13875, have there been waivers granted to the 100-day limitation? Have you had very many examples?

Mr. PANETTA. Not that we know of.

The CHAIR. And, also, in talking about having, let's say, legislative impact in terms of unfunded mandates, our practice has been to contact, let's say the Corps of Engineers, the Federal highway, Department of Transportation, and let the agencies do it. Are you suggesting CBO ought to be doing this for the Congress rather than our submitting to the agencies for their comment on the impact as far as, let's say in terms of the mandate issue?

Mr. PANETTA. No, I think the agencies should provide the numbers that you require as you develop the legislation. The one issue is whether or not CBO ought to review those cost estimates to determine whether or not they believe they are on the mark. And I think the bills that deal with unfunded mandates would basically provide for that review process. That is why I think it is extremely important that the bills that are handed to CBO under this kind of process not be handed to them cold. You need to have the numbers, you need to debate the numbers and decide whether you want to move the legislation. You cannot do, you cannot fulfill your responsibility as good legislators unless you have those kinds of numbers.

Members on the Floor need to be assured that CBO has, in fact, confirmed that this is the situation. That is the correction of some of these unfunded mandate legislation.

The CHAIR. That is what we do with the agencies right now.

Mr. PANETTA. That is right.

The CHAIR. Thank you very much. Mr. Boehlert.

Mr. BOEHLERT. Thank you, Mr. Director, for your testimony. I appreciate it.

The unholy trinity has got us all concerned, as you might understand. It is so easy to address questions like unfunded mandates

and risk assessment and takings that raise the hackles of all of us because of the specter of big government doing all these nasty things. But would you not suggest, as you look at this bill that we have, and when we deal with the subject of unfunded mandates, for example, what we are doing is trying to provide a lot more funding to address the mandates that are already there? Does that not seem to be a positive in a subset of a category that is a negative?

Mr. PANETTA. Well, obviously, I assume—well, let me be frank. I think in some of these areas, no matter how much funding we provide, I assume there would be citizens and local governments that would still be angry about some of the mandates. It is not just the question of unfunded mandates, it is sometimes the question of what is in those mandates that creates some hell. So let us face that issue, number one.

Number two, with regard to the unfunded side of it, and there are some legitimate concerns, as I said, about that, obviously, to the extent that we can provide proper funding and full funding for these areas, I think it would be much more helpful in terms of how State and local governments respond. We do have an obligation there, and I think we ought to try to provide as much funding as we can in these areas.

Unfortunately, as you know, we are in a situation where we are trying to reduce the deficit. We are in a situation where we are trying to discipline our own budget. So what that means is that Congress and the administration are going to have to make some tough decisions about what areas we ought to be into and what areas we should not be into. And if we decide we are going to be in those areas, I think we have to put resources into them.

Mr. BOEHLERT. I tried to help you save some monies in other areas and some other activities.

Mr. PANETTA. I noticed.

Mr. BOEHLERT. Of course, we are discussing the super collider.

But I was pleased with your response over on the Senate side in dealing with the Safe Drinking Water Act and we addressed the subject of risk assessment. What would be the impact if you had to have risk assessment on everything, starting from ground zero, rather than the $100 million threshold that I think you have reasonably acceded to?

Mr. PANETTA. I think you would have a huge bottleneck in which very little would move forward. If we are suddenly going to ask for a full analysis on risk assessment, we are going to ask for a full analysis on unfunded mandates, we are going to ask for a full analysis on takings, by the time—and you are going to do this on every bill, regardless of the threshold, what you are asking for is legislative chaos. If you think people are concerned about the way government operates today, enact some of this stuff and see the kind of bottleneck that ultimately develops in terms of the ability of Congress to move legislation forward.

Mr. BOEHLERT. So the worst case scenario would be no progress because everything would be tied up. But supposing we could get beyond that, could you even fathom what the cost would be of these risk analyses?

Mr. PANETTA. Well, it sure scares the hell out of me, because I have to tell you that when you look at some of the numbers in this area, it all depends, obviously, to the extent that—look, I think when you develop a mandate, and you are talking about new mandates, I think we do owe the American people the ability to put our money where our mouth is. I think we should put our resources there.

For example, on broad compensation, to the extent where we are going to compensate no matter what the impact is on value and some of these other approaches, I think it opens up an impossible approach that is I do not think we can sustain. We are trying to establish, as I said, better discipline with regard to Federal spending. We are trying to make sure we have a path that keeps the deficit moving downward.

I think the ultimate costs on this, if it is done on the broad approach as opposed to a tight approach, if it is done in the broadest approach, I think it not only is not required by the Constitution, but as I said, I think it would be extremely costly in terms of the budget.

Mr. BOEHLERT. CBO has said on takings it could cost as much as $45 billion.

Mr. PANETTA. We have had the same estimates in the Executive Branch.

Mr. BOEHLERT. Following up on the Chairman's colloquy with you, if this is shoved down your throats, and maybe you should look at the other side of the coin, talk about enhancements, so if you increase the value of property by some government action maybe you should require all the taxpayers to pay the government for the increased values of the property. You have to pay it somehow. We cannot keep going the way we are going. That is something for you to consider, Mr. Director.

Mr. PANETTA. What you are talking about is a jobs program for accountants, because we will be—if you think litigation is bad, it is going to look—litigation in the courts is going to look very simple compared to this process. Because if we get into a we have to pay them and they have to pay us and we are looking at values here and they are looking at values there, by the time you let the accountants and the number crunchers get through with this, you are asking for a government to basically get bogged down. I just think it is not the way to go.

Mr. BOEHLERT. I agree with that analysis, and thank you for your testimony.

The CHAIR. Mr. Applegate.

Mr. APPLEGATE. Thank you, Mr. Chairman.

Mr. Panetta, continuing on the unfunded mandates, or as we say maybe adequate funding for Federal requirements, has the OMB or any part of the Executive Branch done an analysis of Federal funding associated with Federal requirements?

There has been a lot of allegations that Federal resources to State and local governments have been declining very precipitously over the years. What is your view of this?

Mr. PANETTA. As part of the Executive Order, we have asked the agencies and departments to analyze existing mandates and to give us a report on which ones are in fact funded and which ones are

unfunded so that we can basically develop that kind of analysis and present it to you and to the country.

Mr. APPLEGATE. Let me ask you this. I know that there is a difference between what we on the committee have worked out in our bill and what the administration has recommended as far as funding the State revolving funds. And we are looking at $3 billion to begin with and building it up to $5 billion at $500 million a year over four years.

Do you or does the administration support this and, if not, why? This is monies that we are going to be putting out, and, hopefully, that we are not going to have to be putting out more. If we are going to be requiring more and more of the local governments, we have to have more and more of the bucks to be able to help them, and that gets into funding a lot of these requirements.

Let me give you a third question to that, depending upon your answer. If it does pass, would the President veto it?

Mr. PANETTA. Well, look, again, from my perspective and from the President's perspective, he has to weigh a series of priorities within a very tight budget. We are looking at a hard freeze for five years in the budget so that what we spend in 1993 is what we are supposed to spend in 1994, 1995, 1996, 1997, and 1998. To, therefore, fund priorities, we have to find other places to save the money and cut the programs. I mean, for example, we recommended in the budget that we cut 300 programs below the 1994 level. We recommended 1,818 terminations on programs. Those are the kinds of decisions that have to be made.

Now, within the context of those decisions, we think we have recommended the right number for the State revolving fund. I am sure the President would like to see more added there. I think all of us would. But in order to do that, we have to find some places to cut in order to make that happen. So I am not going to tell you that we would just obviously avoid consideration of a higher number if that is what you include in the authorization or the reauthorization of this legislation. But I also do not think we should make false promises to the public. We better be damned sure if you are going to provides a bigger number with regard to the revolving fund that we are going to be able to back it up in future budgets and that means, therefore, that we are going to have to find additional cuts in order to sustain that kind of number.

Mr. APPLEGATE. Does that mean if we did pass it, the President would veto it?

Mr. PANETTA. I am not going to say one way or the other what the President would do with regard to that issue. Let's see what happens at the end of the road.

Mr. APPLEGATE. The reason I bring all this up, is because back in the early 1980s we were funding the State revolving fund at somewhere around $2.5 billion, and it was really basically inadequate at that time and costs have risen and now we are down to, what, $1.6.

Mr. PANETTA. Yes, $1.6.

Mr. APPLEGATE. And to increase it up to $2 billion, and then we are going to throw more of these requirements at them and then you know what is going to happen back in the local level, they are

just going to be ticked off totally and start yelling about more Federal requirements.

I think it is our responsibility to be able to—and I don't know where we find the money in order to stay within the budgetary requirements, but I think we are going to have to do it because I think this water thing is probably the most important thing that we are looking at this year outside of health.

Mr. PANETTA. I do not disagree with that priority. I don't think the President would disagree with that priority. I think the more important question is if we are going to put a larger number here, we had better be very sure about whether or not we are going to be able to deliver on that in terms of future budgets.

Mr. APPLEGATE. Okay, thank you very much. Appreciate it.

The CHAIR. Mr. Shuster.

Mr. SHUSTER. Thank you very much, Mr. Chairman. Certainly glad to welcome my good friend, Mr. Panetta, to the committee.

Would you agree, Mr. Director, that there are new unfunded mandates in the Mineta-Boehlert proposal that we have before us?

Mr. PANETTA. On the clean water proposal?

Mr. SHUSTER. Yes, on H.R. 3948.

Mr. PANETTA. There are mandates that are there. I guess whether the full funding is there remains to be seen as it goes through the process, but clearly there are additional mandates.

Mr. SHUSTER. And the information I have on funding is that the Clinton administration, this has already been alluded to, has requested $1.2 billion for fiscal year 1994, whereas the Mineta-Boehlert bill requests $3 billion in 1995, Clinton in 1995 is $1.6, or about half that.

It is also very significant, I think, to note that the so-called bipartisan compromise, which many of us support, actually endorses the higher funding in the Mineta-Boehlert bill. We agree that more money needs to be spent. So while we disagree on many provisions between the bipartisan compromise and the Mineta-Boehlert, we do not disagree on the level of funding.

We believe, however, in the bipartisan compromise, that even without any new mandates, the mandates in existing law are so onerous and the needs are so great that we need that additional funding just to comply with the mandates that already exist.

Do you believe that the Clinton proposal of $1.2 billion in 1994 and $1.6 in 1995 is adequate to deal with the all of the mandates which will remain in the law, plus the existing mandates?

Mr. PANETTA. Well, what we tried to do, Congressman Shuster, is to strike the right balance between what we thought we needed with regard to clean water and what we could afford. And in the context of the budget that we were working with, that is why we came out with that number.

As I said, I think all of us would like to see additional resources committed to this area, but I do not think we should do it in a vacuum. If you are going to tell me you want to take it to $3 billion, then I guess what you need to tell me is what are we going to cut either in the public works budget or elsewhere in order to get there.

Mr. SHUSTER. Well, the first thing I would suggest is that if we do not have enough money to fund all the mandates we are laying

on the State and local government and private sector, then we should not lay those mandates on them. We should only mandate that which we can pay for. Do you think that is a good principle?

Mr. PANETTA. I think it depends.

Mr. SHUSTER. I see your staff smirking and shaking their heads no. Does that reflect your view?

Mr. PANETTA. I don't pay a lot of attention to my staff.

Mr. SHUSTER. I was just informed that the gentleman I referred to is not on your staff.

Mr. PANETTA. You have to be careful looking at audience reactions.

Look, I think you understand it depends on the particular mandate that you are dealing with. There are obviously some mandates that are so important in terms of the health and safety of the American public, that whether or not we have fully funded it, it is still important to try to deal with that. And I do not think we can ignore our responsibility to health and safety just by simply saying, well, we have not fully funded it.

Second, I also do not think we should take the approach that when we deal with these issues that State and local governments are off the hook. They have some responsibility here as well. It is not enough for State and local governments to just simply say, oh, you know, just because the Federal Government does not have enough funds for clean water that we ought not to clean up the water.

Mr. SHUSTER. Well, I think you have touched on an extremely important point which is that we should evaluate the seriousness of the problem and the mandate related there to.

For example, very specific example, in your own State of California, EPA's biomonitoring, the whole effluent toxicity tests and enforcement actions can be, and I believe have been, extremely and unreasonably expensive to municipalities in city of Los Angeles. Up to $25,000 a day is the amount. EPA is suing the city for not meeting EPA's strict pass-fail biomonitoring test. And why did they fail the test? One fish died over a 90-day testing period. Now, that seems to me not to be reasonable. It is bureaucracy run amuck, and it is the reason why we need to bring about some substantial reform.

But I embrace 90 percent of the words you have said today and now I hope, reflecting back on John Mitchell's famous line, do not listen to what we say, watch our hands. I would hope both the administration and the Congress would put their actions where their mouth is.

Mr. PANETTA. Congressman Shuster, I want to assure you that we want to work with you in this effort. I am not going to defend everything that the bureaucracy does or does not do out there. As I said, as a Member of Congress representing a district, I experienced the same problems.

But I do want to tell you of the commitment of the administration to try to confront this issue, because the President as a former Governor, more than a lot of other people, understands what the problem is and is trying to deal with it from the inside, and we are trying to make progress on it, and I want to work with you to try to deal with the legislative side of it as well.

Mr. SHUSTER. Thank you very much.

The CHAIR. Thank you very much. Mr. Hayes.

Mr. HAYES. Thanks.

Leon, we really miss you around here, so whatever it is you do now, I hope you enjoy it.

Mr. PANETTA. There are days.

Mr. HAYES. I will make you a promise, though, Leon, and you made the statement, but I assure you there is nothing you, me, or the Chairman can do to further undermine trust in government. That I absolutely guarantee you.

In particular, I am going to dwell upon the takings issue because of the constraint of time, and not because the other two are not as important, and, in fact, they interrelate because if we do not handle takings correctly, they can become an unfunded mandate, which is what the Governor has pointed out.

But first the mechanism. In every example you gave, talking about diminishment in value, in every example you gave there was a justification of public purpose. The only example that did not have a visible justification, such as a base closing you can see, would be something like wetlands. In most of the examples that are obvious. In coastal wetlands and marshes, we are not going to have a problem understanding the Federal role or what occurs. It is when you end up in this court of claims cases, where people had no possible way of believing or knowing that what they owned could fall under the Federal jurisdictional guidelines that it becomes a taking by diminishment of value, and those courts so held.

The point I am making is would it not be all right with the administration if we provided individuals with a low cost option of an administrative hearing rather than a quarter of a million dollar alternative to go to a Federal Court, like these folks had the money to do in the three or four cases?

First of all, would the administration oppose an administrative procedure such as suggested by Chairman Mineta in his wetlands section to allow folks access to a process that does not break them with attorneys' fees and other transaction costs?

Mr. PANETTA. I don't think there is any question we would want to work with you on developing perhaps some approach along those lines. I think it does make some sense to look at an administrative process here rather than as forcing people into the courts on this issue. But that is something we have to carefully work out.

Mr. HAYES. I agree with that, but, secondly, as part of that process, and this is not in language the Chairman has yet but is implicit in it, and I want to ask whether it is implicit that the government would bear the role, as it does in zoning, as it does in any other example that you gave, of showing its public purpose as it relates to that site.

In other words, if we are talking about the marshes in Louisiana or if we are talking about a very small area in Utah, those properties could be equally important to Utah as those coastal marshes are to Louisiana. I would not want to have a standard that says that a little-bitty area that is not three feet wide and use a Cameron Parish standard for what has a much, much higher elevation in priority to the State of Utah where it is situated.

The point I am making is, though, should we not have to put the public purpose, like that airport in that city, and not say there is an aviation bill and this is a site suitable for an airport, as merely a hypothetical, therefore, you should not live near it because someday an airport may be there? Shouldn't the government have to say the public purpose of clean water overrides your private interest on your property for these reasons? Do we not owe citizens that same explanation?

Mr. PANETTA. I think that essentially is what we do now in terms of fulfilling the responsibility. Whether you need to take the step of expressly saying that within the context of a piece of legislation——

Mr. HAYES. But you would not find that eligible?

Mr. PANETTA. No.

Mr. HAYES. Finally, because I know the time is limited, what if we provided compensation that was not money? What if we established a system of compensation that involved mitigation land banking, where folks who had big projects, under approval of agencies, under a permit validly granted, set aside quantities, not just as we do now in mitigation that sets aside other wetlands, but set aside funds that could be used for fair treatment of individuals whom we, as policymakers, decide had indeed become the victims individually of a public policy, through no fault, no act, and no circumstance of their own? Just like we do for flood relief, like we do hurricane relief, and like we do for earthquake relief.

Mr. PANETTA. Again, the issue has to be the test of what you compensate. If you broaden that test out, I don't care how you pay it, I think it creates chaos. If the test is the same as the courts have provided and as the Constitution provides, I think you can use other methods of compensation.

Mr. HAYES. I think the court-created case is not through cases involving these regulations, because only the court of claims test involved the direct regulations we are dealing with. If we use the test you just stated in your State of California—you have never had a disaster that destroyed 95 percent of a city. If you want to use the court case, we should never give disaster relief if it exceeds 5 percent remaining value. I don't think we want to impose that test.

And, by the way, let me just finish. Only the Fifth Amendment deals specifically with property. It is distinguished from the elevation in value hypothesis. It is distinguished from the other zoning examples. This is inherent in the Fifth Amendment. The courts, when dealing with it, are recognizing that if you lean to the property owner—and my suggestion about chaos is, if you let just the judiciary determine individual rights and do not plan economically for their outcome, it is going to hit this Congress like a freight train. There is a bill that is out there pending, that is not going to be paid by taxpayers. Any way they can organize, if we do not understand that those rights are coming——

One final observation. They just swore in a new guy from Kentucky. I do not believe at any point in his election process did people stand up and talk about the benefit of Executive Orders.

Mr. PANETTA. Congressman Hayes, let me just say I think you express the concerns that I think all of us share with regard to how

you confront those issues. I do not think there is anybody in this room that does not agree with you in terms of the concerns that you express about how we deal with those problems.

The fundamental challenge is not whether or not those problems are out there, it is what process do you develop to get there. And I guess what I am saying is, for God sake, in that effort, do not create a greater maze of bureaucracy; do not create a greater set of requirements than the problem you are trying to resolve. That is all.

Mr. HAYES. I agree, Leon.

The CHAIR. Given the number of Members here and with the concurrence of Mr. Shuster, we will go to a two to one. So at this time I would like to call on Mr. Parker. The only one comment I would like to make is that the result of an earthquake is not a taking.

Mr. PARKER. Thank you, Mr. Chairman. And I probably know more about earthquakes than Hayes does at this point. That is true.

I am still trying to understand Hayes' last thing he said. We will move on.

Mr. HAYES. There are a lot of folks in that category.

Mr. PARKER. Leon, I appreciate your being here. I am just going to cut to the chase. I know you want to get out of here.

You know, the President says some great things as far as unfunded mandates, the wording is great, you know, the Executive Order is very good, and I appreciate it, and I am glad he appreciates the problems. And him being a former Governor, he understands.

Now, when we come to a problem that we have had in trying to address the problem, dealing with nonpoint source pollution, and that is basically in agricultural areas, and I am fortunate enough to have my capital city in my district, but the majority of my district is rural, so I have to worry about that a great deal, and there are a lot of other people that have to worry about that. But we have a situation where the Federal Government has basically said we have a problem and we want it resolved and we know it is going to take money, so we are going to authorize this money.

The problem is we just never quite get around to funding it. Then we say, you know, we never have funded it, but, you know, we need to make it work but it is not working so we need to require some more but we are not going to fund it either. We put people in a bad position.

Now, in the bipartisan discussion draft, what we have got in there is a little thing, it is somewhat nocuous to some of us, but we say in there basically that if we do not fund it, then we are going to turnaround and we are just going to postpone compliance and enforcement within that provision. And I think that is a fair thing to do.

Now, granted, we know that there are people in the administration, there are others that say, well, enforcement is the key. Funding is also the key.

Now, whenever Mr. Hayes said that everything is interrelated, I believe that. Mr. Moynihan has said that on risk assessment. What he says is we waste around $200 billion a year on risk assessment

because—now, I don't know where he got those figures but it is a great figure to have—but if we would look at this thing from the standpoint of trying to save some money on risk assessment, turn around and fund some of these things, like section 319, fully fund it, it would just make a lot more sense.

Would the administration support postponing compliance and enforcement in nonpoint source pollution, section 319, if we did not fully fund it, or would you support some kind of variable of that, whether you would get partial compliance or whatever? Is there some way we can work this thing out so we do not keep telling me you are going to do it but we are not going to give you any money to take care of it?

Mr. PANETTA. I think the bigger challenge is to try to find the funding to basically support that kind of effort. If we think it is important enough, if we think it is something that needs to be done, then it seems to me that we ought to make an effort to try to provide the additional funding required.

If, on the other hand, we are not committed enough to put some funds into it, then I guess the question is how serious are we about trying to accomplish the goal at the other end. That is the problem and that is the whole issue regarding unfunded mandates.

I guess what I am saying, and I think what the bills are saying that deal with unfunded mandates is let us look at every issue on the basis of whether it creates an unfunded mandate. Not necessarily to say we are going to fund every mandate, because there may very well be some mandates for which it is not absolutely essential to provide full funding. But at least give the Members and the public the information to know that when Congress passes that kind of law, and when the Executive Branch deals with that kind of regulation, we have taken that into consideration at the time; that we cannot plead ignorance with regard to whether or not something is funded or unfunded.

Mr. PARKER. I am not trying to put you on the spot, but you agree with me, yes or no?

Mr. PANETTA. Mike, I think I have known you too long to agree with you on everything.

Mr. PARKER. Thank you, Mr. Chairman.

Mr. PANETTA. I think what you have said, what you pointed out is the basic problem. We need to develop a process that will show the public that we have at least gone through the process of thinking these things out rather than simply throwing these mandates at people without telling them the truth about whether or not we are willing to put the money into it.

The CHAIR. The gentleman's time has expired.

Could I inquire, then, Mr. Panetta, because it seems to me in a way we are mixing apples and oranges here. One is we are talking about the obligation of the State to enforce the law. On the other hand, we have never paid, I don't believe, a private property owner not to pollute. I think that is the difference here. So that in terms of the unfunded mandate issue, the present law is $100 million. We take that to $300 million in my bill, end up to $500 million at the end of the fiscal year 1997, I believe it is.

So we are trying to deal with the unfunded mandate because of the imposition of the work load on the State. But I do not believe

under any environmental or pollution law that the Congress has passed that we have ever compensated someone not to pollute. I think that is the difference between, in terms of what I view as the issue of unfunded mandate.

Mr. PANETTA. Again, as my testimony points out, I think you have three different issues here. One is the issue of unfunded mandates. There, I think obviously you can approach it on several bases. One is to put the funds in you think will meet the level of mandate that is required. Or in the very least provide a process that presents to the Members whether or not the mandates are fully funded.

Second is the risk assessment process, which involves something similar to unfunded mandates in that you want to provide the information with regard to what the risk assessment is with regard to a particular proposal.

And third is the issue of takings and the sense of how that relates to private property and whether or not you ought to compensate. Those are three very different issues.

The CHAIR. Thank you.

Mr. PARKER. Would the Chairman yield?

The CHAIR. Absolutely.

Mr. PARKER. The point is, when you talk about nonpoint source pollution, that is one of the problems. You cannot find basically an individual polluter. We are talking about byproducts. We are talking about things that occur in the normal course of doing business that has always been done in agricultural communities. So that is a different problem than finding this pipe out there and a company owns that pipe and you go to it and you can target that individual.

And so from an agricultural standpoint, you are dealing with a different situation totally. And you have a bunch of people that have conducted business for generations and all of a sudden they are put in a situation of saying, you are going to comply. And they look at you and they say, okay, great, I want to do that, but explain to me exactly how I go about that. So I think it is apples and oranges, I agree, from that standpoint, but let us get real about what we are doing in rural America.

Thank you.

The CHAIR. Thank you. Mr. Clinger.

Mr. CLINGER. Thank you, Mr. Chairman.

Mr. Panetta, we are grateful for your testimony, and I want to applaud you, because of the efforts you have made in terms of addressing the unfunded mandates' issue within the Executive Branch. I would tell you there are some skeptics who would suggest that that was done in response to, I think it was one of them that assigned it the day before unfunded mandates day. But, nevertheless, I think you deserve credit for dealing with this thing.

And I would also agree that I think the Executive Branch has clearly done a better job, at least in starting to deal with this problem, than we have in Congress, and we are clearly a major part of the problem and, obviously, there is a lot of anxiety about that on both sides of the aisle and how we deal with it and where we go from here.

But, I guess my specific question would be of the two Executive Orders which have been promulgated for regulatory review and

Federalism, if these are indeed adequate, and as you would suggest, to address the issue there still continues to be a lot of controversy over the clean air DOT conformity rule, and why do you think that controversy still exists if, in fact, the Executive Orders are adequate to address the deal?

And I guess States and local governments, which we hear from on a regular basis, are very concerned about the deadlines and the sanctions that are spelled out in that rule. How much consultation really went on before that was taken, Mr. Chairman?

Mr. PANETTA. I can give you a full answer in a minute because I have the head of OR here.

I think with regard to that particular one, a lot of those rules with regard to that issue were enacted before or put into place before the Executive Order. However, after that, we have gone into a number of consultations with the local and State governments, and we have been talking to them about appropriate provisions.

Mr. CLINGER. So that there may not have been total consultation prior to the promulgation of the rule?

Mr. PANETTA. That is right.

Mr. CLINGER. There has been since that time.

Mr. PANETTA. That is correct, and incidentally, on the Executive Orders, the Executive Orders we think give us the room and the flexibility to deal with the regulatory side, but there is, obviously, the whole issue of statutory enactments that I think has to be dealt with.

Mr. CLINGER. I certainly understand that. Mr. Hayes said that, you know, people are not really concerned about what Executive Orders do or do not do, they are just frustrated and mad and upset by the fact that they are being required to do things.

But let me ask you this: In terms of Executive Orders, have we had some success stories? Can you site examples where in fact this is, you have really, the Executive Order has had some bite and made a difference?

Mr. PANETTA. I point out some within the testimony, but I can give you a list for the record of changes that we have made as a result of this process.

We have found, in a number of areas, whether related to HHS and some of the proposals they have had on foster care, where we have increased the approach or the flexibility used because of this very Executive Order, that is requiring them to tell us what the problems would be. We did the same thing with the Department of Education. EPA is almost a daily situation in which we review orders according to this, that we have to deal with ways to try to provide greater flexibility.

I can give you a more explicit list for the record but I can assure you we have, in fact, been implementing this every day and almost every day I have a meeting of one kind or another that basically looks at these issues and asks these questions when we are sitting down with these agencies. And that is what you want. That is what you want, frankly, in the Congress is a process than forces this debate.

Mr. CLINGER. Thank you very much.

[The information requested was not received by the subcommittee at time of publishing.]

Mr. HAYES. Mr. Chairman, could I clarify one thing?

The CHAIR. Mr. Hayes.

Mr. HAYES. The comment that I made at the end regarding the Executive Orders was not related to any particular President. The point I am making is that over the course, since 1972, we have one level of Executive Orders, but the folks at home deal with the local administrative agencies. In this case up to five agencies they do not care about or never heard of. All they know is what is happening with them immediately at home. And that process has not been affected by these or, quite frankly, previous Executive Orders.

So I appreciate your indulgence, Mr. Chairman, because I did not want that to sound—I put it in the context of a political campaign because when people vote, they vote on what is happening to them then, now, and what they are feeling where they are. So thank you very much. I wanted to clarify that.

Mr. PANETTA. I understood exactly what you were saying.

The CHAIR. Ms. Shepherd.

Ms. SHEPHERD. Thank you. Thank you for being here and taking all of our questions. I am trying to frame this into some kind of coherent picture so that I can deal with it myself and you can be very helpful to me.

I am just going to summarize a little bit what I think I am hearing, particularly in respect to what Representative Parker just said; that we are really asking people who have been doing things for years and years and years the same way to change what they are doing, and that is not fair; and, furthermore, we do it in a bureaucratic way so we virtually torture them into their change, and that is the part of government that is causing us the most trouble right now.

But I think we are faced with the consequences of living with our increased population. There are just more of us, so we cannot live the way we have always lived. And we are forced to change and we have to decide what do I have to do differently so that more of us can live in this State or this city or this town, and what is the cost of clean water and what is it worth to us to change in order to get this clean water. And those are extremely important questions that I have a feeling the citizenry is not focusing on, because what they are really focusing on are these little bureaucratic hoops that we require them to jump through.

I would like to say that I think any way, I mean absolutely any way that we can make the process of complying with the standards easier is going to help them and help us achieve our goal. Because it seems to me that for the past 12 years at least the goal has been to make people hate government and that the administrative agencies have really been very successful in making people hate government, and that we ought to turn that around a little bit.

My question, Leon, is that would not a takings provision as it is proposed in this alternative Clean Water Act be, in essence, a new entitlement for people who want to be paid to have clean water for the whole Nation?

Mr. PANETTA. Well, again, if you use the broad interpretation of what you would compensate, I think you are talking about, in essence, what would be a large expenditure. Whether you would for-

mally call it entitlement or not might be a question, but you clearly are going to have to face huge new expenditures as a result of that.

Ms. SHEPHERD. Carol Browner was here yesterday and she said that wetlands were in a metaphorical sense to the land what kidneys were to our human bodies, they were the filtering system, and, since it is obvious that we cannot afford to pay the price of these takings that would occur if we were to pass the alternative Clean Water Act, then one has to presume that the goal of passing that bill would be that we would have fewer wetlands, we would go either with just one kidney or maybe we would go with no kidneys.

My husband and I lived in Egypt for two years once and they did not have clean water. It was an extraordinary experience to live for two years in a place where you did not dare brush your teeth in the water, and I do not think Americans realize how close we are in some cities and some places to that, and I wondered how committed the administration is at this particular point in time in maintaining the standards that we have set. Because there is a real drive to lower the standards right now, and that is what the unfunded mandate thing, which I am very sympathetic with, but I do not want to lower, is the standards of the water in order to make life easier for people.

Mr. PANETTA. Obviously, Carol Browner testified on this issue and she is the expert with regard to the particulars.

I can tell you that the administration obviously supports the reauthorization of this legislation. I do not think we should walk backward with regard to where we are at now. We have made a lot of progress in this area and I think we have been able to do a lot of good in this country and I do not think we should step backward from that.

At the same time, I think that this debate is a healthy debate. I do not think this is something we should walk away from. The debate about what those mandates ought to be, whether or not we are funding them, how much we should fund them, is a good debate for both the Congress and the country, because everybody has to weigh the importance of what we are trying to do in terms of the goals versus the resources that we are going to assign to that effort. And I think that is a very good debate to be held.

Ms. SHEPHERD. One final very quick question. Can you envision a process through which we could simplify the way in which people have to deal with government around these issues?

Mr. PANETTA. Well, that is a major, major challenge to any administration that comes in and has to deal with a myriad of governments and agencies, and of course I see it firsthand by virtue of the budget and having to deal with all of these agencies.

The purposes of the Vice President's effort in trying to really reform government, improve its management, try to simplify the way government deals with people is a major effort. We have made some good progress in that area. It is not something that can be solved in one year or two years. It has to be an ongoing effort, but I am firmly convinced that there is a better way for agencies to serve the public. I am firmly convinced that we can do that. We just need to keep pushing.

Unfortunately, sometimes people get into a certain groove, they begin to lose sight of what it is all about, that they have to be sensitive to what the public's concerns are all about and that they have to try to simplify their process. There is a tendency in government to simply create everything in a bureaucratic process that loses its meaning. And that is the challenge, really, of the National Performance Review is to try to slice through that and try to see if there is not a better way to serve people.

We think we are making some progress in some of these agencies.

Ms. SHEPHERD. Thank you.

The CHAIR. Mr. Oberstar.

Mr. OBERSTAR. Thank you, Mr. Chairman.

Mr. Director, former colleague, we are glad to have you here before the committee to bring your wisdom and your practical understanding of these issues as a practitioner from our side and as a practitioner on the Executive Branch side, and also as, I think, as the most distinguished Chair of the House Budget Committee that we have ever had.

I understand very well what the gentleman from Louisiana, Mr. Hayes, said a while ago about land banking. I understand his concerns about zoning and acquisition. There are a couple of programs for land banking. Under the U.S. Fish and Wildlife Service and under the U.S. Department of Agriculture, I was the author of one of those. It is kind of a zoning, I mean a set-aside program where you pay farmers not to develop land and keep that in reserve as a wetland. We were spending about $9 million a year on that program, in effect, renting land from farmers for them not to develop it. And every five years a payment was to be assessed and adjusted according to inflation.

There was another wetlands acquisition program, buying land from farmers for the Fish and Wildlife Service, but during the Reagan years the budget cut that money out, eliminated it. So there is not an effective tool. And the loan program has not been operative in several years, either. But I must say to my colleague, if we were to apply the Hayes test in the way the gentleman has spelled it out, we would never have built an airport in this country. We would never have built a mile of highway. We would not have poured a cubic yard of concrete on the interstate system, and we would not have the——

Mr. HAYES. We would not have——

Mr. OBERSTAR. You had your time. And we would not have purchased a mile of advanced right-of-way for the highway program either.

There is a risk of carrying some things too far, preaching too loud, and I think what the director has said is it is not that mandates are unfunded, it is often what is mandated. Before section 404 of the 1972 act, which was drafted right here in this committee, and on which I spent dozens and dozens of hours with Members and the committee's staff crafting that legislation, we were on track to losing another 50 percent of the Nation's wetlands. We have already lost half of what we had when this Nation was founded. We were on track to losing them the old-fashioned way: A prairie pothole here, a marshland there, a bayou over there. And that

legislation put a slowing break on the loss of wetlands. We have not stopped it. We slowed it down a little bit.

I think the Corps of Engineers did us a very serious blow when they took those four lines of the 1972 act providing for section 404 and in a miracle greater than the laws of fishes translated it into 34 pages in the Federal Register that drove people crazy. We spent the next seven years trying to untangle the complexity.

And there is reason for frustration there, says my colleague from Louisiana. Yes, and this committee worked very hard and so did Merchant Marine and Fisheries trying to untangle that mess. Let's not scrap it.

It is annoying. It is exasperating for the State Highway Department to stop its plan for construction of a section of road to analyze the wetland that lies in the way of the ready-mix trucks.

Yes, it is exasperating for the Corps of Engineers to have to stop a dredging project because they were flinging the dredge spoil over the bank of the river way into a marshland and killing an area where waterfowl and birds dependent on the migratory fly ways were nesting and breeding.

Yes, it is exasperating for a marina developer to stop and look at the little inlet where they are developing, and make a different plan to develop that area for boating and recreational activity. It is going to cost them a little bit more.

But that is not their land. That is the common heritage of all Americans. We have to stop and make these assessments and realize that all the water there ever will be on earth is here now. We cannot create any more water than there is. We can dissipate a lot of it. We can destroy it. And pollute it. And we have done that.

We have spent $230 billion since the 1972 act between the private expenditures of industry and the public expenditures of the Federal, State and local governments to clean up point sources of water pollution. And one-third of the Nation's waterways are still not clean. They don't meet the 1985 swimmable drinkable standard. That is a sad legacy.

There were great concepts carved out in this room, fashioned with hard work and vision, but we aren't meeting them. All those industries that than spent billions of dollars to clean up point sources ought to be pounding the table now to say stop the destruction of those streams and lakes from nonpoint runoff, from open land runoff, because we spent good money to clean up those discharges that these industries and municipalities were making all these years, and they ought to be after every nonpoint source which is destroying the Nation's waterways and say, let's be fair and equitable. Let us all remember that this isn't ours—this land, this water, this marshland, these flyways. They belong to generations yet to come and those that preceded us.

There is a place in Alaska I go hiking along, a desolate road, kind of like we call in Minnesota a tote road, an old camping area. There is a pile of wood. It says, take all the wood you need, but when you leave this place, leave the pile a little higher than what you found. I think that is our challenge. Leave the pile a little higher. Leave the quality of the water a little bit better than what we found here..

Thank you, Mr. Chairman.

The CHAIR. Thank you very much, Mr. Oberstar.

Mr. Gilchrest.

Mr. GILCHREST. Thank you, Mr. Chairman.

I almost think we should recess now and process—and I am saying this sincerely—the eloquent words that Mr. Oberstar just gave us.

There has been some discussion—I have a number of questions, and they vary depending on who asked the question preceding me. But I want to focus my time to a certain extent on agriculture because I hear a great deal about the farming community and how difficult it will be to come into compliance with new perspectives on nonpoint source pollution, and I want to bring the nonpoint source pollution into the framework of an economic issue.

I live in a farming community, and in my perspective and in my understanding of best management practices not only does best management practices help prevent nonpoint source pollution, but it also, in the process, significantly reduces farm runoff of soil and herbicides and pesticides and other forms of chemicals. But in the process of incorporating best management practices on the farm, it significantly increases the effectiveness of that farm and, fundamentally, the farming community by instituting these best management practices, becomes much more economically viable.

The nonpoint source pollution proposals and regulations are not just simply put there to damage the farm. It is put there to improve and continue to improve the economic viability of the agricultural industry.

I have also heard earlier that many people don't quite understand how to institute nonpoint source pollution. They don't understand the problems of groundwater and the relationship of the farming community with wetlands. But I don't know where the rest of the country is, but maybe you ought to come to the Eastern Shore of Maryland because we have Soil Conservation Service people there that help farmers. We have agriculture stabilization conservation people there that help the farmers. We have the State agricultural people.

In our area, it is becoming increasingly obvious that improved agricultural techniques benefit the farming community and then thereby benefiting the other communities in our region.

It is an economic issue if you live on the Eastern Shore of Maryland, and I certainly know this is true in other rural areas of the country. Farming is a source, an important source, of our economic liability. Recreation in our area—it is hunting. It is fishing. It is boating. It is going to those restaurants that serve crab cakes. It is the commercial fishing industry. It is people's health.

So if we are looking at the regulations, I think we have to understand why we are instituting these regulations. It is to retain the health and economic viability of our Nation's communities.

Now, the question, Mr. Panetta—and this is all related—the question I formed when I first came in this morning, but these other things have come into being over the last hour or so, like Mrs. Shepherd and certainly Mr. Oberstar would like for us to take this debate and put it in some type of context. We need a frame of reference upon which we legislate, and, yes, we need goals. And

everybody has said here they want clean water, and we want to be healthy.

But now we have to fill in the elements to achieve those goals. And my question relates to a certain extent, again, about compensation and about property rights.

We all understand the fifth amendment in which it states if someone's land is taken away for the public good they should be compensated. But, as the Chairman said earlier, if someone's—should we compensate a property owner—that when we regulate their property to prevent public harm where does that fall into place?

Should someone whose property is regulated to prevent public harm, should they be compensated? And who determines what is public harm? Is it the Congress? Is it the State? Is it the local government? Is it the courts? Is it the agencies—EPA, the Corps, Soil Conservation Service or whatever? Or is it all of us collectively trying to wrestle with this issue, communicating one on one, in some instances, but fundamentally saying we have a situation here. What can we do about it in a positive way?

And I am unsure where the question falls into play here, Mr. Panetta, and I think——

Mr. PANETTA. Mr. Gilchrest, you have done an excellent job defining the issue. I don't know that there is a hell of a lot I can add to what you just said other than that, obviously, this country has struggled with those kinds of issues for a long time.

Generally, the courts have been the place where the issue of compensation has been debated. And the courts have provided some guidelines, and, generally, right now it takes a significant impact on somebody's private property to warrant compensation, and that is the test. Because in fact I think the courts have looked at the public side of it, the public value side of it, the goals side of it and said that these have to be balanced with the impact on the private property owner. You can't just have total compensation or it is going to result in chaos.

And so that is the kind of fine line you need to consider as you consider the issue of takings. But I think you have defined the issue perfectly in terms of the nature of what you are trying to do as a committee, what we are trying to do as an administration in trying to define how we protect those interests in the broader scale and yet at the same time try to deal with those particular concerns.

It isn't easy. I am the last one to tell you it is easy, but I think you have defined exactly the crux of the problem.

Mr. GILCHREST. Thank you. Thank you, Mr. Chairman.

The CHAIR. Thank you very much, Mr. Gilchrest.

Mr. Geren.

Mr. GEREN. Thank you, Mr. Chairman.

And I thank Mr. Panetta for joining us. I appreciate it very much.

I want to ask you a question about the risk assessment provisions and what the administration would be willing not only to not oppose but actually endorse.

I would really like to thank you for the balance you bring to this debate. Just the very term unholy trinity seems to suggest that somehow we are pitting the forces of darkness against the forces

of light. And I know you understand that what we are talking about is competing important public interests and balancing those interests.

When the EPA comes in and tells a city, by gosh, you are going to build a water treatment plant or you are going to be fined $25,000 a day, it means maybe child nutrition programs don't get funded or lay off police officers or shut down satellite health care centers. There are trade-offs.

And I don't think any of us are about advancing anything unholy. It is just a question of how do we allocate scarce public resources and how do we decide who pays for that allocation.

Sherwood Boehlert talked about CBO, estimated it would cost $45 billion. The mandate is going to cost $45 billion. We are here to decide who is going to pay for it. It is not whether or not we are going to avoid that cost. We pay for it as a Federal Government. We share it with the cities. Or do we force them to pay it all?

Those are the kind of issues that we, as Congress, are asked to decide, and I think it is so important for all of us to understand we are deciding between very important public needs we say the EPA can come in and tell the city what to do. That means that other public needs will go unmet. And so it is not unholy against the holy, but it is deciding among holies. And I really appreciate the perspective you bring to this.

You all worked long and hard with the Senate on the safe drinking water. We are trying to craft some kind of a risk assessment that could pass this committee and pass the Congress. Could you talk about how the administration sees that? I know you referred to it a little bit earlier but go into some detail about where you all would draw the line and where you go from support to not oppose to oppose?

Mr. PANETTA. These are all fine lines, but, on the Senate side, we worked with Senator Johnston from New York and with others to try to look at this risk assessment issue.

The amendment that was developed on the Senate side, the good things about it are that it basically required that the regulation have a threshold of $100 million or more, which we think is important and it kind of meets what we have in the Executive order. So that was good.

Mr. GEREN. Do you think—in looking at the clean water bill, do you think there is anything in clean water, the magnitude of the jurisdiction of the bill, that would suggest that $100 million is too high for this, too low for this? Do you think a criteria that——

Mr. PANETTA. I think that fits pretty well.

Obviously, it almost—you need to continue to look at the threshold to try to make sure that it fits, but I think, as a beginning step and beginning to implement an approach like this, that you need to have some kind of threshold. Otherwise, you go beyond that. And, as I said, it just creates a very tough and complicated process.

I think it fits if it hits that level. So the threshold we like—it also provides for a description of the risk to be addressed. I think that needs to be a part of it. It provides for a comparison of that risk to other risks. So that you can, in fact, see how that risk com-

pares to other risks that are associated so you have got an evaluation there.

It provides for a certification that the analysis is based on the best reasonable, obtainable scientific data. I think that is important—that the regulation is likely to reduce the risk addressed, that there is more cost-effective—that there is no more cost-effective alternative available and that the costs will justify the benefits.

These are some of the guidelines that we think ought to be part of that process of evaluating risk, and so those are some of the elements. As I said, we did not object to the enactment of this on the Senate side. We think that probably there is a lot more work that can be done here to try to improve it, and we are willing to do that, but we think it was a step in the right direction.

Mr. GEREN. What kind of teeth would you be willing to give to those guidelines? Would they be standards under which a decision could be challenged legally or are those just administrative guidelines?

Mr. PANETTA. Again, I think our view, at least on the risk assessment side—I will tell you on the risk assessment side that we think that kind of cost benefit analysis as presented in the legislation provides then the Members or the Senators the ability to debate the issue based on the cost-effectiveness of that particular issue.

I am a little concerned about whether or not you would establish any enforcement with regards to this element.

On the unfunded mandates provision, however, we have looked at the question of whether or not we ought to require that if you have determined that there is an unfunded mandate should there be a point of order that the level of authorization should at least accommodate the funding necessary to implement that mandate.

Mr. GEREN. All right. Thank you. I appreciate it.

Thanks, Mr. Chairman.

The CHAIR. Thank you.

Mr. Poshard.

Mr. POSHARD. Thank you, Mr. Chairman.

Leon, I really appreciate your being here today, and I applaud your effort to bring some balance to this argument, and I think you have done that.

Let me just point out some concerns that I have about standards. I heard you mention a while ago that we don't want to go backwards in terms of what we are doing, and I agree with you.

I want to address part of my comments to Mr. Oberstar who I think is one of the great consciences of this Congress, especially on this issue, and has accomplished much.

When I look at the National Water Quality Inventory Report to Congress, 1992 report, which is the latest one we have, it says in the summary of findings—and this is what is outlined in the report in the large letters—about two-thirds of assessed waters are good enough quality to support the uses States set for them such as fishing and swimming, which are our standards for water quality in this country—not drinkable—fishing and swimming—and, therefore, meet the Clean Water Act goals established by Congress.

Two-thirds of the assessed waters are good enough quality to support these. Which seems to indicate to me that we are not going backwards, that we have been going forwards.

Now, when I look at that and I look at the other end of the ledger sheet here, which is $4.3 trillion of indebtedness—and I have got all of your charts. I have kept them for years, and I use them back in my District.

I see this tremendous debt that we have incurred as a Nation, which undermines our ability to educate our children and build infrastructure for our cities and towns and our commerce and defend our Nation and everything else. The point that Mr. Geren and myself and others who are concerned about this is not that we somehow lessen our efforts to achieve water quality but how do we do that, on balance, with the overwhelming debt that we have in this Nation?

Is the goal here to achieve 100 percent achievement in terms of the Clean Water Act, in terms of drinkable and fishable and swimmable? If that is the goal we will never achieve it.

We have to say, are we making sufficient progress on balance on this issue? And many of us think we are and that if we do some of the things that are incorporated into this bill to try to achieve the ultimate, we are going to so damage the fiscal ability of this country to survive that we are going to take away in many other areas of that budget from things that are equally important, and maybe more important. That is what our concern is.

I look at the assessment just put out by the Soil Conservation Service. Ninety-two percent of our conservation plans are now on schedule.

I talked to the farmers in my District who are laying land aside and filter strips to stop the erosion, all kinds of other things where we seem to have nonpoint source pollution. In our State, we have voluntary compliance in many of these areas to try to take care of this problem. Do we really need to mandate every acre of this country being in some sort of compliance plan controlled from this level of government if there is no problem that exists there?

These are real concerns that we have. We are not idiots out here who are trying to impose some higher standard of care for our Nation's waterways. But, on balance, there has got to be something achieved here that, given the amount of debt that we have accrued as a Nation, we have to find a middle ground. And I don't know where it is, but it is a legitimate struggle.

Mr. PANETTA. I don't disagree with anything you have said. I think the issue is you want to continue the progress that we have been able to achieve in this area. But to achieve that progress it has got to be done in a sensitive way that balances the needs of people and tries to balance with the resources that we can put into an issue. I mean, that is the challenge here.

I don't think anybody disagrees we ought not to continue on the road to try to improve the water in this country and try to continue to build on the progress that has already been made.

From my point of view, having represented an agricultural area in the Congress, the greatest frustration among the farmers wasn't so much the desire to have clean water, it was oftentimes the way these laws were implemented in the area and the way they were

dealt with. And I think there is a lot we have to do in trying to improve that side of the process.

So I agree with you. It is the balance that you are trying to achieve so that everybody walks in the same direction together. Because if you try to bludgeon people in this process you are going to wind up reversing the progress that has been made.

On the other hand, if you continue to work with people so that we are all working in the same direction so we can give our children a cleaner environment and cleaner water, I think that is what we need to do. We need to work together on that.

Mr. POSHARD. Thank you, Mr. Panetta.

Thank you, Mr. Chairman.

The CHAIR. No, thank you, Mr. Poshard.

Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

Mr. Panetta, we have heard a good bit about unfunded mandates or—and the need for funding of mandates. We have heard quite a bit about the role of the Federal Government in paying for those unfunded mandates, also of local government, whether it be State or local, paying for those mandates.

But is it not true that when you really get down to those who pay, it is the working people in America? Those who have worked and retired and enjoy the fruits of their labor, and those who work daily—are they not the ones who actually are paying for all of the mandates whether they be passed here, passed on by State or passed on by local?

Mr. PANETTA. You got it.

Mr. COLLINS. That is who we should take into consideration at all levels.

You made another very interesting comment and that is that local and State governments should share in responsibility. I think at any time a group of people choose to live closer together to form a city or a township, there is responsibility involved. But when we pass legislation, whether it be at this level or State level, it is broadsweeping. It affects everyone the same. That is the intent of it.

It also oftentimes involves more than one agency for oversight. And I want to give you an example, a little county in Georgia. It is a small county—45,000, 50,000 people, suburban area of Atlanta, bedroom community. 1988, they applied to the Corps of Engineers for a permit to build a river, 1,100 acre river, produced 14.5 million gallons of water per day, would actually replace 525 acres of wetlands at a cost of $4.5 million.

The Corps agreed to this. Then along comes the EPA and wants to talk about the 525 acres of wetlands.

$1 million later, study after study, five years later, they resubmitted, through the guidance and compromise of those two agencies, a plan to build three rivers, total acreage of the 3,649 acres—gallons per day, 11 and a half million versus the previous 14 and a half. Wetlands was 350 acres.

The Corps actually approved and—with EPA—the first wetlands mitigation plan from 1988, $1 million five years later.

No credit was given to Henry County in that new proposal for newly created wetlands due to the backwaters, and Ms. Browner

said the day before yesterday that there is a credit for newly created wetlands; but no credit was given here.

Having said all of that, how do you determine the share of responsibility at the different levels? Do you determine it based on the revenues that are paid into each level of government? If so, the Federal level receives far more than State and local. Or do you have any idea how you go about sharing in that responsibility?

Mr. PANETTA. I don't have a magic formula for that.

But, you know, in the district I represented I had almost the same situation is that you just talked about. Community needed to build a dam because we were in a drought area and had to add space to that dam. And in order for me to get that job done I had to put 25 agencies in a room from the Federal level, the State level and the local level. And unless I had put all of those people in the same room so they could talk to each other, I don't think they would have gone anyplace.

I don't have a magic answer to where the level of responsibility is. Obviously, to some extent, it may relate to resources. I think that is one legitimate area to look at.

In one way, it relates to public interest, whether it is at the national level or at the local level. But I think, ultimately, unless we are able to work with State and local agencies in implementing these kinds of proposals we are just going to ask for trouble every time we deal with issues like this.

You have got—we have got to promote a partnership approach to these kinds of issues. Everybody has got to sit around a table, and everybody has got to work their way through it. If we think one group or another can somehow slam dunk these proposals on some other government in other areas and somehow get away with it, we are nuts.

Mr. COLLINS. That is a good point and kind of the same scenario as you did with all 25 agencies in a room. The compromise was reached after my staff attended a meeting of those same agencies. I go back to that. And that, too, may be where risk assessment should come. That may be part of risk assessment.

Mr. Chairman, I appreciate the opportunity, and I would like to enter into the record the comments from the Water Authority of Henry County, Georgia.

The CHAIR. Without objection, so ordered.

[The information follows:]

HENRY COUNTY WATER AND SEWERAGE AUTHORITY

533 GA HIGHWAY 81/20 • McDONOUGH GEORGIA 30253
TELEPHONE (404) 957-6639

May 24, 1994

The Honorable Mac Collins
United States Representative
1118 Longworth House Office Building
Washington, D. C. 20515

Dear Congressman Collins:

You have notified the Henry County Water & Sewerage Authority (HCWSA) that the House of Representatives will commence hearings concerning the Clean Water Act (H.R. 3948), and requested that the HCWSA provide you with its comments concerning this important legislation. You have also requested that the HCWSA provide you with a report concerning any difficulties that the HCWSA encountered in obtaining permits for the construction of reservoirs for the sole purpose of providing potable drinking water to the residents of Henry County, Georgia.

As you know, the United States Army Corps of Engineers (USACE), the United States Environmental Protection Agency (USEPA), and the Environmental Protection Division of the State of Georgia (EPD) have jurisdiction and control over the issuance of permits for the construction of potable drinking water reservoirs.

As you are also aware, Henry County is experiencing explosive growth. It is presently the second and eleventh fastest growing county in the State of Georgia and the country, respectively. The HCWSA, anticipating this growth, began preparations to provide for the county's drinking water needs in 1983, when it initiated a study and began to develop plans for additions to the existing potable water reservoir system. The HCWSA completed these plans in 1987. At this same time, the USACE initiated its own research and began surveying the best locations for reservoir sites in the south metro area. The results of the USACE effort were reported in March of 1987. One of the reservoir sites proposed by the HCWSA in its study was on the Towaliga River. This site was also one of the sites selected and recommended by the USACE in its report of the same year.

In the latter part of 1987, the HCWSA and Spalding County entered into an agreement whereby the proposed reservoir at the Towaliga River location would become a regional reservoir that would serve both Henry and Spalding County. To this writer's

knowledge, this was the first such agreement to develop a regional reservoir in the State of Georgia.

Approximately two months after the Henry/Spalding agreement, the proposed reservoir plans were presented to the USACE for their review and comments. Receiving the plans in February, 1988, the USACE raised no objections and in fact complimented the HCWSA on its site selection. Accordingly, in April of 1988, a formal permit application was filed. In June of 1988, however, the USACE and USEPA began to raise questions concerning the reservoir site selection, wetlands, and wetland mitigation, notwithstanding their earlier endorsement. The HCWSA has always been very sensitive and aware of the need to protect our water, wetlands, and environment, and the measures taken by the HCWSA since its inception to preserve and protect its sources of water and wetland environment are well documented. It therefore came as a complete surprise to learn that the support for the reservoir proposal voiced earlier was withdrawn.

The original application filed with the USACE requested that the Authority be allowed to construct an 1100 acre reservoir along the Towaliga River that would produce 14.5 million gallons of potable water per day for Henry and Spalding County. The reservoir was expected to inundate approximately 525 acres of wetlands, which in turn comprise less than two percent of the existing wetlands of Henry County. The estimated cost of the reservoir, including mitigation, was predicted to be 4.5 million dollars. The above-stated plan was approved by EPD prior to submission to USACE.

As a result of the issues raised by the USACE and the USEPA concerning site selection, wetland inundation, and wetland mitigation, however, the HCWSA was compelled to employ additional consultants and perform extensive, repetitive and unnecessary investigations and reports. The expenses incurred in consultant fees, professional fees, engineering fees, and legal services to accommodate the desires and wishes of USACE and USEPA were in excess of $1,000,000.00.

After being advised that the USACE would not issue a permit for the 1100 acre reservoir along the Towaliga River, the HCWSA amended its application and requested that permits be issued for:

(1) a 350 acre reservoir located on the site of the original 1100 acre reservoir,

(2) an enlargement of the existing reservoir of the HCWSA located on the Towaliga River at Steele Mill Dam, which presently comprises 89 acres, and

(3) the construction of a new reservoir along Long Branch consisting of 210 acres.

The estimated cost of construction of the three-reservoir system, wetland mitigation, and expense of obtaining the permit is expected to exceed 8.5 million dollars. The amended permit was approved by the USACE and USEPA and was issued in November of 1992. The above-described reservoir system consists of 649 acres of water inundates 350 acres of wetlands and produces a yield of 11.5 million gallons per day.

The wetland mitigation plan first proposed by the HCWSA and endorsed by the USACE in June of 1988 was ultimately agreed to, as amended, by USEPA and USACE in November 1992. Even though the permit was eventually issued, the taxpayers of Henry County will continue to bear the cost of the bureaucratic intransigence of the USACE and USEPA. This cost, in terms of time, money, and effort needlessly expended, is staggering:

(1) The funds expended ostensibly to preserve an additional 175 acres of wetland over the original proposal has cost the taxpayer in Henry County in excess of $ 4 million.

(2) There is a net reduction in water yield of 8 million gallons per day to the residents of Spalding and Henry County.

On numerous occasions during the permitting process, Henry County officials argued, pled and begged USEPA and USACE to stop the waste of public funds and allow the funds being spent on environmental consultants, engineers and attorneys to be spent in acquiring and preserving existing wetlands.

After a review of H.R. 3948, and in light of the above-described events that the HCWSA was required to endure, we would respectfully make the following recommendations:

1. One governmental agency should have the control, review and decision-making process concerning the issuance of permits for the construction of potable water reservoirs.

2. When a permit application is filed, the agency should be required to specify in writing and in detail what is unacceptable about the permit application and what must be done to bring the application in compliance with the statute.

3. The agency in charge of issuing permits should be required by law to respond to the applicants within specified periods of time.

4. The permitting requirements and process should be distinctly written by the governmental agency and approved by Congress before enactment.

5. Reservoirs that are built for the sole purpose of providing drinking water for the public be exempt from the wetland mitigation requirements if the reservoir systems do not consume more than 10 percent of the wetlands of the county or counties in which the reservoirs are located.

6. If wetland mitigation is to be required, that state wetland banking systems be established so that local governmental agencies such as the HCWSA can contribute to the banking system as a substitute to providing on-site mitigation for wetland loss.

It is the sincere hope of the HCWSA that this letter will give you some insight on the problems the HCWSA has experienced so that other public agencies will not be subjected to the harsh, unrealistic and expensive process that the HCWSA was put through by the USACE and USEPA. It is also the sincere belief of the HCWSA that the environment and the public's interest can best be protected through extensive amendments to the Clean Water Act and other governing statutes as recommended above.

The HCWSA deeply appreciates your concern and interest in this matter. If you have any additional questions, please call.

Sincerely,

HENRY COUNTY WATER & SEWERAGE AUTHORITY

Lindy D. Farmer Jr.

LINDY D. FARMER, JR.
GENERAL MANAGER

cc: The Honorable Sam Nunn
The Honorable Paul Coverdell
All Members of the House Delegation

The CHAIR. Mr. Hamburg.

Mr. HAMBURG. Thank you, Mr. Chairman.

And thank you very much for being here, Leon. I really appreciate your approach.

Every once in a while over the last year and a half there has been something we haven't agreed on, but I think on this we are very much in sync. I personally believe that we very much need this reauthorization and we need this law.

I am behind the Mineta-Boehlert reauthorization, and I think that anyone who thinks we don't need strong clean water law is really not looking at the facts, looking at the amount of—the very small percentage of the rivers in this country that are still healthy.

I have seen estimates as low as 2 percent of the rivers in this country really being healthy in terms of their aquatic life, in terms of swimability and potability so on. I have seen figures as high as 75 percent in terms of extinction of aquatic invertebrates in our waterways.

You mentioned the salmon industry. Something over 100 stocks of Pacific Northwest salmon are now extinct, and over 200 stocks are now in danger of extinction. So this is not an issue that is not very critical.

I don't know if anyone in this room saw the recent series that was done by the L.A. Times on the health of our estuaries and waterways on the East Coast and the impaction of sludge and the destruction of the infrastructure, if you will, of the physical environment of our waterways, and we are literally going to strangle ourselves.

It is not only that the Oyster Bays are crashing, the ground fish are crashing, but it is—eventually, it will get to us because we are part of the network. We are interconnected. And killing off our environment is just a way to eventually get at ourselves.

I do want to say, though, listening to Congressman Shuster's comments really brought to mind for me the major mismatch that we have between public needs, desires and expectations in terms of what government should be doing in the area of clean water and funding.

And I noted that the EPA's 1992 needs assessment in terms of just municipal wastewater cleanup in this country was $137 billion, and this does not include looking at stormwater or nonpoint source problems to any great extent.

I wonder if you could tell us if you and OMB have worked up any estimates of what the total cost would be to meet the clean water needs of the country?

Mr. PANETTA. I don't believe we have, but let me determine whether those studies have been made either within OMB or within the agency, and I will be happy to supply that for the record.

[The information requested was not received by the subcommittee at time of publishing.]

Mr. HAMBURG. Because when I look at the figures that were put out today—was it $3 billion for fiscal year 1995 is the proposal in this bill?

Mr. PANETTA. That is correct.

Mr. HAMBURG. And 1.6 billion is what the administration wants. This leads to a lot of frustration on my part and I think on the part

of the American people that we are identifying this tremendous need out there and then the amount of funds is so paltry.

I would like to ask you, then, since we know the costs are way out there—you know, they are way more than what we are talking about authorizing or appropriating. What do you think we should be looking at in terms of funding alternatives to meet clean water standards and not—I mean, I know you are very concerned about the deficit and all of us are. Do you think there are funding alternatives that we are not looking at from the Federal level?

Mr. PANETTA. Well, I am more than happy to try to explore that side of the issue. Obviously, right now, I have a very difficult time trying to find the funding resources to pay for GATT, to pay for welfare reform, to pay for a lot of initiatives that a lot of people, including the administration, think are very important.

At the same time, within the appropriations process we are struggling to be able to fund our initiatives and struggling oftentimes with Members of the Subcommittees on Appropriation who are saying we can't cut the programs you are recommending for cutting because we think those programs we ought to maintain the funding for. And so this is the kind of dilemma we are in.

I think if the consensus is that this is a major priority for this country, then I think we have an obligation to try to find the resources to put in here. And if that means cutting other programs, if it means finding other savings, if it means raising other revenues, whatever it means in terms of how we fund it, then we ought to make that decision.

But we can't pretend—what I don't want to do is pretend that you can put a number in a bill and then say to the American people that that is the number I believe in, but then, at the same time, not go out and make the tough choices.

Mr. HAMBURG. I think we end up looking a little bit out of whack ourselves when we talk about needs in the area of $137 billion plus, and we are funding it at $3 billion. People have to look at that, who are paying attention to that, and go, are these guys real?

Because, otherwise, some of the things that my so-called conservative colleagues are saying start to make sense. I mean, why do you set this kind of a benchmark if you are really not prepared as a Congress, as a Nation, to meet it?

I agree with you, finally, that local and State government definitely have a responsibility here, and I say that to local government officials. I mean, this can't simply be done by the Feds, and they have to look at their resources. And I think that the majority of people, the great majority of people in this country want clean water.

I, too, have lived in a Third World country. I have experienced what it is like to not be able to drink the water, not be able to brush your teeth with the water, and that I think is where we will head if we do not have a strong regulatory framework and good laws to implement clean water in this country.

Thank you.

The CHAIR. Let me call on the next Member, call on our fine colleague from Washington for a unanimous consent request.

Ms. DUNN. Thank you very much, Mr. Chairman, for that courtesy.

I would request unanimous consent to present to you and for the record a copy of a statement by Congressman Pat Roberts of Kansas.

The CHAIR. Without objection, so ordered.

Ms. DUNN. Thank you.

[The statement of Mr. Roberts follows:]

Submitted by
Congresswoman Dunn

The Honorable Pat Roberts
Hearing Statement: Clean Water Act amendments
Water Resources and Environment Subcommittee
House Committee on Public Works
May 26, 1994

Thank you for the opportunity to present this statement to your Committee on an issue that is nearly as important to the nation's farmers as are the multi-year farm bills written by the Committee on Agriculture. The reforms proposed to address the issue of non-point source pollution in the context of the Clean Water Act reauthorization could have far-reaching implications on farmers and their ability to feed a troubled and hungry world.

The first laws adopted by Congress to conserve soil and enhance water quality were enacted as a part of the New Deal. For over 60 years farmers have been in the vanguard of protecting soil and conserving water. In 1985, Congress re-affirmed our nation's commitment to soil and water conservation by including stringent conservation compliance measures to federal farm policy.

What is conservation compliance? Simply stated, conservation compliance provisions require farmers to have fully implemented conservation plans to protect soil and water on fragile lands in place by 1995. In addition, in 1985 Congress also adopted the Conservation Reserve Program, a program that has idled over 36 million acres of marginal farmland by returning it to permanent cover -- i.e. grasses, forbes and trees -- to meet the goals of reducing wind and water erosion of the soil, conserving water, expanding wildlife habitat, and reducing burdensome commodity supplies that were depressing market prices.

Why is conservation compliance and the conservation reserve of interest to this committee and the Clean Water Act reauthorization? Because they are proof positive that production agriculture is already hard at work to improve conservation efforts with the co-benefit of reducing non-point sources of pollution.

We have all heard the statistic that 30 percent of our nation's streams are seriously impaired and that agricultural run-off is a major contributor to that problem. First, I would make the point that I am not comfortable with this statistic. As EPA has pointed out in its briefing on U.S. water quality, the data used -- because of the time it takes to collect and compile -- is a few years behind present conditions. In addition, there is a broad range of standards used by various states to measure water quality, and that state-by-state comparisons generally end up in the classic apples to oranges scenario. To expand on this point, I note that in nearly every Clean Water proposal that has floated to the surface this year, one of the first steps required is for the states to survey its watersheds and determine the existence and extent of the problem.

Yet without even a full, scientific understanding of the scope of the problem, most of the clean water reform proposals would eagerly impose a regulatory scheme on farmers for controlling non-point source pollution that may ultimately prove ineffective because it misses the root cause. Before we saddle farmers with new rules and regulations addressing clean water and non-point source pollution, it would be wise to get a good, solid, scientifically-derived grasp of the problems and their sources. As I mentioned, U.S. agricultural producers are meeting this challenge as evidenced by USDA data indicating that over 96 percent of this nation's farmers are meeting the schedules set forth in the conservation compliance provisions.

The net result is that there is an evolution -- perhaps even a revolution -- well underway in farm country that unfortunately is going largely unnoticed and unappreciated. Farmers are moving away from older, more erosive tillage methods and practices and moving toward minimum and no-tillage practices that are making a decided improvement in terms of runoff. More and more evidence is turning up that if you control surface run-off you have a leg up on controlling non-point pollution problems.

I would urge this committee to consider the on-going activities of producers working to meet conservation compliance when drafting the non-point source pollution provisions of this bill. While I have real reservations concerning the overall approach of the Oberstar proposal, I do commend the gentleman from Minnesota for recognizing in his bill that farmers are making a contribution to controlling non-point source pollution through reference to conservation compliance and the conservation reserve program (CRP) provisions of the Farm bill. At a minimum, any regulatory scheme imposed on farmers needs to take into account the impact these two programs already contribute toward the goals of the Clean Water Act.

In addition, it makes little sense not to include the Soil Conservation Service in any non-point source legislation. If, as proponents of CWA reforms argue, agriculture is a primary source of non-point source pollution, then USDA's SCS must be recognized as the front-row agency with a presence in virtually every county in the U.S. that also has the expertise and experience to work <u>with</u> farmers and ranchers in developing common sense solutions that address any appropriately identified non-point source pollution problem.

One final point of concern. Deadlines that cannot realistically be met and citizen suits are two very dangerous ingredients in any legislation. Their potential combination in a bill of this scope will prove disastrous for those who hope to craft a package that enables both the regulators and those being regulated to work in a positive, cooperative manner to meet the goals of reform.

The CHAIR. The gentleman from West Virginia, Mr. Wise.

Mr. WISE. Thank you very much.

And, Mr. Director, it is good to see you. I was delighted to hear your remarks to the gentleman from California, Mr. Hamburg, that you apparently have a lot of unfunded mandates, too. Congress is passing along to you, and you are trying to find out how to put them all together.

I do also want to reassure you, Mr. Panetta, that the Chairman of our committee, Mr. Mineta, has restrained me from asking you about capital budgeting, so you are safe. It is just good easy stuff like unfunded mandates, takings, risk assessment, and so on.

On the unfunded—the other thing I want to thank you about, Leon, you have always been, I have found, one of the easiest Members to talk to as Chairman of the Budget Committee before and as a Member of leadership, and I have been struck, as we have worked our way around, how many of us aren't really asking you questions but we are catharting, and I think it reflects a lot of what this committee is trying to go through.

I want to thank you very much for the psychological service you are providing us, and, hopefully, out of this is going to come some resolution which you are always good at bringing.

Mr. PANETTA. I engage in a lot of group therapy.

Mr. WISE. Don't worry. You won't get paid for this, either.

I would like to talk on unfunded mandates for a second. And there is a serious vein. I asked this this last week or a few days ago of the EPA Administrator, and that is, is it possible as we talk about—and I understand the concerns that local communities have, and I hate to have things passed on to me, but I also get to meet the local official who wants to stand up and say I am willing to accept a lower testing standard on water than perhaps has been mandated. I am willing to put people at that kind of risk.

Is it possible to measure the cost of not meeting that mandate, whether it is the $137 billion that Mr. Hamburg refers to, of not meeting the Clean Water Act standards?

I just know in my area where I grew up in the Kanawha Valley, I know in the area where I grew up that several children each year came down with meningitis from our local river and that you didn't—you drank that water with great trepidation. Today, that is not the case, happily. Freshwater fish are being pulled out. More significantly, the water is significantly cleaned up, as is the air.

What is the cost, for instance, of sickness, whether it is water and whether it is air? What is the cost?

We have been experiencing a massive round of flooding—happily, not serious—but two floods out of the hundred-year floodplain within 90 days. Something has happened, whether it is wetland changes, whether it is topographic changes or whatever.

And so I have a concern about whether it is possible to measure that cost.

I also note when it comes to mandates—you are better versed on this than I—but I believe the figure I have seen is something like $200 billion flows from the Federal Government to the States every year to assist medicaid—75/25 match in my State. Don't try and cut it. Clean water—80—I am sorry. Highways is 80/20. The clean

water program started at a 75 percent Federal grant. It is now down to an 80/20 match on the revolving loan fund.

So there are a lot of areas that I think the Federal Government has assisted.

I appreciate—incidentally, you referred to it, I believe, in your testimony and the EPA has moved forward on it, that Carol Browner and others have announced the flexibility on CSOs, combined sewer overflows. I think that is significant because I think that is what people are asking for.

Is there a way to rate—I guess if I had questions instead of just my own catharting.

A couple of questions: Is there a way to, one, estimate what happens if you don't fulfill these? And, number two, is there a way to rate them?

I think some of the concerns—if it is a minor accomplishment you are gaining, that is one thing. But in clean water I think it is significant and a major accomplishment that is sought out, and we are going to have to pay for it.

The third, I guess, is the ways that we can make the process more flexible. While I don't agree with the takings issue as—or the takings solution as put forward by the gentleman from Louisiana and others, I do think they have raised a question on flexibility, on what concerns many landowners about following a proper procedure, and so I think that that is an area, too, that perhaps we might address and, in so doing, try and get some resolution.

Mr. PANETTA. Thank you.

I will make a couple of comments on page 5 of my testimony with regard to unfunded mandates.

I think it is important that if you are going to present information to Members about the cost of the implementation of that mandate that it ought to be a balanced picture. So as I stated in the testimony, it is important that the data provide a balanced picture. And for this reason, we would include not just the cost of the mandate but also the benefits, ensuring that that kind of balanced debate takes place.

I think you want to know both sides of this issue. You want to know what the benefits are and what indeed the costs would be if you didn't implement those requirements as well as what the costs of implementing the mandate would be in and of itself.

Second, I really think flexibility is an important part of this whole thing. We need to give State and local governments the ability to implement these. Obviously, it is going to be within a certain framework, but in the end the more flexibility you give them, I think the better off they are going to be in the way they enforce the law at that level.

Mr. WISE. If the Chairman would indulge me one 10-second remark.

I do have to observe, Mr. Director, if we could work out a system of capital budgeting on wastewater treatment plants we could certainly get a lot done in a short period of time and begin reaping some of those benefits. Thank you.

The CHAIR. Let me just mention that we are down to nine minutes now.

Mr. Ewing.

Mr. EWING. Thank you, Mr. Chairman, and Mr. Director thank you for coming.

I want to say a few things, too, as all my colleagues have.

First, I believe that you have to keep pressure on for us to make progress on clean water. And I approve of that, and I support that.

I think also you should be congratulated for your work as Director in trying to see that regulations are fair and that the Regulatory Flexibility Act is enforced.

Presidents come and go, Directors come and go, bureaucracy stays on forever. And the point I think we need to make—and you made wonderful comments here about getting into a groove, limiting the power of bureaucracy, being sensitive to people, implementing laws that are fair and reasonable. We don't want the tail to wag the dog.

Two hundred and fifty Members of this House have said we need judicial review. The bureaucracy—maybe your own bureaucracy is saying we don't need judicial review. The Vice President says we need judicial review. Mr. Director, can you support judicial review? Bring that fairness to small business, local governments? So that when we pass the Clean Water Act they will feel that they are getting fair regulations, the cheapest, best regulations?

Mr. PANETTA. We have, generally, as an administration not supported providing broad judicial review just because of the, again, the complications of the process, the amount of litigation that would result from all of this.

I guess what I would be willing to do with you is to try to review to ensure that the existing legal process, for whatever reason, may not be adequate to deal with it. We think it is adequate, and we would rather rely on the existing legal process rather than creating a whole new set of actions based on new judicial review.

Mr. EWING. And, certainly, I don't want to encourage excessive litigation. I have always been one for judicial reform. But the Vice President put it at the top of his list, and sometimes, you know, the people being regulated want to feel they have a fair, even plain. And that is what it is going to take. I appreciate your consideration of that.

The CHAIR. Again, Mr. Ewing, thank you very much.

And, Mr. Panetta, let me thank you very, very much for your patience and your—really, the way you handled, as you always do, the kind of inquiries that are made of you. We recognize you are not from EPA, but a lot of the questions we were dealing with, some of the issues that come out of EPA, so I do appreciate your being here as well today. Thank you very, very much.

The committee will stand in recess for 10 minutes, and we will reconvene at that point.

[Recess.]

Mr. APPLEGATE. Sorry we are running just a little bit behind time, but we are going to get this meeting started because time is going to be running out, and we want to get in all of the panels and find out about this very important issue from each of them.

We have before us right now Charles Loveless, Legislative Director of the American Federation of State, County and Municipal Employees, accompanied by an old friend that has been around the

halls for about as long as I have been here, Jay Power. So it is good to have you here and we are looking forward to hearing from you.

TESTIMONY OF CHARLES LOVELESS, DIRECTOR OF LEGISLATION, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL–CIO, ACCOMPANIED BY JAY POWER, LEGISLATIVE REPRESENTATIVE, AFL–CIO

Mr. LOVELESS. Mr. Chairman, distinguished Members of the subcommittee, I am not your originally scheduled witness, Gerald McEntee. Let me say he was here until about 20 minutes ago, but he learned early this morning that he is the proud grandparent of a new grandson, and he is on his way, with his wife, up to Philadelphia to join his family and he regrets very much that he cannot be with you. And I would beg the Chairman's indulgence to present our testimony.

Let me start by saying that AFSCME represents approximately 1.3 million workers across the Nation, the great majority of which are State and local government employees. We are here to testify not only representing AFSCME, but we are here also representing the AFL–CIO on some of the issues that have been raised relative to reauthorization of the Clean Water Act.

Let me start by saying that clearly, water pollution is one of the most important issues facing contemporary America. It determines a large part of our quality of life, our health, our well-being, our supply of drinking water, the kinds of recreational opportunities we have, a significant part of our food supply, where we can locate new businesses, where we can accommodate growth and what kind of world our children and their children are going to inherit from us.

It is the responsibility of this subcommittee and of the full Committee on Public Works and Transportation to report legislation that reauthorizes the historic Federal Water Pollution Control Act amendments of 1972, known as the Clean Water Act.

On behalf of the entire labor movement, we urge the committee to promptly join the issue and begin the process of reauthorizing this crucial law. It is the responsibility of all of us to ensure that Congress does not end this year having failed to reauthorize the Clean Water Act.

We, in the labor movement, are prepared to work tirelessly to secure passage of the reauthorization.

As you know, the Chairman's mark is before the committee, and the Environmental Protection Agency administrator and the administration have given their views, it is now time, we think, to craft a balanced, progressive reauthorization that meets today's needs, one of which is not burdened with harmful amendments that would effectively derail the historic purpose of the Clean Water Act.

The focus of our testimony this afternoon is with the direction of so-called regulatory relief proposals, which are being advocated to be included in the reauthorization of the Clean Water Act and in numerous other pieces of legislation.

Of these regulatory issues, unfunded mandates, takings, and risk assessment, any one of which could be added to the Clean Water Act or any other authorizing legislation, we have major concerns

and in fact oppose. But today, because we represent overwhelmingly State and local government workers, we have a particular interest and concern with the unfunded mandates issue, and that is where I want to concentrate today.

Let me begin by saying that there are few subjects as important as shedding light and furthering debate on the subject of underfunding of needed public services and the financial condition of State and local governments. Such local services as maintaining a clean environment, constructing and maintaining our public infrastructure, ensuring public safety, educating our Nation's school children, caring for the sick and elderly, and so much more, have been severely strained throughout the 1980s and early 1990s.

There is no question that Federal budget cutting has caused irreparable harm to the fiscal stability of State and local governments. All this has occurred at a time when demand for these and other services has been at an all time high, resulting from generally poor economic conditions throughout the country during the past several years.

According to our AFSCME analysis, Federal aid has fallen as a percentage of total State and local spending. For example, in 1980, total Federal grants in aid accounted for 25.8 percent of total State and local outlays, but that gradually fell over the Reagan administration years to 17.7 percent, and has only climbed to 22 percent by the time President Clinton took office.

So, in our opinion, Federal aid is not keeping pace with the increased responsibilities State and local governments have had to assume. The recent increase in Federal aid has been to programs which benefit individuals, and this is particularly so in the medicaid program, not programs that benefit directly State and local governments.

The Advisory Council on Intergovernmental Relations reports that grant payments to individuals accounted for only 35 percent of all Federal grants in 1980, but now have skyrocketed to 62 percent in 1993. So while we believe Congress does need to focus on the issue of adequate funding for the delivery of vital community services, and we share with the governors and the mayors and other groups representing State and local governments the need to do this, we cannot endorse any of the mandate relief bills that have been introduced in the Congress or any of the proposed amendments to particular pieces of legislation, including the Clean Water Act. They do not address what we believe is the real issue here, which is inadequate Federal funding for vital State and local services and programs.

Instead, we are concerned that they would provide what would amount to a convenient excuse to curtail or eliminate enforcement and coverage of important Federal laws and protections for working Americans and their families, including the Clean Water Act.

If the unfunded mandate relief legislation or amendments are adopted, I doubt that the Congress could be able to pass any of the current major domestic policy initiatives pending in the Congress, including the Clean Water Act, reform of the Occupational Safety and Health Act, health care reform, or the welfare reform for that matter with any confidence that the States would follow them.

What would result would be an unequal system of local enforcement and protection of important national policies directed at environmental protection, civil rights, labor laws, and even the education of disabled children.

By requiring funding of Federal requirements at a time of budgetary restrictions, would mean that the overall impact of important congressionally approved national policies would be reduced.

It is simply unfair to exempt State and localities from compliance with Federal policies when the private sector is forced to comply and when citizens depend on governmental protection as well. While adequate funding is a very real issue, and should be a major concern of this subcommittee and committee as you go through the process of reauthorizing the Clean Water Act, we do not believe that States and localities must be reimbursed as a condition for complying with Federal laws and regulations.

Let me also say that we must raise significant questions about the workability of unfunded mandate proposals. What exactly is an unfunded mandate? Just exactly how would reimbursement be determined? Who decides what constitutes full funding?

If only partial funding is provided, do States have to comply with only certain requirements of a particular law? Suppose requirements are attached to grants in aid, do you lose the grant money if you do not comply fully? There may be other adverse consequences associated with such legislation and amendments.

In particular, the question of whether State and local governments would have to comply with various Federal regulations and laws inevitably would give rise to numerous lawsuits. The growing drum beat for eliminating unfunded mandates may sound like a catchy and worthwhile idea, but behind it lurks an outright assault on fundamental Federal protections which benefit all Americans.

While we know that many of the proponents of such legislative proposals are well intended, we are fearful this is a thinly disguised effort to undermine laws and regulations designed to protect the health, the environment, the safety and civil rights of all Americans.

For these reasons, AFSCME and the AFL–CIO strongly oppose unfunded mandate relief type legislation. We believe that any effort to include an unfunded mandate amendment on the reauthorization of the Clean Water Act should be rejected.

Instead, we would urge all concerned officials to join with us in fighting for adequate reimbursement of State and local government services as well as reducing Federal requirements on a case-by-case basis when it is warranted.

Thank you very much, Mr. Chairman, and I will be pleased to answer any questions that the subcommittee may have.

Mr. APPLEGATE. Thank you, very much, Mr. Loveless. I appreciate your being here and my congratulations to your boss. It is a wonderful time in your life to become a grandfather.

Your statement is presented well and there is not really a whole lot that needs to be commented on it. You do very strongly believe in the approach that we take in this bill as far as funding the SRF's more than what the administration has proposed, since they proposed some $2 billion.

We are going at $3 billion plus $500 million a year for four years to take it up to $5 billion.

Mr. LOVELESS. Mr. Chairman, let me say, we have not had the time to study all the particulars of the bill, but we believe the addition of funding that is included in the Chairman's bill is certainly a major improvement, yes.

Mr. APPLEGATE. It is difficult for me to understand that anybody would even think that the $5 billion is too much money when the EPA estimates our needs are at $137 billion, which over the past few years or so is up from $180 billion. And as time goes on that is just going to continue to swell. And by the time we reach this minuscule number of even $5 billion, which sounds like a lot of money, the costs are going to far exceed what we are even looking at now.

So the $5 billion is really a good investment from a local standpoint, because it is going to be money that will be paid back, and we are giving more flexibility for the States to use the money and we are going to allow 30 years to pay that back, so we are going to keep that fund in continuity and perpetuity and, hopefully, at least, anyway.

Let me just ask you this one question that I have. On the Hayes/Shuster alternative, which has been proposed, it requires an estimate of the cost of implementation and an estimation of the Federal funding which will be made available for implementation.

Now, if Federal financial assistance is expected to be less than 90 percent, EPA must report to Congress on the reasons for and the consequences of the shortfall, and this, as we see it, appears to be setting a standard that Federal requirements will be judged as unfunded if 90 percent is not paid by the Federal Government.

What is your reaction to that?

Mr. LOVELESS. Mr. Chairman, we have major problems with the Shuster/Hayes provision in this area. In our view, this particular provision is going to, in effect, become a bureaucratic mechanism which essentially is going to lead to the delay and perhaps the elimination of any enforcement of the Clean Water Act.

We think that is going to cause needless delay, and as I said even suspension of Federal Rules and laws, so we do not believe this would be desirable at this point.

Mr. APPLEGATE. I know as a member of the AFL–CIO and some of your brethren who represent heavier industries, metals industries and all, that they have some problems with regard to intake credits and groundwater and mixing zones and things of that nature, and they want to see some of those things changed a little bit to sort of modify.

What do you think about—have you looked at their promotion to see, because I know that you are interested in seeing industry survive in this country because if they go down the tubes, you go down the tubes, the American worker.

Mr. LOVELESS. Absolutely. It is a vital part of the infrastructure. I would hope you would allow me the opportunity to turn to my distinguished colleague, Mr. Power, from the AFL–CIO, to answer.

Mr. POWER. Thank you, Chuck. Mr. Chairman, you raise a very valid point. There are industries that employ other affiliates of the AFL–CIO who are involved in not only living under regulations im-

plemented under Clean Water Act, but in terms of the workers who actually do the construction to achieve the goals of the law.

There has been discussion in the Senate hearings about a study of some of these areas to make sure there is not a direction being taken that is actually harmful to larger goals of the act. We certainly think at a minimum the committee may want to look at that.

In terms of specific regulatory relief, we also want to look at it, we want to continue to talk to our employers as we have, and have further dialogue with the committee to see what is the best direction to go.

But certainly at a minimum, it may call for a study in some of these areas to make certain there is not an undo emphasis that could hurt the goals of the law.

Mr. APPLEGATE. Okay, well, that is fine. We will certainly be talking later about those particular issues and some of the others, and we will finally get down to putting together what we hope will be a fair compromise and where everybody can come on board and say gloriously, this is it.

Mr. POWER. Here, here.

Mr. APPLEGATE. Then we will all be in heaven or someplace. And with that, I shall recognize our very distinguished Chairman of the full committee, Mr. Mineta.

The CHAIR. Thank you very much, Mr. Chairman, and Mr. Loveless, I do appreciate your testimony here and filling in for Mr. McEntee. I don't know if you were here earlier when Mr. Panetta testified before us but, he pointed out that it is necessary, he felt, to better define what is meant by mandate, and you also raise that as an issue here.

But I guess the question that keeps coming up is how do we determine those costs. It does not seem to me, and I will be asking later witnesses, that we should be reducing the standards, the water quality standards, under which the law or the regulations presently operate. It is really the starting point of clean water or safe drinking water, in terms of what they are required to do.

In the absence of Federal legislation, would they do nothing or would they be doing something? And is the cost, then, that incremental cost from what they think the local standards might be to whatever the Federal requirements are, above that?

I am just wondering, do you have any thoughts as to how we ought to be able to determine what those costs might be? How should we calculate the costs? I was wondering if you could help us out on that.

Mr. LOVELESS. Well, Mr. Chairman, you ask what I think is one of the crucial questions in this whole debate as we move toward reauthorization of the Clean Water Act.

First, on the first part of your question, with regard to what is an unfunded mandate, I would say AFSCME became particularly concerned about the direction of this whole debate when the National Conference of State Legislatures, a group that we normally work very closely with, recently published a catalog of what they termed to be unfunded mandates.

I would urge, if you would like, we will submit a copy for the record, but, Mr. Chairman, everything is in there from A to Z,

every major piece of legislation, practically every piece of legislation that has recently been adopted by this Congress, from agriculture to veterans. That issue, as to what a mandate is, is one that there is no——

The CHAIR. We are a little sensitive about A to Z around here so——

Mr. LOVELESS. Actually I should say A to V so I will amend my testimony. Veterans is basically what I was referring to, but there were a variety of veterans legislation that they termed as unfunded mandates.

With regard to cost estimates, and I would ask my colleague to jump in here, there are various bills that propose the Congressional Budget Office be more heavily involved in this area in terms of making assessments.

The difficulty here, of course, is, as we all know, that CBO is overwhelmed currently in dealing with subjects before them. But this is, obviously, an issue which is going to be, I think, a real crucial issue during the debate.

Mr. POWER. Let me supplement what Mr. Loveless has said, Mr. Chairman, by referring back to the statement Mr. Panetta made in his testimony earlier today.

Clearly, there is, I think, an obligation on the part of Congress to exercise a balance between the listing of the scope of problems and the listing of the ability of Congress to budget to solve the problems.

Let me give you an example from another area of this committee's jurisdiction. I vividly remember in 1991 when we passed the historic ISTEA legislation that was funded at some $150 billion over five years, which is an important piece of legislation for the AFL–CIO and for our members who both benefit by it and work by it.

Nonetheless, at the time of the historic ISTEA bill, a study came out that said just the cost of repairing America's bridges would be $150 billion, just for bridges. And yet the funding in 1991 was set at $150 billion for the entire range of needs.

So certainly there is a valid point in talking about leveling with American taxpayers and citizens about what real costs are.

However, I share with our affiliate, AFSCME, testifying today, the national AFL–CIO is very concerned that Congress not turn the process on its head and take what is legitimate concerns about cost, takings, mandates, risk assessment, and have them in fact be the engine of government.

As I think Director Panetta aptly put it, do we want to replace legitimate problems that need to be solved with a whole new system that brings with it baggage and anchors that in fact can lead to major environmental and safety laws not being implemented, and the American people who benefit from them, and who often will have their lives diminished without them, being left in the lurch because Congress does not act?

The CHAIR. Mr. Chairman, do I have some time left?

Mr. APPLEGATE. Mr. Chairman, you are the Chairman.

The CHAIR. Well, if I might, then, take the prerogative. You testified very eloquently on unfunded mandates, and I appreciate that. I would like to ask you something about takings.

A new theory is being proposed in the Hayes bill and Tauzin bill that government would have to pay people who believed they were disadvantaged by being told not to pollute or not to harm the public interest in other ways. What would that approach do to the government's ability to protect the public interest, to protect public health, or to protect public safety?

I am wondering what is the view of the unions on this new theory or direction as it relates to takings.

Mr. LOVELESS. I think I can speak for the entire labor movement, Mr. Chairman, in making it very clear that we strongly oppose so-called takings amendments or so-called takings legislation.

We believe the bottom line is that it is going to impede the ability of government to provide vital services and to protect vital interests of our citizenry. It is interesting to take a look at the argument by some of the advocates of this, which is that I gather the Fifth Amendment is not adequate to protect property interests.

But the fact is if you take a look at the ability of our Nation to respond to environmental crises, to respond to health and safety issues, it is going to be dramatically impeded by the legislation and we have strong problems in that area.

The CHAIR. Well, again, thank you very much for your testimony, and thank you very much, Mr. Chairman.

Mr. APPLEGATE. Thank you, Mr. Chairman. Ms. Brown.

Ms. BROWN. Thank you, Mr. Chairman, and thank both of the Chairmen for having this hearing. Let me say that Mr. Oberstar is not here, but I want to have myself associated with his remarks, because he certainly understands the goals.

However, having served 10 years in the Florida House of Representatives and served on regulatory reform, I understand unfunded mandates and I have a couple of questions for Mr. Loveless.

The first one, some of the opponents of OSHA reform have said OSHA coverage of public employees is another new unfunded mandate which we also should not implement unless the Federal Government provides the funding.

What are your thoughts on this issue?

Mr. LOVELESS. Ms. Brown that is an excellent question. Let me say that during the markup of the OSHA reform bill in the Education and Labor Committee, that is indeed the argument that various opponents of OSHA reform used; that it was, an unfunded mandate. And let me say that energized my union to become much more interested in this area.

I would say that, first of all, to respond to that, we would argue that it is not an unfunded mandate. We believe that all employers, it does not matter whether it is a State or local government or any type of a private industry, that all employers should have obligations toward protecting the health and safety of their own employees. But, in fact, that is the argument that is being used by various opponents of OSHA reform.

And we would further respond by saying there was a study that just came out in this last week by the Labor Department that actually indicates that there will be a net savings to State and local governments in terms of reduced worker compensation costs, and all the costs that would be attributable to workers having to go out

because of workplace injuries and accidents. But this is a major problem.

And I am going back to what the Chairman said. What is an unfunded mandate? It shows how imprecise this term is, and it is being used by a variety of individuals to impede the adoption of progressive domestic policy initiatives.

Ms. BROWN. Thank you. I have one other follow-up question.

Do you see the reauthorization of the Clean Water Act as a jobs creation bill and in what way?

Mr. LOVELESS. Yes, I think it is a jobs bill. And let me say the clean water bill is, I think important, not only for public employees, but for thousands of people in the private sector. I think literally hundreds of thousands of jobs could be at stake in this legislation.

We represent public employees who service and maintain water treatment facilities and also are employed in delivery and different types of waste recovery systems.

The other affiliates also represent private sector workers who are actually involved in the construction of many of these different facilities. So very clearly this is a jobs bill, and I think that the committee should keep that in mind as we go through the process of reauthorizing the Clean Water Act.

Ms. BROWN. Thank you very much.

Thank you, Mr. Chairman.

Mr. APPLEGATE. Thank you, Ms. Brown.

Mr. Gilchrest, no questions?

Mr. GILCHREST. Not right now.

Mr. APPLEGATE. Not now, okay.

Mr. Barcia.

Mr. BARCIA. Thank you very much.

Just one comment, I guess, Mr. Chairman. I thank you also for the time that you have taken to put together this hearing today to allow the committee Members to receive additional testimony regarding this important legislation.

I would like to say as a Democrat from Michigan, I do have a concern about unfunded mandates. I suspect, in fact, I happen to know a member of the AFL–CIO who took his own life because he saw his life's savings disappear as a result of litigation costs involved in attempting to create some development on property that he had been left from his deceased father's estate.

It was a sad story all the way around, particularly when the land in question was not really wet. It is wet a little bit during the springtime, during heavy rains. In the spring if it does not rain heavily and the water table is low, it is not even wet at that time.

I would like to comment specifically about whether you think there is an adequate amount of funding, given the expansion of the regulatory authority that is contained in the reauthorization of the Clean Water Act, and some specific concerns I have as relates to my home State about the authorized funding under both of the proposals contained in the legislation.

In each my State of Michigan would receive approximately 3.85 percent of the State revolving fund. If the program were fully funded, that would mean an increase from $83.4 million in fiscal 1993 to $115.5 million in fiscal 1995 from 1993 to 1995.

While this might seem to be cause for celebration, Michigan's percentage has dropped by about half of a percent from 4.35 percent to 3.85 percent. Therefore, that increase occurs only if we receive full funding or a 36 percent increase in the program over 1993 dollars and 40 percent over last year.

If that $3 billion gets cut to $2.25 billion, which I fear is quite likely given the depths of our concern about deficit reduction here in Congress, my State winds up exactly where we started two years ago. Worse yet, we only get that much if the Appropriations Committee finds room for an 11 percent increase over the 1993 budget dollars for the State revolving fund.

In Saginaw, Bay City, and Flint in my district, population may have decreased but certainly need has not. We have experienced migration due to a loss of manufacturing jobs, but the problem still exists.

In the rural areas of my district there is an increase in need that has resulted from economic development and an increase in population.

So we also have a particularly bad problem, even under existing law, with such things as combined sewage overflows, which currently the City of Saginaw, and I know AFSCME represents many of the city workers in the City of Saginaw, I think has about a $75 million tab in addressing the combined sewage overflow problem for the City of Saginaw. I suspect without significant Federal assistance, we will be looking at massive layoffs of your work force in that municipality. And I would like to see if you want to comment on that.

Mr. LOVELESS. Well, Mr. Barcia, clearly as a union that represents I think well over 1 million State or local government workers, we share with you the need or the concern to make sure that there is adequate funding in this legislation for the various services and activities that need to be undertaken as a result of the legislation.

We would like to work with you and other Members of the committee to make sure that the legislation does indeed provide that funding.

Mr. APPLEGATE. Mr. Barcia, are you through?

Mr. BARCIA. Yes, thank you very much, Mr. Chairman. That was the response I was after. Thank you.

Mr. APPLEGATE. Good. Ms. Shepherd.

Ms. SHEPHERD. Thank you, Mr. Chairman, and thank you, Mr. Loveless, for joining us.

I am interested to hear you comment from the point of view of a representative of the employees who make the Clean Water Act work. It is the people that do it that know it best, and I would like to have you comment on the current Clean Water Act as it has worked over the past 12 years, and perhaps to tie what you see as the current failures of the current law to improvements in any of the suggested bills or weakening items that you see in either of the suggested bills.

Mr. LOVELESS. Ms. Shepherd, as a last minute substitute for the original witness, I will defer to my colleague, Mr. Power on this.

Ms. SHEPHERD. All right.

Mr. POWER. I will be happy to respond, Congresswoman. Clearly I think one of the changes that has occurred over the years, as has been testified before this committee and others about this program, has been the change in the nature of the problem.

In 1972, which was the first year that I started working for the labor movement in the carpenters' union, before this committee there was a huge problem in factory pollution and discharge runoff, the kind of dramatic TV footage that probably still plays around our mind when the average citizen thinks of clean water. I think one of the changes that has been evident in recent years about the problem has been the growth of nonpoint pollution, the growth of agricultural runoff, the problem with the wetlands issue in terms of what is a wetland and how it shall apply.

It is somewhat complicated in terms of the EPA role, their ability to target the problem. Certainly for the first decade of the program, I think an enormous amount of the funding very properly went to the kind of image that I referred to of the factory that is discharging raw sewage into a river and polluting where our children swim and where fishermen have to make a living.

The challenge, I think that confronts the committee and the administration is to realize that problem of course still continues in some regions of the country, but also there are multiple problems, especially in rural areas that have really been playing second fiddle in terms of funding and attention, and we in labor have no trouble working with the committee and the administration to help you craft a bill that is fair to the new face of pollution, if you will.

Mr. LOVELESS. I would just add to that, I mean clearly, as Mr. Barcia indicated and as the Chairman seeks to address in his mark, that the overall issue of funding for these vital services is that we they think the committee needs to pay particularly close attention to.

Ms. SHEPHERD. Thank you very much.

Thank you, Mr. Chairman.

Mr. APPLEGATE. Mr. Poshard.

Mr. POSHARD. Thank you, Mr. Chairman, and I appreciate—I apologize for not being here during the majority of your testimony, but I tried to go back and pick up a little bit of the written testimony.

And, again, I just want to make a comment rather than a line of questioning here, because I know you folks' hearts are in the right place. I have lots of AFSCME folks in my district and I work very closely with them. I know you cannot see this from where you are sitting, but I want to share something with you here, in case anybody has not looked at this lately.

This is our Federal budget this year. It is a $1.5 trillion budget. $1.5 trillion! And this year we are going to have close to $200 billion in deficit spending in that budget, which is spending more than we are taking in. This year, if you look at the three major parts of the budget; discretionary programs, which are defense, education, transportation, justice, law enforcement, environment, energy, agriculture, science space and tech, and other programs, these are the programs for which most Americans, I think, feel that government has a major responsibility. That is the production end

of our society. That is 35 percent of the $1.5 trillion budget this year.

The second part of the budget is the entitlement part of the budget. That is Social Security, Medicare, Medicaid, food stamps, unemployment insurance, Federal retirement, farm price supports, and some lesser programs. This year that is 45 percent of the budget. That is the consumption end of the budget.

The interest on that $4.3 trillion debt this year in our budget is 20 percent of the Federal budget. This year we will spend 66 percent of every tax dollar sent to Washington, D.C. on entitlements and interest on the budget, and we are running the country on 34 cents on the dollar: trying to defend the Nation, educate our children, build infrastructure, protect the environment, justice, law enforcement, provide energy, research in space technology and so on.

Now, we have capped the discretionary side of the budget. We have said beyond this point we cannot go any further, because health care costs have been rising so rapidly that entitlements have gone through the ceiling, as you know.

We have capped this side of the budget. We cannot cap entitlements or have not been able to for various reasons. But as interest payments become a larger percentage of the total of the budget, and entitlements continue to go through the ceiling, discretionary keeps going down and we are fast getting to the point, folks, where if you listen to OMB or GAO or any of the other agencies, we are going to be running this entire country on 30 cents on the dollar. We cannot do it. There is no way in the world we can continue this trend and survive as a Nation.

When you are only spending 30 cents of every tax dollar on trying to defend the country, educate the children, build the infrastructure to be competitive in the economic world, protect the environment, provide law enforcement and everything else, it is just a matter of time before we are all down the tubes.

Now, every day, no matter what committee we have, everybody comes in here and says do the ultimate, do the maximum for whatever it is that we want that we represent. And I understand that; but at some point in time, whether we are dealing with the concepts of unfunded mandates or maximum protection of this or that, we have to decide on balance what we are capable of doing in this country and what we are not capable of doing.

And that is where we are right now. This is the most critical thing facing this Nation.

Nobody would run their household this way, nobody would run their State or should be running their government this way. But this is where we are. And I just—you know, if we do not do something to assess the overall costs, on balance of what things cost us, what are we going to do for instance, with our emphasis on crime, let's say, to get control?

What will we do with my AFSCME workers that work in the prisons? I have more prisons in my district now than I have community colleges. What will we do all with all those AFSCME workers when we say we had to spend the money here so we cannot spend it in law enforcement.

Even on the discretionary side, there is going to be trade-offs that are going to have to be made that will affect our people. This

is a serious problem and we have to somehow grapple with it before it is too late and our children simply have no chance at turning anything around.

It is not that we are anti anything or do not want to help folks, but, for crying out loud, how far can we go before we get to the bottom of the problem? Which is this: We do not want to tell senior citizens no, we do not want to tell veterans no, or farmers no, or laborers no, or business people no, doctors, lawyers, nobody.

We have had an administration for 12 years that has told the American people you do not have to pay for a thing, we will never tax you for any reason, and we had a Congress for 45 years that has told the American people you do not have to do without anything, we will never tell you no for any reason. That is why we are $4.3 trillion in debt and cannot get out and keep going farther in debt.

You tell me how to solve this if we do not start being honest with the people and telling them we have to pay for things as we go, in this country. And sometimes that means a tax and sometimes we have to tell all the special interests that are represented in this city, no, you cannot have it. Tell me how we get out of this hole.

That is the essential problem facing this country. Somebody at some point in time has to come in here and say, Congress, do what is right for the Nation.

I am sorry, Mr. Chairman. I am frustrated as hell with all of this stuff. I really am. We just——

Mr. APPLEGATE. It is a great speech and it comes from heart, and I understand what you are saying and I think others do, and I see the Governor of Nebraska sitting over there nodding his head in approval of those things which you were talking about.

Mr. Geren.

Mr. GEREN. Thank you, Mr. Chairman.

I want to also welcome our witnesses and I do want to echo what Glenn has said about his relationship with AFSCME over the years. I have represented many of your members and have had a good working relationship with you and appreciated the chance to visit with you today and I certainly appreciate your testimony.

I want to respond to a point Mr. Loveless made and also it is in the written text here. There is the impression, and it is part of this debate, that somehow the initiatives that fall under unfunded mandates or risk assessment or a combination of those, as you said, stand in the way of the enactment of progressive domestic legislation in this country.

But I think it is important for us to understand that when we in Congress decide what a municipal government is going to spend its money on, the cost to the progressive agenda is not negligible. When we tell a city, through our EPA, that they are going to build this water treatment plant, period, or your city manager is going to be fined $25,000 a day, those cities do not have the luxury or the purse that we have. They cannot deficit spend. They cannot pass it on to the next generation. And that means some other piece of the progressive agenda will get pushed out of their budget. That means they will cancel a health care facility, or terminate it in an underserved area. They will cancel a childhood nutrition program.

It means they will lay off policemen in the face of increasing crime rates. They will close senior citizens centers.

So it is important to realize regardless of the perspective you come from, whether you call yourself a progressive politician or take pride in being a Neanderthal politician, there are costs associated with these decisions. And when we in Congress send a mandate to Kleberg, Texas, and we do not send the money, that means that they are not going to do something that their city council has decided is important.

That does not mean the city council does not think the environment is important. They think it is very, very important, but they have had tremendous layoffs right now and, by gosh, they think the health care plan in their city is awfully important as well.

So I think it is important we do not frame these issues as progressive against this Neanderthal or unholy trinity against the holier than the rest of us. And you, as representing the folks that you represent, you all have people that provide all those kind of government services, and I commend them for committing their lives to that kind of work in which they are not rewarded near to the extent they deserve. But you also have folks in health care. And when we say you are going to build a water treatment plant, some of those folks are not going to be able to do that part of the progressive agenda. So it is not cost free looking at it even solely from the perspective of the progressive agenda.

In the risk assessment area, are there projects that you all would be willing to support or that you could live with? Have you looked at the Senate bill in the risk assessment provisions that are in there and is that something that you think that your membership could endorse? Are there problems that you all have with that?

We are trying to come to some kind of agreement on risk assessment in this bill or if there is risk assessment in this bill, is that something that you all are going to say, absolutely not, we cannot support it, we are against it? And we have heard that from some people.

Mr. POWER. Congressman I will give you the best answer I can today. We in labor and the AFL–CIO and AFSCME and many of our affiliates who are concerned with this issue have been following the risk assessment debates and certainly the recent developments in the Senate.

I will be quite specific. What occurred in the Senate was that a compromise amendment was given to Chairman Baucus on risk assessment and the Johnson amendment was rewritten. I know that many of our friends in the environmental community were troubled by even the compromise.

We certainly believe the compromise was an improvement over Senator Johnson's original amendment that we felt was draconian, harmful, and which we could not support. We currently, and I am not an attorney, which my sainted mother is very proud of, but our attorneys are looking over the compromise amendment. It is an issue of some importance that should not be overlooked.

It is important that government be fair and that the interface of government with its citizens, whether business or average citizens, not be heavy-handed so that we do not dismiss the motives behind these amendments. But we do have a great concern, as AFSCME

testified today, that some may want to use these issues for purposes that would derail the underlying legislation. So we are looking at what passed the Senate. We have not come to a conclusion.

I would not be candid if I did not tell you we are troubled by it, overall. But we think this committee should continue to look at it. We would welcome discussions with you personally and Members of the committee about a way to achieve a balance here.

I say that many by way of restating something Mr. Loveless said at the beginning of his testimony. We in the AFL–CIO believe very strongly that if Congress should end this year without reauthorizing the Clean Water Act and the Safe Drinking Water Act and Superfund, or without making a start on some of them, that there really has been a great opportunity lost.

We are not naive about the complexities of these issues. I think the time and the questions asked to Director Panetta are indicative of how complicated these are.

But that should not for a moment lay aside the duty to move forward in a progressive way and achieve passage this year of these laws that are so crucial to this country. We in the labor movement, I can assure you, will work for this committee. No one works harder for the product of this committee than the trade movement and we will work hard to see this work.

Mr. GEREN. You said your lawyers are looking at the Senate bill right now. As soon as they finish their assessment, would you provide me copies of their conclusions?

Mr. POWER. I will be happy to, sir.

Mr. GEREN. I appreciate that. One thing in closing. In Washington, because of deficit spending, we can be for everything: Clean environment, more health care, more nutrition. We can be for more everything. But when you endorse a legislative product that forces a Kleberg, Texas, to build a water treatment plant, that means that some of your workers working at the hospital will get laid off. Some of your workers working at the senior citizen center are going to get laid off. We have to understand that.

We are not talking about Washington, where everything is free. We live with that delusion. In the municipal and county area, when we force them to do something, some of your folks who are doing some very wonderful other things, are going to lose their jobs. That is something we need to remind ourselves of constantly.

There is a choice between good things, and the decision here is who is going to make that choice between those good things. Is it going to be the council or those of us sitting on this panel?

Thank you, Mr. Chairman.

Mr. APPLEGATE. Mr. Borski.

Mr. BORSKI. Thank you, Mr. Chairman. I have a quick couple of questions, if I may. I want to welcome our panelists and thank them for the testimony.

I have serious concerns about the level of scientific precision of comparative risk assessment in its current state of development, which I believe is part of the Shuster/Hayes alternative. Can we compare risks that are very different in nature, for example, comparing human cancer risk with public welfare risk or ecological risk? How many children with learning disabilities equal one can-

cer death? And what about habitat destruction? How does comparative risk assessment make the trade-off?

Mr. POWER. I think, Congressman, your question summarizes the very conundrum we are in about the problem of risk assessment. It would be irresponsible for us to tell this committee that the Congress and the Executive Branch, in promulgating regulations, should not look at the cost of those regulations, the cost versus other regulations, the impact on business, the impact on the private sector. Our members are taxpayers too and they want good responsible regulation of their tax dollar.

On the other hand, your question is exactly the problem that is faced by some who are proposing risk assessment and cost assessment as the end-all and be-all of reform of the Nation's basic environmental health and safety laws. Some of these issues cannot be assessed that easily. And if the priority in terms of direction from Congress is that risk assessment and cost assessment and takings have to be solved first, before basic environmental health and safety and labor law move forward, we have turned the process on its head.

We have taken what contains some legitimate concerns that this committee and the administration needs to address and decided that they are in fact going to be the tail that wags the dog of environmental health and safety law in this country. And we just are very fearful of that process.

Should there be a look in these directions? Should these issues be handled perhaps with more specificity than they have over the years? We have no problem with that. But we want to make sure they are carefully looked at and the kind of differences and science that your question implies, I think allude to the complications of a simplistic answer about risk assessment, takings and unfunded mandates.

Mr. BORSKI. I thank the gentleman.

Thank you, Mr. Chairman.

Mr. APPLEGATE. Mr. Chairman DeFazio.

Mr. DEFAZIO. No questions for the moment, Mr. Chairman.

Mr. APPLEGATE. No questions. Well, that looks like that took care of it. You wiped this side out and we are still here. So maybe they knew where you were.

At any rate, thank you, Mr. Loveless. Jay Power, thank you very much for being here and being so articulate in answering our questions. We appreciate it very much.

Mr. POWER. Thank you, Mr. Chairman.

Mr. APPLEGATE. The next panel, we are very honored to have a very distinguished governor with us, and his Congressman, our colleague and friend, Pete Hoagland is going to be here to introduce him and the governor's assistant. And also we have Jeffrey Wennberg, with the National League of Cities. Mr. Wennberg is also the mayor of Rutland, Vermont.

Pete.

STATEMENT OF HON. PETER HOAGLAND, A REPRESENTATIVE IN CONGRESS FROM NEBRASKA

Mr. HOAGLAND. My name is Peter Hoagland. I represent the Second Congressional District in Nebraska. It is my pleasure to be

here to testify to introduce our fine governor Ben Nelson before the subcommittee and Members of the full committee.

So Chairmen Mineta and Applegate, let me tell you, I have had an opportunity to review the governor's testimony on the Clean Water Act amendments. He is testifying here of course on behalf of the National Governors' Association.

Ben Nelson and I have known each other since the early 1970s. We are both attorneys from Nebraska who have had a long-lasting friendship and working relationship. He is one of the most effective and hardest working governors that our State has ever produced. He is a very, very talented man. Whenever I see him, I kid him about how hard he is working and urge him not to work quite so hard.

As you can see when you hear his testimony and ask him questions how much time and effort he has put just into this one project alone to say nothing of all of his other responsibilities and efforts on behalf of the people of the State of Nebraska, we are very lucky to have him.

It is my pleasure to introduce him to the committee today as representative of the National Governors' Association. He is indeed a very effective, competent and important political figure in our State.

So with that, Mr. Chairman, let me turn it over for Governor Nelson and thank you for allowing me the privilege to introduce him to the committee today.

Mr. APPLEGATE. Thank you Pete, and we certainly welcome Governor Nelson to the panel.

TESTIMONY OF BEN NELSON, GOVERNOR, STATE OF NEBRASKA, ON BEHALF OF THE NATIONAL GOVERNORS' ASSOCIATION, ACCOMPANIED BY RANDY WOOD, DIRECTOR, DEPARTMENT OF ENVIRONMENTAL QUALITY, STATE OF NEBRASKA; AND JEFFREY WENNBERG, MAYOR, RUTLAND, VT, ON BEHALF OF THE NATIONAL LEAGUE OF CITIES

Governor NELSON. Thank you, Mr. Chairman. Thank you, Congressman Hoagland. It is a pleasure to have you introduce me and it is a pleasure to be here with you.

Good morning, Mr. Chairman, and Members of the subcommittee. I am Ben Nelson, governor of Nebraska. I am here today representing, as Congressman Hoagland said the National Governors' Association. First of all, let me say that we appreciate this opportunity to provide input on Chairman Mineta's reauthorization amendments before the full committee takes action on the bill.

I am happy to have with me as well Randy Wood who is the Director of the Department of Environmental Quality in the State of Nebraska who has worked very closely with the other States on the Clean Water Working Group to develop the State package and he will be able to answer some specific questions on the work on Nebraska's water programs.

The governors' primary concern is in fact a clean environment. The purpose of my testimony today is not to weaken Federal regulations but rather to promote changes that create indeed a safer, healthier environment. Let me begin by clearly stating that the governors are committed to working to passage of amendments to

the Clean Water Act this year in support of your objectives to reauthorize the act.

And in support of those, we have invested significant time and energy through the National Governors' Association to ensure continued improvements in the programs that protect the quality of the Nation's waters. The governors consider the protection of public health and waters of the State as among the most important responsibilities of our office. We have passed sound legislation at the State level and we have worked with Congress over the years to enact sound Federal laws.

What the governors want is an improved Clean Water Act. It is too easy to fall into empty debates about stronger and weaker. Measuring the effectiveness of the law should be based on reality and not rhetoric. The existing Federal Water Pollution Control Act, the Clean Water Act, is generally considered an effective environmental law that has resulted in significant improvements to water quality across the country.

As a result of the law's success, there is little disagreement about clean water objectives. The route we choose to reach the objective, however, will determine how fast we get there and at what cost or whether we get there at all. The governors believe that reauthorization should increase the effectiveness of the law and provide for improvements to water quality commensurate with the investment of new resources in the program.

I commend Chairman Mineta for making Clean Water Act reauthorization a clear priority within the committee this year. I also commend Mr. Mineta and you, Mr. Applegate, for all of your work over the past year to obtain input through hearings to develop this reauthorization bill.

In most respects, the substitute amendment to H.R. 3948 identifies the clean water issues of greatest importance to governors, including nonpoint source pollution, watershed planning, State revolving funds for wastewater infrastructure, stormwater management, and wetlands protection.

Additionally, I would like to commend the Chairman's recognition of the need for increased funding levels to fully capitalize the State revolving loan program and to adequately fund the implementation of new and existing clean water requirements.

Current funding levels are clearly inadequate in the face of projected needs.

The governors support an annual appropriation of $5 billion, $2 billion at a minimum, through the year 2000 to capitalize State revolving funds. Congress must appropriate moneys that reflect the higher authorization levels in H.R. 3948 to confirm the Nation's long-term commitment to environmental protection.

A mixed message is sent to our citizens when Congress imposes new clean water requirements on States, localities, and the regulated community while appropriating funds at the lowest levels in the history of the clean water program.

We have learned a great deal since the landmark Federal Water Pollution Control Act of 1972. In 1994, we must achieve a more effective clean water partnership that builds upon the experience of the last 22 years and takes advantage of the capability and commitment developed over that time. To date, we have been working

on what in some respects are the easiest problems. Now we will have to work not only harder but much smarter.

A successful partnership must acknowledge the limited resources available today for water resource management and demand improved intergovernmental cooperation in order to maximize existing resources. Additionally, the Federal-State-local relationship must be refined to streamline requirements in a way that removes unnecessary and unproductive burdens on State and local governments in the implementation of Clean Water Act requirements.

Regarding the Chairman's substitute amendments to H.R. 3948, I would first like to acknowledge a couple of areas in the bill in which you have clearly listened and responded to concerns raised by governors. First, in addition to increased and continued funding, we greatly appreciate your proposed improvements to make the State revolving loan programs more efficient and effective.

The bill maintains broad eligibilities for State revolving loan funds which allows the use of funds to improve water quality in both traditional and innovative ways. The bill also recognizes the need to provide special assistance to certain needy communities, by offering loans with negative interest rates and extended repayment periods.

The governors recommend that the bill authorize States to identify such needy or hardship communities based on State-developed affordability criteria to allow flexibility without a designated population cut-off. This approach makes sense because the size of small communities and the characteristics of economically disadvantaged communities varies significantly from State to State.

Second, the governors applaud the amendments to ensure Federal consistency with State water quality requirements and programs, including a waiver of sovereign immunity. The bill appropriately clarifies that Federal activities are subject to the requirements of the Clean Water Act in an enforceable manner consistent with the law's applicability to all persons outside of the Federal Government.

The governors maintain a strong position in support of ensuring Federal compliance in all environmental statutes. A fundamental concern that governors share about the bill stems from an underlying theme to transform the Federal-State relationship in a manner that will cripple successful water quality efforts under way at the State, local, and grassroots levels.

The accomplishments achieved under the current act demonstrate the value of a framework in which the Federal Government provides policy and technical guidance that States can appropriately tailor to meet local needs.

Without clear justification, H.R. 3948 proposes to significantly expand Federal authority over groundwater, anti-degradation of State waters, and applicability of Federal water quality standards without public notice and hearing in the State. Historically, these areas of water resource management have been under State jurisdiction. The existing framework for the Federal-State relationship should be refined, not reversed.

Additionally, we are disappointed that the amendments contain no provision to ensure that the U.S. Environmental Protection Agency, the EPA, utilizes a risk-based approach that is consistent

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and accessible to interested citizens when developing clean water regulations. A risk-based approach makes public health sense while ensuring the requirements can be implemented in a cost-effective manner at the Federal, State, and local levels.

The governors propose that the EPA administrator should incorporate risk assessment and cost benefit analysis taking quantifiable and qualitative measures into account when developing regulations.

Additionally, we propose that the administrator, at the petition of the governor, should authorize States to transfer grant funds between water quality programs and target State water quality priorities, as well as the goals of the Clean Water Act.

I would like to briefly illustrate our concerns with some specific provisions of the legislation that are particularly important to governors. For the record, these and other issues are more specifically discussed in my written statement.

The governors embrace nonpoint source objectives and are committed to developing effective strategies that will reduce pollution caused by runoff from agricultural, commercial, and residential sites. However, unlike industrial sources that can be regulated at the point of discharge, to demonstrate measurable reductions in pollution, nonpoint source runoff requires the highest degree of innovation and flexibility to achieve progress.

After 20 years of regulating industrial and municipal point sources of pollution, the goals are not yet achieved. Overcoming the complexity and variety of existing nonpoint source control problems will clearly take significant funding, time, and education.

We support the framework proposed in H.R. 3948 in that it builds on existing nonpoint source management programs and clearly identifies a goal to attain water quality standards in 15 years. We believe the appropriate Federal role is to provide financial and technical assistance as well as oversight of State programs.

We also believe it is appropriate that States retain primary responsibility for nonpoint source programs. To meet this responsibility, States should be required—and I emphasize required—to implement a nonpoint source program that addresses pollution of threatened or impaired waters. However, I urge you to reconsider the assumption that requiring States to impose mandatory enforceable measures on individual farmers and landowners will effectively reduce nonpoint source runoff.

We believe that State and local government can demonstrate nonpoint source success under the current Federal and State program framework if given a reasonable time frame to do so.

For instance, in Nebraska, our State program alone, not including Federal funds, has resulted in the implementation of 7,404 miles of terraces, 443 grade stabilization structures, 754 irrigation trailwater recovery beds, 8,061 acres of grassed waterways, 577 irrigation surge valves, 10,867 acres of pasture and range seeding, all of which have a direct and positive effect on surface water quality.

All of my State's 23 natural resources districts either have in place or are developing groundwater quality management plans and implementation schedules to address nonpoint sources. These

are but a few examples of voluntary State and local lead initiatives which, if given reasonable time, will demonstrate positive results.

The best way, in my opinion, to assure a productive nonpoint source program is to base it on an educational approach, not an enforcement approach. In Nebraska, we have approximately 40,000 farms of greater than 50 acres in size. We have experience with this exact situation and can assure you that it works and it works at the local level.

Regulatory enforcement oriented approaches are the best bet for getting the worst product in the longest time frame. We must learn from the prescriptive approach which has plagued the Superfund program. As governor of a State with a significant amount of rural land area and agricultural production, I am a firm believer in compliance through education and other cooperative measures.

Individual farmers and landowners want to protect their land for future generations. Grassroots support for a nonpoint program is essential to obtaining the long-term compliance that will result in pollution reductions throughout the years.

Let me suggest to you that a mandatory enforcement approach will severely limit the ability of States to get off the dime with an effective nonpoint source program that has buy-in from the agricultural community. Further, we maintain that imposing mandatory enforceable measures at the national level will bring voluntary compliance in all States to a screeching halt. States must maintain the utmost flexibility in reaching the goal of water quality standards, based on a combination of incentives, regulatory and voluntary measures, education, and training to address local priorities within watersheds and communities.

As in the nonpoint source arena, success in watershed management will be the result of ensuring local ownership of a holistic approach that applies—achieves multiple objectives with innovation and efficiency. We applaud your inclusion of provisions authorizing States to take a holistic approach to water resource management on a watershed basis.

The Chairman's amendments recognize the benefits of the watershed approach and provides some desirable incentives but still propose prescriptive Federal criteria for individual plans and new layers of bureaucracy to obtain Federal approval of a State program. A micromanaged Federal approval process may ultimately discourage States from developing a watershed program. I urge you to review the nonpoint source and watershed management proposals in the State package which identify and hold States accountable to the same goals as the Chairman's amendments, yet allow for the innovation and flexibility that is absolutely necessary to realistically achieve those goals.

While governors strongly support national recognition of States' groundwater protection efforts, an expansion of the scope of the Clean Water Act to impose Federal authority over groundwater is unprecedented and moreover unnecessary. States hold authority to address instances where groundwater pollution may impact navigable waters. States have long recognized the vital importance of groundwater and are actively involved with groundwater monitoring, protection, and management programs.

For instance in my State, we have passed legislation and are implementing programs dealing with well construction, well abandonment, chemigation, special protection areas, groundwater quality management areas, secondary containment, wellhead protection and leaky underground storage tanks. In addition, each of our State's 23 natural resources districts has developed a groundwater management plan and implementation schedule.

If Congress intends to establish a national groundwater protection policy, it should be developed in a comprehensive manner outside of the Clean Water Act. Adding references to groundwater within existing clean water programs will only create confusion. It will also result in more work for States, without more money, and without commensurate improvements in water quality.

In Nebraska, such efforts would also disrupt what are recognized as progressive and effective groundwater protection programs.

Mr. APPLEGATE. Governor, I am going to have to interject at this point because we do have two amendments on the Floor which we will have to go and vote, and so I am going to recess this meeting for about 15 minutes or maybe 20—19 minutes. We should be able to get back. There are two votes, so we will get over and we will be able to get back just as quickly as we possibly can. We appreciate your indulgence. We will be back.

[Recess.]

Mr. APPLEGATE. If everybody will take their seats, we will proceed with these hearings. Governor Nelson.

Governor NELSON. Thank you, Mr. Chairman.

In the interests of time, I have shortened my statement and I would refer you to my written statement on anti-degradation, water quality standards, and stormwater management. But for the record, we do have concerns and comments in the written statement about those issues.

I would like to refer now to our concerns about wetlands protection. The governors strongly believe that wetlands management must be improved by streamlining the Federal regulatory requirements and enhancing the States' role in wetlands management.

The governors support H.R. 3948's inclusion of the national goal to achieve no net loss of the Nation's remaining wetlands base. The States' role in wetlands protection should be strengthened by increasing the feasibility for States to assume the Federal program and by explicitly authorizing the U.S. Corps of Engineers to grant States general permit authority. The latter provision is included in H.R. 3948.

Regarding a State's ability to assume the Federal program, the governors believe that each State that assumes the program should negotiate a method of Federal oversight appropriate to its circumstances. Oversight in the form of an annual program audit eliminating the Environmental Protection Agency's authority to veto individual State permits should be an option. This question could be revisited as a State program matures.

While our objectives to improve the quality of the Nation's rivers and streams are in strong agreement, we believe that some of the provisions in H.R. 3948 reflect a different approach to achieving clean water than the framework proposed by governors. To demonstrate our commitment to maintain a structure and a process

that will improve water quality in a protective cost-effective manner, we have developed a State proposal for your consideration in authorization discussions.

I believe you are aware of the State package, presented as amendments to the current law, which reflects a State perspective on how best to improve and strengthen the Clean Water Act. It also incorporates important elements of reinventing government into a structure and process that is intended not just for show but for work that will produce real world results.

The State package was developed by an ad hoc Clean Water Working Group composed of representatives of more than 25 governors and open to all States. It has been reviewed by all governors. I ask that a copy of the State package be included in the record of this hearing.

[The State package may be found on page 1088.]

Governor NELSON. I understand that some elements of the State package have been incorporated into a clean water discussion draft, known as the bipartisan alternative developed by several Members of this committee. I strongly encourage you to consider the perspectives of the State package as a vehicle to facilitate discussion in the spirit of reaching broad-based agreement. We look forward to continuing to work together on this reauthorization.

That concludes my written testimony, Mr. Chairman and Members. I want to thank you all for the opportunity to testify today and I will be happy to answer any questions that I may be able to answer at this time.

Mr. APPLEGATE. Governor, let me ask you, are you on a tight time schedule?

Governor NELSON. No.

Mr. APPLEGATE. Okay. Because you were here with Mr. Wennberg and I thought what we would do, if you were not, we would just let him go ahead and we can ask questions of the both of you.

Governor NELSON. That would be fine, Mr. Chairman.

Mr. APPLEGATE. Mr. Wennberg.

Mr. WENNBERG. Thank you, Mr. Chairman, Members of the committee. I am Jeff Wennberg, mayor of Rutland Vermont and Chair of the National League of Cities Energy, Environment and Natural Resources Committee. I am here today to testify on behalf of NLC and the 16,000 cities and towns we represent on reauthorization of the Clean Water Act.

For years, the Nation's cities and towns have been your partners in the protection of public health and the environment. Now it seems that Federal requirements are moving us from a protection to perfection. For too long, the ability of local governments to absorb and implement unfunded mandates has been ignored by both the Federal and State governments.

We are not here to ask you to gut the Clean Water Act. Rather, the scarcity of local resources demands that we focus these resources on the real problems. Municipalities have reached a point where we are confronted with Hobson's choices. Having to choose whether to provide safe drinking water to our citizens or public access to all disabled individuals. Whether to upgrade our sanitary landfills to meet new Federal requirements or implement a Federal

mandate to control pollution from stormwater runoff. Whether to provide lead-free public housing or finance clean up of toxic wastes. All of these, however worthy, are unfunded requirements imposed on municipalities by the Federal Government.

Yet, in your State, Mr. Chairman, and in State after State, either by referendum or legislative action, taxes and spending limitations have imposed severe constraints on municipal leaders.

At a time when the number one concern and priority of our citizens is crime and violence, we are forced to divert ever-increasing proportions of our own capped budgets to meet Federal environmental regulations. Quite simply, local governments do not have the resources to pay for it all.

The issues I would like to highlight in my testimony today are the priority concerns of cities and towns in any Clean Water Act reauthorization. They include, first and more most, stormwater management. Urban stormwater runoff is a nonpoint source in the ordinary meaning of the term.

NLC believes stormwater should be regulated under the nonpoint provisions of the Clean Water Act and not under the NPDES provisions. In addition, it is essential that investments be made in research to determine whether and how to achieve water quality objectives for stormwater runoff.

Under the current program, the Federal Government is holding municipalities responsible to accomplish what no one knows how to do at a price no one can afford. Meanwhile, there is absolutely no Federal investment to determine whether the stormwater objectives are even feasible. For those in the Nation's smaller communities not yet swamped by the stormwater tidal wave, this argument assumes even more validity as we see our colleagues in the larger cities spending millions on permit applications and losing elections for imposing rain taxes.

Most importantly, NLC opposes end-of-pipe limits for stormwater discharges. The insertion of a distant future date for compliance and imposition of these limits as incorporated in both proposals which you are considering does not make this concept acceptable to us.

EPA should and must first deal with the issue of establishing wet weather water quality standards before considering the imposition of numerical effluent limits or any other performance standard on stormwater discharges. We think that both urban and agricultural runoff should be addressed through programs driven by water quality objectives.

Second, combined sewer overflows. NLC strongly supports the committee's ratification of EPA's recently promulgated CSO guidance and a provision authorizing the issuance of long-term permits. There is no avoiding the fact that CSO-controlled facilities can be enormously expensive and most of the costs will be borne locally. But several key provisions in the guidance are very positive and we wholeheartedly support them.

Third, enhancement of nonpoint source programs. As municipalities face growing requirements in both the Safe Drinking Water Act and the Clean Water Act, the need to look for pollution controls beyond municipal boundaries becomes increasingly clear. NRC supports an enhanced nonpoint source program and believes that such

efforts should also be focused on the protection of sources of public drinking water as well.

Some cities are seriously considering or even already implementing pollution control programs outside their jurisdictions at local municipal taxpayer expense, because it is proving to be the most cost-effective way to obtain reductions in pollutant loadings. Another critical issue for municipalities involves our ability to address toxics in the context of secondary treatment.

Publicly owned treatment works were designed to remove conventional, not toxic pollutants from municipal wastewater. An enhanced nonpoint source initiative will clearly help in reducing the number and amount of toxics that end up in the receiving streams.

We applaud your recognition of the trading concept and support this initiative as an appropriate, cost-effective method for furthering clean water objectives.

Fourth, enactment of a watershed management program. We support a comprehensive approach to managing all sources of pollution that affect the Nation's waters. However, we can only support legislation which recognizes that watershed management is a new and, for the most part, untried concept. Watershed management programs should only be required to the extent that Federal legislation recognizes the significant and substantial diversity across this Nation.

Fifth, Federal financial commitment. NLC supports a revitalized Federal financial commitment to assist municipalities in meeting Clean Water Act requirements. We believe both grants and loans should be available for the variety of municipal controls necessary to obtain compliance with the act.

I would like to submit NRC's national municipal policy on Clean Water Act issues for the record. It details our position on the issues not specifically addressed in my testimony.

And Mr. Chairman, I want to thank you for the opportunity to provide testimony on behalf of the National League of Cities. I would be happy to answer any questions.

Mr. APPLEGATE. Thank you very much, Mr. Wennberg. That was a very short statement. This is good. And a couple of things I just would mention.

One of the things I think would make our job a little bit easier here in dealing with the wetlands if we were able to get the National Academy of Sciences to complete their study and delineation so that we would know what is going on. Instead, what we are doing is we are trying to write something into law delineating wetlands and this type of thing without the advantage of having that study before us.

And, Mr. Chairman, I don't know how we are going—how can we jack those people around a little bit to get them to move forward and try to get that study. How long has that been at the National Academy of Sciences? That has been ongoing now for three or four years.

The CHAIR. Yes.

Mr. APPLEGATE. It is long overdue and yet we are dealing with it as one of the primary provisions of this bill.

Let me say this. I heard when Mr. Poshard was waxing very eloquently his philosophy which I think most people would agree with,

don't know anybody that wouldn't agree with what he was saying because I thought it was very good, and I noticed you were nodding your head and I hear what you are saying in your testimony. But by the same token I think that you are saying, too, that there is less and less money that is coming back from the Federal Government in order to take care of some of the problems and that the Federal assistance is the lowest that it has been in many years.

It is pretty difficult for us to try to put all of this together if we are going to do what Mr. Poshard wants to do. You know the only way that we can meet a balanced budget, as you know, you either cut spending or increase taxes or maybe do a little bit of each.

But in light of that, let me ask you this: You know that of course the needs survey, most recently in 1993, says that we need $137 billion, and that is up from $80 billion just a couple of years before that and it keeps constantly increasing. In our State revolving fund for our Federal assistance, we do indeed intend or at least hopefully increase above the $1.6 billion that is in there now and above the $2 billion that the administration wants to give to a total of $5 billion in, I believe, four years or maybe five. We are going to $3 billion and increments of $500 million apiece.

I would say this, and I think you would agree it does indeed give more flexibility to the States in areas of combined sewer overflow, watershed nonpoint corrections and things like that and with a 30-year payback and I think that we will have perhaps for certain States who are—who have been ahead of the game and can perhaps come up with up to a 20 percent match, maybe establish a grant program. Well, we are going to try to set up something along that line.

And of course what you are talking about is more of a volunteer program than a mandatory program.

Governor NELSON. Well, if I could interrupt.

Mr. APPLEGATE. Yes.

Governor NELSON. Not strictly voluntary. We are talking about standards and we are talking about the requirements that you get there. The question is whether you get there through enforcement or whether you get there through compliance and through cooperation based on education.

There is an assumption that somehow landowners don't care or are irresponsible. I don't buy that. I don't see that in the State of Nebraska. Nor do I think that enforcement is necessarily the answer.

We have changed the name of the Department of Environmental Control to Environmental Quality to get compliance rather than enforcement, where people are looking for environmental police versus doing things because it is right. I don't think there are enough dollars available to force people to do it, but I do think that if you provide inducements and encouragement and education you can get there. If you can't do it because there is not enough money, then it seems to me that we ought to take another look in a different direction and do the kinds of things that are working in Nebraska, for example.

Mr. APPLEGATE. Well, that does make sense. What do you think about the bill's proposal for the amount of money for the State re-

volving funds? Do you think that that—everything is relative, of course.

Governor NELSON. It is relative, Mr. Chairman.

Mr. APPLEGATE. So is that relatively adequate at the moment?

Governor NELSON. Based on all the—what is available and all the other demands that you have and certainly based on Mr. Poshard's eloquent comments about making the tough choices, it is probably the most that could be asked for. I would prefer to be here asking for nothing in terms of dollars.

Mr. APPLEGATE. I would, too.

Governor NELSON. And I would prefer to also have more flexibility at the State level without any Federal dollars. We are not here simply complaining as in some instances we do with the Safe Drinking Water Act, for example, about unfunded mandates. We are talking about just a different directional approach here.

Even if you totally funded it and there were enough dollars to go around, I would still have reservations about the methodology of enforcement versus cooperation in the program.

So this is less a mandate issue here than it is in many other instances, but it is still an economic issue and there is only so much to go around. So the economic issue is being—is really being pushed to the States in some respects, but if so, I would like to have the flexibility to be able to do it the way that we know we can work it.

Mr. WENNBERG. Mr. Chairman, could I stay a stab at that one.

Mr. APPLEGATE. Sure.

Mr. WENNBERG. Let me make absolutely clear it is my perspective and I believe it is the perspective of certainly the members of my committee and the National League of Cities which sets policy in this area for our organization—recommends policy, that the Clean Water Act is without question the single most successful piece of environmental legislation ever enacted by this Congress. And it is our contention that the principal reason for its success over the last 22 years has been not the club but the carrot.

It was the availability of substantial Federal financial resources dedicated to that purpose and that purpose only, and it was not the sanctions which come to the communities that would not respond to the Federal mandate and carrot but it was the carrot the itself. Communities almost without exception want very much to achieve—remember, that is the water that is in our community; it is not just some esoteric thing in some statistical report. That has the water that we might fish in or we might swim in or that a community nearby might draw drinking water from it. It is very, very important.

So the availability of those financial resources meshed perfectly with local priorities, but recognized local inability in terms of local resources. And my community and thousands of communities matched those resources, and States, too, and accomplished some marvelous things in a very short period of time. We are not done. We have to go ahead.

The Federal Government is facing a wholly different financial situation today than it did 22 years ago. The thing I think we recognize is any movement to influence the financial support from the Federal Government is a movement in the right direction. How-

ever, even a 30-year repayable loan is not a funded mandate. It remains an unfunded mandate as long as the loan must be repaid.

Our concern is many of those loans, depending on how the programs are structured, tend to go to the communities that have the least need, in other words, the ones who are credit risks, tend to fall out through the cracks. The private sector won't finance those projects and even the public sector tends to be disinclined through the State revolving fund.

There is a greater need especially in what are commonly referred to as basket case communities. There is a growing need for a straightforward grants program for those communities that have fallen by the wayside where the support hasn't been there and the need is growing very much so.

So I strongly encourage a meaningful grants program not a negative interest rate. I don't believe that that solves your problem or our problem, but a grants program for those communities that desperately need that financial support and aren't going to be able to do it otherwise.

Mr. APPLEGATE. I can't disagree with that. And I think that as Mr. Panetta said earlier today when he was here that we have to be bound by a partnership, a strong partnership between the Federal Government and not only local governments but local industry and I think together we should be able to find the answers. And so that it is not going to be such a tremendous burden on either and that we are not going to raise the level of the deficit so far out.

What we are doing here, this has to be one of the most important pieces of legislation for fishable drinking water and the health of our country. If we have a good one here, we are certainly going to cut down the need for excessive money to take care of a health care reform bill in the outyears.

Mr. Mineta.

The CHAIR. Thank you very much, Mr. Chairman.

I appreciate the Governor and the Mayor being here.

Governor, I am sorry I haven't had a chance to really go through your statement in real detail, although you do have a very detailed statement. I guess I take it from what I read, you like the color of the paper that H.R. 3948 is written on. I guess you like the fact that we are working on clean water reauthorization, that we have attempted to get input through hearings to develop a reauthorization bill, that we have identified some of the clean water issues. And then you have got nine pages of why you don't like the bill.

Do you have any mandates in Nebraska as it relates to local government?

Governor NELSON. We have from time to time, Mr. Chairman, passed mandates from the legislature to communities. But many of those mandates have been as a result of implementation of Federal mandates rather than just simply State-originated mandates but we have had some examples of that.

However, I have refused to sign and would veto further mandates from the State to local governments in their budgets if we didn't provide funding, because it is impossible to run government at the local or the State level if you have your foot on the spending brake and someone else has their foot on your gas pedal.

So we recognize there are public policy issues that must indeed be dealt with, but the public policy issues must in fact be compared on a basis of which are the most important, which are the highest priority. And if you are going to move priorities around, then you are going to have to move resources around not just simply change from having those resources be your resources to somebody else's resources.

The CHAIR. In Nebraska, who provides public health services at the local level, city or county?

Governor NELSON. It would be all three levels in most instances. There are some State programs but there are also local community-based programs as well.

The CHAIR. And those State programs that are mandated on local government, how are those funded?

Governor NELSON. I would think that most of the programs that are local in nature are funded at the local level that are probably not mandated on local individuals. State programs to my knowledge right now in Nebraska would come from the State and would be funded by the State and/or through Federal grants.

The CHAIR. Or do you do it like they do in California where they mandate it and then they say put in that boilerplate language that says nothing contained in this law could be deemed a mandate on local government.

Governor NELSON. No, we don't do that.

The CHAIR. I come from local government. Before I was here I was mayor of a city and I was on the city council and I have always thought that cities were creations of State law. Then after that, States treat the cities like illegitimate children. I don't think that has changed. And there was a Federal–State relationship—a Federal and local relationship that started in the late 1960s because the cities were in tough times, none of the States did anything about their own cities and the States—and the cities then had to hook up with the Federal Government to get relief.

I was on a city council starting in 1967, active in the National League of Cities, active in the U.S. Conference of Mayors. Served on the legislative action committee of the U.S. Conference of Mayors when we did a lot of these programs because we couldn't get anything out of States. So we had to go to a city–Federal relationship to get some help.

Now we talk about unfunded mandates. I think when I was looking at H.R. 3948, I tried to look at it from wearing a mayor's hat, maybe not a governor's hat, the local government. I did that when I wrote to ISTEA trying to delegate decisions out to States and NPOs. Here we are trying to delegate through watershed management areas to States and localities.

So it seems to me that one of the things that I was trying to do in 3948 was to deal with the unfunded mandate issue by increasing funding. This was a $2 billion authorized program.

Governor NELSON. Yes.

The CHAIR. Reagan wanted to eliminate the grant program and the only way we could save this thing was to have a State revolving fund, so we ended up with a State revolving fund, not grant programs. In the late 1970s we were up to close to $7 billion in this grant program and so now we end up with a $2 billion program,

fiscal year 1994. President Clinton took $840 million of the clean water program to put it into the economic stimulus program, and when the Republicans killed that program in the Senate we never got back that $840 million. So in fiscal year 1994 we had a $1.2 billion program and then this year the President submitted a budget for 1.6 billion.

H.R. 3948 starts, as Mr. Applegate has indicated, $3 billion a year and then we add $500 million a year so that by the end of fiscal year 1997 we are going to be at $5.5 billion. What I tried to do in this bill was to reduce some of the mandates and increase that funding.

Now, I understand your perspective because from 1972 we have done pretty well at point source discharge and now we are starting to concentrate on nonpoint. So I can understand your concern about parts of the bill that deal with nonpoint. But, on balance, certainly for municipalities and I would think probably for States, the bill, I think, improves on the present situation with regard to the unfunded mandates. Maybe not as much as you would like us to fund in terms of these mandates, but I think it improves and I am wondering if you—obviously, you must disagree with that assessment.

Governor NELSON. Well, Mr. Chairman, with all due respect on the funding or the nonfunding of the methodology, obviously, if we are going to take the carrot approach, it is a matter of economics, and the States have put significant dollars into, certainly in the case of the State of Nebraska, a significant amount of money into creating carrots, creating incentives, inducements, to agricultures, and to industrial concerns to make sure that they are complying with the point source requirements.

We think we can continue to do that in nonpoint source as well, and we would like to have the highest degree of flexibility such as using porous roadways, things of that sort, all of which are designed to try to slow down the problems with runoff. But whether it is funded or not, we think it still a better methodology to create the carrot than to come in with all the enforcement tools that are added to this bill with the EPA, which now has the hammer.

We do not object to the standards. We do not object to being held to standards. We do not object to timetables, time frames to get there. What we are asking for is the flexibility to decide how to get there at the State level rather than having the enforcement tools of the EPA to get us there. And even with the money coming from Congress, I would disagree with the methodology.

The CHAIR. But that is part of what we are doing here is its State enforceability, as I recall. State enforceability is part of H.R. 3948. We are saying—we are not saying there is going to be Federal enforcement, unless I misread my own bill.

Governor NELSON. The EPA is not strengthened in this process?

The CHAIR. On nonpoint source we say this has to be—we leave that up to the States. States, come up with your own plans. You come up with your own enforceability. We do not say that EPA is to do that.

Governor NELSON. We may be misreading the bill, but we did not read the bill——

The CHAIR. Pardon?

Governor NELSON. We may be misreading the bill.

The CHAIR. My colleague, Mr. Poshard.

Mr. POSHARD. Mr. Chairman, may I ask, though, what happens if the State, in determining their time frame disagrees with the time frame in this bill that is laid out by EPA for coming into compliance?

The CHAIR. Well, the Governor's testimony says he has no problem with the 15-year compliance.

Governor NELSON. Right, with the 15-year.

The CHAIR. Again, I think we have been having hearings here for three years. I don't think my hearing has gone bad. So we have been trying to do things in this bill to try to do things for State and local governments.

Where we are going to end up, I think, Governor, is that it seems to me that we are going to be put in a position of having no bill and then we will be at that point where you will be facing the mandates with no monies and all the rules—if there is no reauthorization bill, all the rules and regulations still are in place, we just have no money. So it seems to me, if you think you have it bad now, wait until next year until there is no bill and you still are faced with the rules and regulations of the Clean Water Act and no money.

Governor NELSON. But the requirement, for example, that we are concerned about under the nonpoint source is that the States must, in fact, have enforceable measures on individual farmers and landowners built on the model of the point source pollution and runoff, and we think that we can demonstrate nonpoint source success under the current Federal and State framework if we are given this reasonable time frame to do so, rather than to have it mandated on us.

I think, once again, we have come up with a framework to developing programs to enforce as opposed that create the carrot. Unless you are saying that we can create carrots and we do not have to go on enforcement, we are not reading it that way.

The CHAIR. I am not sure we require permits——

Governor NELSON. We get into permitting problems with EPA; we get into all the other requirements that are enforcement in nature rather than compliance on the basis of encouragement and inducements and incentives.

The CHAIR. Here on Page 7 you say, "The Governors believe that H.R. 3948 should clearly authorize the use of site-specific measures, including enforceable nonpermit approaches, i.e., use of design measures and porous pavement to minimize runoff from parking lots, frequent vacuuming of concrete grid pavements, inspection of basins and ponds) to control storm water."

Now, it seems to me that is what we do in H.R. 3948.

Let me go on to something else.

Governor NELSON. Let me ask one other question, though. Will the States have the authority or the communities have the authority to prioritize storm water control; or will it be based on a cost-benefit analysis? Or will it be held to a simple standard that you have to get there without regard to those items?

The CHAIR. You know, the thing is that your implication, as I was listening—I just asked Mr. Kopocis, do we have numeric

standards? I don't think so. We are specifically taking out numeric standards. What I am trying to do here is to try and get that decision-making out to the States and localities.

Governor NELSON. We appreciate that.

The CHAIR. They do not want to do that because they do not want to be faced with having to deal with nonpoint source and whatever political heat they may get from the farming community or others. Well, you know, either I am in the position of saying okay, at the Federal level we are going to get away from the rigid one-size-fits-all rulemaking from the Federal level, or we are going to delegate it out there, and I am willing to delegate it out there and also give you the money to go with the $3 billion program, and we will be up to $5 and a half billion by the end of fiscal year 97.

I know what Reagan was trying to do and what Nixon was trying to do to us in local government, and that was to shift the program responsibility to local government but provide no funds. It was a no brainer. I can put on my mayor's hat and say that is a shift in the shaft. Shift program responsibility to local governments and have no money going with it. But here what I am trying to say is, look, 5 years ago, 10 years ago, when we were dealing with transportation planning, we could not deal with a MPO, a metropolitan planning organization. But in 1991 the time had come where in ISTEA I was able to deal with delegating that out to local governments, regional MPOs.

I was working with Governor Wilkinson when we were doing ISTEA, and he would say, Mr. Chairman, I am going to have 15 mini DOTs in my State. I said, yeah? But under ISTEA the minimum population requirement is 200,000. Now, tell me, how many 200,000 population urban areas do you have in Kentucky? And I said, do I count three? He says yes. I said, well, where are those others you were talking about?

There is so much misinformation I think floating around about this that I wish we could come to some kind of a meeting of the minds as we try to deal with these things.

But let us go to a basic issue that maybe I should start then with something that we talked about or you talked about, and that is, Mr. Panetta even raised this, and that is what is an unfunded mandate? Maybe we have to start at ground zero, right at the beginning, and determine what is an unfunded mandate? Does the Federal Government have to assume all costs? Does that mean that——

Governor NELSON. No.

The CHAIR [continuing]. Cities will never put in a sewer? Will never put in a sewage treatment plant?

Governor NELSON. Well, Mr. Chairman, I think it is important to say that even funded mandates tend to become underfunded or later are unfunded as resources are directed to other priorities. And so it is a question primarily on the methodology that is received by the State as to what it has to do.

Getting back to what you just said about the nonpoint source program, we did not read your bill to track with what you have just said. We may need to go back and reread your bill, but we felt that there are enforcement requirements on the States——

The CHAIR. On the States, not EPA. Not EPA. You said EPA, and we do not put it—it is not with EPA, it is with the States.

Governor NELSON. But then is the—if it is not based on the model of the point source program, which we thought that it was, it may be that by not having the EPA or the permitting process involved could be helpful. But we still believe that an enforcement model is less likely to get the results that a compliance and cooperative model, that we have been utilizing thus far, will get.

We think that the minute that you move away from compliance and voluntary programs to enforcement, the voluntary compliance tends to stop and now you go back to enforcement. That is what we are objecting to.

It may be that you are not telling us exactly what the enforcement has to be, but if we are going to be held to standards of enforcement rather than having the flexibility to come up with our own models, which may or may not involve enforcement, then we feel we can have the flexibility to achieve it. And that is true whether you give us money or not.

The CHAIR. I think that is the point, that the States have to be able to have that responsibility of determining what their nonpoint source program would be.

Governor NELSON. Yes. That is really what I was saying. It took a long time for me to say it here in the text of the statement but that is what we are really trying to say. And whether you have the EPA in or whether you do not is in many respects assault on top of injury if you are going to an enforcement model versus programs that the States have been working on, as we have in Nebraska, where we have, for example, empowered local folks in the natural resources districts, 23 of them with the watersheds in Nebraska. We could have a hammer over their head if they do not take care of it. But I can tell you that it has not been a hammer——

The CHAIR. Have they complained to you about that being an unfunded mandate?

Governor NELSON. No, because we permit them.

The CHAIR. What is the difference about their not complaining to you about that not being an unfunded mandate and what you are saying about what the Federal Government is doing to the State government?

Governor NELSON. I don't think that establishing reasonable standards—reasonable standards without dictating how you go about achieving those standards is typically criticized. If the standards can be based on risk analysis, cost benefit analysis and other risk factors, I do not think you will get much criticism from the States. It is when you move, for example, to a standard of perfection, as opposed to, as my colleague said, protection. If your standard is based on science, and health protection, you are not going to get objections.

But we tend to have, I think today, a concern about any standardization being confused as an unfunded mandate. It may or may not be. There may or may not be objections from the States and the cities and counties to standards if they are based on cost and risk analysis. You are going to have fewer complaints whether it is the Safe Drinking Water Act, the Clean Water Act, the Clean Air Act or whatever environmental objective is being achieved.

Mr. WENNBERG. I will take a stab at that. I believe an unfunded mandate is essentially what results when a higher level of government imposes on a lower level of government spending priorities over the preferences of the people at that level. When the Federal Government reorders the spending priorities in my community against our will, if I can say it that way, that becomes an unfunded mandate.

The CHAIR. So would you advocate, then, that we ought not to have any Clean Water Act at all then?

Mr. WENNBERG. No, absolutely not. I think I just praised the act as one of the most significant, successful piece of environmental legislation the Congress ever passed. I submit, though, that the question really comes down to who decides. And, clearly, I will give my community as an example.

Several years before it was mandated that surface water treatment systems under the Safe Drinking Water Act be filtered, my community voted successfully and bonded for a filtration plant. We were able to persuade the voters of the community that the expense, and it is significant, expense involved bought a more than commensurate or more than adequate level of health benefit, health protection. And the public said, that is not a bad deal. We are going to vote for that and we will buy that. It wasn't mandated by the Federal Government at the time, and it is under construction as I speak.

It was a local decision; it was a local priority. When the Federal Government imposes—I will give you what, quite frankly, sounds like an absurd example, but it is not that crazy and it is on point, specific to this law.

Under the storm water provision, which the National League of Cities has its greatest concern for, best management practices under storm water typically include things like pooper-scooper laws. Some ability, some law, some local ordinance which would require residents with household pets not to allow the excrement from the household pets to find its way into the receiving waters directly or indirectly through storm water runoff. That is a reasonable thing if you want to make sure the storm waters that you discharge in storm waters is as clean as possible. It is a reasonable thing to do.

The difficulty comes when a local official, for example, has to divert resources in order to maintain compliance with that law, divert resources, law enforcement resources from drug control to enforcement of pooper-scooper laws in order to prove that we are serious about cleaning up after dogs and other household pets. When I am forced as a mayor in order to comply with that provision—and my city is small enough that we have not had to, I am using this as a hypothetical example in my case, but it is not hypothetical in many others. If I were to have to divert resources away from what is clearly unambiguously a local priority in order to meet that mandate, that is an unfunded mandate.

That is an unfunded mandate. It is the reordering of local priorities against local will, and the funding that is required as a result.

The CHAIR. Well, I do not want to carry this on any further. Having been in your position and having taken a city in one term, one four-year term from roughly 400,000 in population to 560,000 and

building, going from a 87 MGDs plant to 130 million MGDs and that plant went from secondary to—or primary to advanced secondary, we have now gone to a tertiary plant. We are now up to 153 MGDs. EPA is now telling the city of San Jose they can no longer discharge into South San Francisco Bay because what they are discharging into the bay is too clean and it is turning the saltwater brackish.

So you are not telling me anything in terms of experience. What I am trying to deal with is that kind of a situation. It is stupid but we are going to end up with no bill. You will end up with the rules and regulations and no funding. Thank you.

Mr. APPLEGATE. Thank you, Mr. Chairman.

The gentleman from Maryland, Mr. Gilchrest.

Mr. GILCHREST. Thank you, Mr. Chairman.

I was never a gentleman from Nebraska, but I was a gentleman from Vermont. I used to live—I lived outside a little town called East Fairfield, just a little south of Canada, and I know a man—is the light going to be on or can I—there is a guy named Irving French, lives in Rutland, Vermont. He is one of your constituents. Irving French is probably about 80 years old, somewhere around that age.

Mr. WENNBERG. I am going to write the name down.

Mr. GILCHREST. Irving French in Rutland, Vermont. Have not seen him for 20 years but he lives—I guess my question is, and I did live in Vermont, and I will say one thing quickly about nonpoint source pollution and that is we used to get our water gravity fed from a mountain spring and we really appreciated the fact that there was not much development around that mountain spring and, therefore, nature kept the nonpoint source pollution down to an absolute minimum.

Inside the little town of East Fairfield, back then, they were the only towns in the State of Vermont that did not have to have their town water treated. That is how clean it was. Now, I don't know what it is like today because one of the problems we face, no matter where we go in this country, is more development, more people, more activity, and as a result of that more development, more people, more activity we have to come up with ways to filter our water supplies and to find ways to keep the groundwater clean and so on.

One of the things I think we are trying to do up here in this bill, and I really feel this bill goes the extra mile to work with local communities, and I think the intent of this law is to ensure that there can be some flexibility, that there is not going to be a mandate where you will be fined millions of dollars in the next few months.

I guess my question to both of you is if you can say that there are some problems in Nebraska and Rutland, Vermont, I just like that word, Rutland, Vermont, I live on the Eastern Shore of Maryland now and I have part of the Annapolis and Baltimore City in my district as well but the Eastern Shore of Maryland is just like Vermont, except it does not have the mountains or the snow in May, which my wife did not like, but anyway.

Mr. WENNBERG. Budget doesn't like it either, Congressman.

Mr. GILCHREST. Your budget doesn't like. Well, eventually it melts. After the mud season, it is really nice up there.

Anyway, in Rutland and Nebraska, to a certain extent, there is going to be a nonpoint source pollution problem. There is going to be a point source pollution problem. There is going to be a groundwater problem.

Would you say, with some flexibility, with some help, not a sledgehammer approach, with some help from the Federal Government that you could in 15 years pretty much have the knowledge, the technology, and the inclination to have these things solved? In 15 years? I think that is pretty much the course of the expectation in the bill.

Governor NELSON. Well, yes. The answer is an unqualified yes. That would be not only the goal but we would have the expectation that we can get there based on the strides that we have made thus far over the last 22 years, with the increased and improved technology, with the opportunity to have flexibility to put the resources in the priority areas. Yes. Yes.

But if we have it all mandated and we have it all predetermined as to how we have to go about doing it and/or we have to have an enforcement model, then I don't think the answer is yes.

Mr. GILCHREST. That is the point that confuses me to a certain extent. As I understand the bill, and I live in an area where there is a great deal of agriculture, I understand that the State sets the priorities. The State focuses on those areas that need to be cleaned up and then the State creates a program which will basically, in their perspective, solve the problem. But the State comes up with these creative alternatives and the State sets the priorities. That is in this bill.

See, I am a little confused as to the different interpretations of the same piece of legislation.

Governor NELSON. We will take a look at that part of it and respond, but it is our belief that there are requirements that will be imposed in terms of an enforcement model rather than a compliance model which we prefer but we will look at that.

Mr. WENNBERG. If I could speak to the nonpoint source issue. NLC, our membership, are the folks that are caught between the rock and the hard place.

Chairman Mineta's statement yesterday I think accurately represented the EPA estimate. I believe it was something like 72 percent of pollution in streams is not from the point sources that have been heavily regulated and successfully controlled nearly everywhere in the Nation. If we are going to get a lot of bang for the buck, if we are going to get a lot of cleanup for the investment, I think we have to look at that 72 percent.

We find it very difficult to ratchet down on the traditional wastewater treatment facilities another 2 percent or 3 percent, whatever. Removal gets extraordinarily expensive and, quite frankly, we get in the conundrum that we have in our community.

We have an advanced secondary treatment in our community, and when we were going through our permit examination, we do the standard biomonitoring test, we took the extra step of doing a biomonitoring test for the receiving waters of the stream. Interestingly, the fish lived, reproduced, and prospered in 100 percent effluent from our treatment plant. In the 50–50 mix, effluent and the

stream water, receiving water, they struggled and then expired. And of course in the stream itself, they died almost immediately.

There are no municipal discharges upstream of our plant. It is entirely agricultural pollution that is in that stream. And, quite frankly, I somewhat factitiously asked the agency, the Secretary of Natural Resources in Vermont, what he intended to do to stop the pollution of our effluent by that stream. I know it sounds ridiculous but it is in fact a situation we are in.

Clearly, the initiatives in a number of municipalities are taking that, I mentioned in my previous remarks, to go outside their jurisdictions to try to encourage and create improved situations for the stream. Increasing their capabilities at far less cost than continuing to ratchet down is a response to that reality.

The question that it begs, however, is the fairness question. Is it fair, and this is perhaps a better question for the States, but is it fair for municipal feepayers and taxpayers to be footing the bill for technologies and practices and investments being made outside their jurisdiction. Is that entirely fair? And I think the real answer to the question is obviously not. It is a bigger issue and the nonpoint program does have to be strengthened and NLC supports that.

Mr. GILCHREST. If I could make one more quick comment, Mr. Chairman. I understand you to say that you feel some of the problems in the stream is not as a result of the sewage treatment plant technology which you are required to improve but some of the problems of the stream is as a result of nonpoint source pollution upstream which is out of your jurisdiction.

Mr. WENNBERG. It has gotten to the point that is a far larger constituent. It is the biggest problem that remains. That is not to say our treatment plant does not put stuff in the stream that we ought not to. Clearly, it does and we are going into our third upgrade this summer on a plant that was finished four years ago. So we are continuing to make those investments. But the reality is you can spend millions of dollars on minute amounts.

Mr. GILCHREST. Maybe Mr. Mineta can answer this question. The question I have is if the State sets the priorities and you have a time frame to meet those priorities, so it is not my understanding of the bill that Rutland, Vermont, is going to have to spend a million dollars in the next few months or even the next couple of years to upgrade their sewage treatment plant they just completed?

Mr. WENNBERG. I cannot speak to the specific impacts of this bill on our particular situation, but relative to the nonpoint program, I think you are definitely moving very much in the right direction, and I think municipalities who have been turning down that ratchet more and more and raising those fees more and more see and know what is in those receiving waters and know that in a great many cases, and nationally the numbers are very compelling, in a great many cases the real remaining problem, the lion's share of the remaining problem, is the nonpoint problem as opposed to——

Mr. GILCHREST. I think we address that really well. Thank you, Mr. Chairman.

Mr. APPLEGATE. Thank you. Mr. Poshard.

Mr. POSHARD. Thank you, Mr. Chairman. I appreciate it, Governor and folks, appreciate your being here.

I just want to get back to some of the questions that have been asked before. By the EPA's own report here, two-thirds of the assessed waters of the country under our present policies are now good enough quality to meet the goals of the Clean Water Act that we have. So we are dealing with the additional one-third that apparently are not meeting those goals at this point in time.

However far in terms of the percentage that we get toward that 100 percent absolute clean objective, I don't know how far we can get to it, but here is the way I kind of see this thing, representing an agricultural district that stretches about 260 miles. We have accomplished a lot of this two-thirds to absolute perfection through the present Clean Water Act, primarily concentrating on point source. You can build a plant, you can assess quantitatively and qualitatively what that plant puts out. Now we are beginning to look at nonpoint source, and we should, but it is a different mechanism for achieving the success altogether.

Building filter strips, mitigating our forested wetlands, putting in settling ponds, these things take time. Lots of time. It must be done over a period of time that cannot be measured by just implementing a best management practice and saying at the end of this five-year period we will be at 72 percent of the goal. And if we are not there, then you get this fine or this penalty or whatever. That cannot be done.

These can be moving targets that we are shooting at, because best management practices for nonpoint source are a different animal than for point source control.

For those of us that represent large agricultural areas, this is a point we are trying to get folks to see. If you are going to say, here is the 5-year goal and it is 3 percent better quality than where we are now, and we do not meet that goal at the end of 5 years, then do we really need the control for that and the hammer for that coming from the Federal level, when we in fact may not be able to meet it no matter what we do? That is the only point I am trying to make.

I am not against the goal, but we are dealing with a different ball game here, that is all. If we can build a plant out on every stream in this country and accomplish the objective and the goal that we set out here at the national level, great. We cannot do it in the agricultural areas of this country. We are dealing with different processes. Where we have an identifiable degradation of the streams, and that has been proven by science, where somebody has gone out and measured the quality of that stream through an appropriate process and accumulated the scientific data to say this is degrading, then, in almost every case, the agricultural community began a voluntary compliance program of watershed management and nonpoint source pollution control to begin to check that.

If we can do that in southern and central Illinois, why can we not do it across this country? I believe we can.

I do not think we necessarily have to say you will be at this point five years down the road. We are dealing with a different type of pollution control here with different methodologies, and in my mind, we ought to be able to go forward and try to accomplish the goals; but for crying out loud, let us not develop a system where, if we are not there five years down the road because we are trying

to associate ourselves with a different way to get there, let us not beat each other over the head with this. Surely we can do this in a better way.

My sense is in Illinois, and maybe your sense is in Nebraska, that voluntary compliance does work when we are talking about nonpoint source. And if I am wrong about that, then I apologize to folks who see that differently. But I do not think I am. I think we can accomplish the very commendable goals that we need to achieve in this country with respect to clean water without the mandatory approach that I think we are taking here.

The CHAIR. Would my colleague yield on that point?

Mr. POSHARD. Yes, sir.

The CHAIR. I guess I will go back to the testimony here and just ask simply where is the hammer?

Mr. POSHARD. Mr. Chairman, may I ask or and if I am wrong about this I apologize, but let's say we take the process forward here and the States set goals according to what this bill wants to achieve. The goals are set here. The States determine the plan for achieving those goals. Okay? Let's say at the end of that first five-year time frame Illinois cannot be in compliance because we are dealing with a different type of mechanism to try to come into compliance with nonpoint source than we are able to do through point source? What happens, from the Federal level, to Illinois at that point in time?

The CHAIR. You will not lose your SRF funds.

Mr. POSHARD. Will there be any penalties?

The CHAIR. To the extent that you are still given, as I indicated earlier—let's say that, from my perspective—and I am going to have to ask Mr. Kopocis or Mr. Schoellhamer to be precise in terms of what I think I have in my own bill. I do not have the hammer you are referring to. I do not have numeric standards. I am saying to the State, Mr. Governor, this is your ball. It is up to you. And I am saying you have 15 years. To the extent they come up with a plan, they submit it to EPA for approval, they do not lose anything from that.

Mr. POSHARD. But, Mr. Chairman, may I ask you something?

The CHAIR. Sure, absolutely. I want to make sure I understand my own bill, too.

Mr. POSHARD. I want to make sure I understand where you are coming from. We may have a fundamental disagreement here and we may have just a fundamental misunderstanding.

My sense is that when we pass this bill, EPA is going to promulgate rules and regulations to meet a goal out there for improving water quality standards in this country. Now, you say we do not have any numerics to deal with. But if we do not have numerics to deal with in the rules and regs, how do we know when we get there? If we do not know to what standard we are going to, how do we know we will not get any better than 66 percent or whatever?

The point I am making is, my sense is that EPA, in the rules and regs that implement this legislation, is going to say, here is our goal. Whether we state that numerically or we state that philosophically, this is the point to which we are going to reach.

Now, at the end of 5 years, the State plan is going to say, okay, we have to be this far along, or at the end of 10 years, this far along. All I am saying is, what if we cannot get there? What if through this nonpoint source pollution methodology, which differs greatly from point solution, what if we cannot get there? What if we try and we miss and we say, okay, we have to change in the middle of this process now. We have to implement different types of things to try to—you know, I do not know.

Mr. APPLEGATE. Will the gentleman yield?

Mr. POSHARD. Yes, sir.

Mr. APPLEGATE. I thought maybe at this point I would like to let Mr. Kopocis perhaps to try to answer that question for you.

Mr. POSHARD. Okay.

Mr. KOPOCIS. If I could, Mr. Poshard, the bill requires that a State develop a plan toward the attainment of water quality standards and the design date is to 12/31/2009 which is consistent with the Governors' plan. If a State program, in its first five years, does not result in reasonable progress towards water quality standards, the State is required to revise and strengthen its plan. But there are no specific thresholds that the State plan must meet. There are no specific time lines in terms of what the State plan must meet in achieving water quality.

Mr. POSHARD. What are the three five-year periods for, then?

Mr. KOPOCIS. The three five-year periods are an opportunity for that State not to have to buy a Cadillac in the first year if it can get by with a Chevy. It allows a State to put in place a plan to evaluate the effectiveness of the plan so the State is conducting constant water quality monitoring within its State of its various waters.

It can evaluate whether it is making progress toward water quality standards. It can evaluate whether it thinks it will meet them at the end of a 15-year period. If it will not, then at the end of the first five-year period, it would look to revise its plan according to what it has identified as its needs. But there is not an ability for EPA to come in and start enforcing plans within a State.

Mr. GEREN. Would the gentleman yield on that point and allow me to ask for a clarification?

Mr. POSHARD. Yes, sir, I yield to the gentleman from Texas.

Mr. GEREN. On Page 62, it says if a State fails to submit a management program, or a revised management program under subsection B, or under section B, or the administrator does not approve such a management plan, the administrator shall prepare a management plan for controlling pollution—added—for nonpoint sources of the navigable waters of the State. What does that mean?

Mr. KOPOCIS. It means the plan is to be prepared by EPA, but you will notice one of the pieces missing is any authority of EPA to implement the plan and the President's Clean Water Act proposal they specifically asked for the authority for EPA to implement the plan and for EPA and the Department of Justice to enforce the plan. Both of those have not been included in the Chairman's bill.

Mr. GEREN. So what happens is this is a meaningless provision.

Mr. KOPOCIS. It is not a meaningless provision from existing section 319, but our experience with section 319 so far has been that

each State has in fact prepared a plan and submitted it, that States have chosen to exercise the authority they have been given to develop plans unique to each State.

Mr. GEREN. What is the purpose of this plan that the administrator shall prepare? Does he just——

Mr. KOPOCIS. It would be the preparation of a plan that a State could use in implementation.

Governor NELSON. Could use?

Mr. KOPOCIS. It is not authority for EPA to implement it or require it or to enforce it.

Governor NELSON. Could——

Mr. POSHARD. Mr. Kopocis, reclaiming my time.

Mr. GEREN. Yield back.

Mr. POSHARD. Yes, sir. I appreciate the explanation. I guess I—you know, if we are not there at the end of the first five-year period and we give EPA then the authority under this plan to write a plan for the State, and then to suggest that EPA will have no authority to carry that plan out or to force compliance with that plan—you see, I just have a tough time thinking that will happen. And I understand your good will here, but why would we give EPA the authority to write a plan for the States if we are not going to give them the authority to make sure the State carries it out. I do not understand that and I do not trust that.

Mr. KOPOCIS. Well, Mr. Poshard, it is virtually the same provision we have in existing 319 that was enacted in 1987. And the reason we have not is because the States have strongly objected to having the EPA come in and implement a nonpoint source program.

Mr. POSHARD. If this bill goes forward, can you say at this point in time, then, that there will be no—if the States set their own plans and they are not in compliance in five years, that there will be no penalties from EPA assessed to the State at that point in time and if EPA decides to write up a plan for the State, that there will be no enforcement of EPA to force the State to carry that out?

Mr. KOPOCIS. Penalty provisions in section 309 do not extend, for example, to imposing fines or criminal prosecutions or even administrative penalties. And in terms of EPA having authority to implement a nonpoint source plan, should a State's plan fail in five years, the law would have to be amended to effectuate that because if this provision were to be enacted EPA would not have that authority.

The CHAIR. Let me ask, would a State lose SRF funds under that scenario?

Mr. KOPOCIS. No, they would not be eligible for the grant program under section 319 because one of the elements is that they would be implementing their program. So if they choose not to implement a program, there would not be any program to which you could give them a grant. But it does not have an effect on the SRF program.

Mr. POSHARD. Thank you, Mr. Chairman.

Governor NELSON. Mr. Chairman, I think you have a call again, but I have a question. On Page 57 of the act, this is where if the State does not have a plan that works within a certain period of time then the EPA could come in and require the state to have an

enforceable policy and mechanism. That is the point. Enforcing policies as opposed to getting results is the difference where I think that, the difference that we have in an approach.

If the bill would work as Chairman Mineta says, I do not think we have a lot of concerns. If it is entirely up to the State. But what it seems to me is that now this act mandates how the State goes about doing it.

We have to have a plan that has enforceable policies and so forth. We have to enforce that against farmers as opposed to getting compliance and getting results. And if we have—if we want to do that, if we want to have one, we should be able to have——

The CHAIR. And you as a Governor do not want to do that?

Governor NELSON. I am telling you, from my experience you get more progress from the carrot than you do the stick.

The CHAIR. Regardless of whether it is carrot or stick, should that be done by the EPA or should that be done by the State?

Governor NELSON. By the State.

The CHAIR. So what we are doing is delegating it to the State and saying, Mr. Governor, we are saying the State draw up the plan, the State enforcement——

Governor NELSON. But, you see right there is the word "force."

The CHAIR. You go to the next step and say, well, I do not like the stick. I just want a carrot, and to that extent I am not sure that——

Governor NELSON. If I get the results with the carrot, I don't want somebody telling me I have to have a stick or that it has to be the stick.

The CHAIR. If you get the results from the carrot, you are not going to have to use the stick.

Governor NELSON. But it said the policy would involve enforcement. I have a feeling that if we do not get the results as quickly as we would like to, the next step is the EPA comes in and gives us, writes the plan for us. That is what we object to.

Mr. KOPOCIS. The State would have an opportunity to revise its plan. The State would be revising and resubmitting its plan.

Governor NELSON. Submitting it to whom?

Mr. KOPOCIS. To the EPA.

Governor NELSON. To the EPA. That is my point. If they have a bias toward enforcement, they are not going to approve the plan.

Mr. APPLEGATE. The standard upon which you are judged is not enforcement, it is whether you are making progress towards attainment of a water quality standards cap and, Governor, let me say this right now, we have a little less than four minutes. We have to get over and vote.

I would suggest that if you wish, if Mr. Geren would want to keep you here or if you want to have an informal discussion with counsel here, you may do that and we can make that a part of the record.

Governor NELSON. That would be fine.

Mr. APPLEGATE. But the Members have to go over and vote.

Mr. GEREN. Mr. Chairman, I would not impose on his time. He has been awfully patient today and I appreciate his testimony, and I am certainly not going to ask him to stay around to answer any of my questions.

But I think this has been very helpful and I look forward to all of us having a meeting of the minds on this because I think it is not as clear as perhaps it ought to be, and the Governor has raised some important points that we need to flesh through.

Thank you, Mr. Chairman.

Mr. APPLEGATE. Thank you, Mr. Geren, and I would say there have been some very, very important—this has been the most stimulating of all of the discussions that we have had so far and we really appreciate that.

Mr. WENNBERG. Mr. Chairman, if I could have one last minute in this discussion.

Mr. APPLEGATE. It will be with an empty bench.

Mr. WENNBERG. This discussion has been very, very helpful. I would just suggest if you substitute nonpoint source and put storm water in there, that is precisely the problem that the cities have with the storm water program. It is exactly the same issue and exactly the same problem. Thank you.

Governor NELSON. Thank you very much.

[Subsequent to the hearing, the following was received from Gov. Nelson:]

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ASSOCIATION

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Governor of South Carolina
Chairman

Howard Dean
Governor of Vermont
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June 13, 1994

The Honorable Norman Mineta
Chairman
Committee on Public Works and Transportation
U.S. House of Representatives
2165 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the National Governors' Association, I appreciated the opportunity last week to discuss Clean Water Act reauthorization issues with you and members of your Subcommittee on Water Resources and Environment. Our concerns about H.R. 3948 stem from the proposal's fundamental change to the current federal-state relationship in which states hold primary responsibility for managing water resources with federal oversight. I would like to reiterate that the goal for the Governors is an improved Clean Water Act, one that succeeds in this era of limited resources by refining the inter-governmental partnership to protect the quality of our nation's rivers and streams.

In response to questions you raised at the hearing, I am writing to clarify the Governors' concerns with the nonpoint source provisions in your substitute amendment to H.R. 3948. These comments are based on a discussion with Ken Kopocis of your staff and on our understanding of the legislative language proposed in your bill. The Governors want a nonpoint source program that will work. States agree that this is an area in which we must develop and implement effective strategies that will reduce pollution caused by runoff from agricultural, commercial, and residential sites.

First, at the hearing you raised the issue that H.R. 3948 authorizes states to set the priorities of their nonpoint source programs. We are concerned that while this may be the intent, in practice it would not be the result. For instance, H.R. 3948 does not target the program to address threatened or impaired waters first. Rather, the bill requires states, within two years of enactment, to develop a five year schedule addressing "all nonpoint sources of pollution in the state." The bill requires state programs to address all waters unless the state exempts specific waters or areas. We believe that the program should be targeted to address nonpoint sources in threatened or impaired waters. Under a targeted national framework, individual states would not be prohibited from developing a program to address all waters, yet states would not have to justify exempting particular waters in order to obtain federal approval of the state program.

The Honorable Norman Mineta
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Second, the Governors are greatly concerned about H.R. 3948's requirement that states must implement "enforceable policies and mechanisms" in order to have a federally-approvable nonpoint source management program. Although the legislation does allow the states to develop their management programs, such programs are required, "at a minimum," to "provide for implementation of best management practices and measures in conformity with guidance to be issued by the Administrator." Consequently, states face a heavy, if not impossible, burden of proof to demonstrate to the Environmental Protection Agency (EPA) that voluntary and/or regulatory mechanisms other than those identified by the Administrator conform to the national guidance developed by EPA.

We believe that states should not be required to implement new enforcement measures as part of their nonpoint source program if states can demonstrate progress toward meeting water quality standards through non-regulatory measures. Effectiveness should be the test and experience has amply demonstrated that enforceable measures as a first step inhibit, rather than promote, progress in reducing nonpoint pollution. We believe that enforcement measures are appropriate when non-regulatory mechanisms, after sufficient time, are not demonstrating progress toward achieving water quality goals.

At the hearing we also discussed whether or not the bill imposes penalties on states that do not implement new enforcement measures within their nonpoint source programs. While H.R. 3948 authorizes states to choose which enforceable policies and mechanisms will be part of the management program in their state, EPA ultimately determines if the enforcement measures are in conformance with the national guidance. If the state's measures do not conform with the national guidance, EPA cannot approve the state program. As a result, a state is ineligible for federal funding through nonpoint source program grants. Additionally, if a state does not develop a nonpoint source program, EPA is required to prepare a program for the state. We interpret both of these outcomes as penalties that a state may face if enforceable mechanisms are not implemented through the state nonpoint source program.

Thank you for the opportunity to clarify the Governors' concerns on this issue. We believe that little disagreement exists about our objectives to reauthorize the Clean Water Act. We want to work with you in deciding how the objectives can be accomplished most effectively with a reauthorization bill this year. Please feel free to contact me or have your staff contact Tom Curtis of NGA at 202/624-5389 to further discuss this or any other clean water issues.

Sincerely,

E. Benjamin Nelson
Governor of Nebraska

Mr. APPLEGATE. We will resume the hearing. And the next panel, which are all sitting at the table, are Ed Wagner, Association of Metropolitan Sewerage Agencies; James Park, Association of State and Interstate Water Pollution Control Administrators. Jim Moseley, National Association of State Departments of Agriculture; Charles Thompson, American Association of State Highway Transportation Officials; and Jane Garvey, Federal Highway Administration.

Thank you all for being here. And we are looking forward to your testimony.

Mr. APPLEGATE. We will begin with Mr. Wagner.

STATEMENTS OF EDWARD O. WAGNER, DEPUTY COMMISSIONER, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIRECTOR, NEW YORK CITY BUREAU OF CLEAN WATER AND MEMBER, ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES; JAMES PARK, CHIEF OF THE BUREAU OF WATER, STATE OF ILLINOIS, ASSOCIATION OF STATE AND INTERSTATE WATER POLLUTION CONTROL ADMINISTRATORS; JAMES MOSELEY, DIRECTOR, AGRICULTURE SERVICES AND REGULATIONS, PURDUE UNIVERSITY, NATIONAL ASSOCIATION OF STATE DEPARTMENTS OF AGRICULTURE; CHARLES THOMPSON, SECRETARY OF TRANSPORTATION, STATE OF WISCONSIN, AND VICE CHAIR, AMERICAN ASSOCIATION OF STATE HIGHWAY TRANSPORTATION OFFICIALS, STANDING COMMITTEE ON THE ENVIRONMENT; AND JANE GARVEY, DEPUTY FEDERAL HIGHWAY ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION

Mr. WAGNER. Good afternoon, Mr. Chairman——

Mr. APPLEGATE. It started out that way, didn't it?

Mr. WAGNER. My name is Edward Wagner. I am Deputy Commissioner for the New York City Department of Environmental Protection, and today I am representing AMSA, the Association of Metropolitan Sewerage Agencies which represents 150 of the largest wastewater agencies in this country, who serve more than half of the sewered population.

I am going to briefly give you an overview of my testimony this morning, and I ask that my full testimony be entered into the record.

Mr. APPLEGATE. Without objection, which of course there wouldn't be, all of your full statements will be made a part of the record.

Mr. WAGNER. Thank you.

First off, I want to emphasize that AMSA supports the goals of the Clean Water Act. There is much that remains to be done. Today's challenges are much more difficult. They are more complex. They are more diverse and they are going to be more costly to solve. We believe that the current Clean Water Act is, in fact, broken and needs to be fixed.

There are a number of realities in this context that we see. First of all, we believe the public wants continued progress towards restoring the integrity of our Nation's waters. Second, we believe that the public expects that obligations for clean water should be distributed fairly. Third, given the funding constraints at all levels of

government, the public expects that there will be effective investments to correct high priorities first.

AMSA does not believe that the current act fulfills these expectations. We believe that the current act is forcing unreasonable and unnecessary mandates while, on the other hand, interfering with an orderly and efficient process for further progress.

So how do we see the ways to achieve a more fair and a more effective Clean Water Act? We see two principal fixes for a more fair act. First of all, there must be continued and increased Federal funding. AMSA recently conducted a survey of its members, and the results are in a report that is attached to my testimony. It is called The Cost of Clean.

Just a few highlights from the report: 100 AMSA agencies report that they are going to spend, in only the next five years, over $32 billion in capital improvements. Eighty-four percent of this capital burden is going to be borne directly by localities. State funds including, I would add, SRF loans, will total less than 8 percent. And I think the most distressing fact of all is that annual user fees on AMSA agencies have been doubling every six years.

It is clear to us that not only Federal funding must continue, but it must increase.

The second fix for a fairer Clean Water Act is that we must decisively address nonpoint source pollution, which is unquestionably causing three-quarters of the Nation's remaining water quality problems. This really can no longer be ignored, and what we need for nonpoint source controls are an array of controls—flexible, site-specific, State-specific—but controls that are ultimately enforceable by the States.

In addition to an act that is more fair, we believe that the Clean Water Act should be redirected to be more effective, and the principal way of doing that is through a national program of comprehensive watershed management. AMSA's vision of watershed management is where all water body use impairments, including from nonpoint sources and other reasons, are integrated into a flexibles site-specific, priority-driven comprehensive planning process.

For municipalities, we believe it is critical to integrate combined sewer overflow management and stormwater controls into the comprehensive watershed management process.

We strongly urge you to ensure that there are provisions in the reauthorized Clean Water Act that, number one, codify EPA's recent CSO policy; and second, to modify the current approaches to stormwater management by allowing management, not treatment.

And so, in conclusion, we feel that H.R. 3948 provides these essential fixes to the Clean Water Act; and AMSA would like to commend you, Mr. Chairman, and the other Members of the subcommittee and committee for developing this legislation. AMSA views this bill as a mandate relief act.

This bill would achieve this relief by providing increased funding. It will achieve relief by providing a framework of comprehensive watershed management; it will provide relief by providing the tools and the flexibility for an effective, combined sewer overflow and stormwater management program, and it will provide relief by instituting fair yet firm nonpoint source controls.

Mr. Chairman, I will close by saying, like the buttons that you have seen on many AMSA Members this week, we believe that it is time for Clean Water Now. At our meeting, which just concluded yesterday, a resolution which is also attached to my testimony, was signed by 131 AMSA representatives from 25 States supporting reauthorization of the Clean Water Act Now.

Thank you, Mr. Chairman. This concludes my testimony, and I will be happy to answer any questions.

Mr. APPLEGATE. Mr. Park.

Mr. PARK. Thank you. Mr. Chairman, I come before you today as a representative of the State water program managers through the Association of State and Interstate Water Pollution Control Administrators. We are the people that have to implement the vast majority of the provisions of the Clean Water Act, and as such, we feel we have important contributions to make to this hearing today.

We are hearing every day from State legislators, local communities and the public, Clean Water Act reauthorization is critical, and it is critical to be done now. However, we also are hearing that it is not business as usual. The public is losing confidence in government's ability to deliver environmental protection in a fair, scientifically defensible and cost-effective manner.

The Clean Water Act is fundamentally sound, but there are critical components that have to be addressed. Lack of adequate funding and State flexibility are top on our list. The resources envisioned in H.R. 3948 are not adequate to bring the existing programs up to the base level of services for existing requirements.

There also needs to be maintained the State lead role in developing and implementing the programs. H.R. 3948 does provide some very positive enhancements and we commend them to the committee:

To continue to expand the State revolving fund, including strategic changes that build on the State's experience to date and address the needs of small communities;

To provide a flexible approach to State watershed management programs to allow appropriate trade-offs to achieve cost-effective and expeditious achievement of water quality goals;

To increase the funding for nonpoint source programs; and

To require Federal facilities to meet the same compliance tests as public and private sector.

In the interests of time, I would like to focus on several issues that we, as State administrators, feel are critical in addressing H.R. 3948. In the area of nonpoint source, the States have made significant initial efforts to begin this task with the very limited resources that have historically been made available. In most States, the frameworks are in place for further progress.

The problems that we face are many, and they vary significantly from State to State.

Federal requirements must provide States with the flexibility to tailor their nonpoint source programs to individual needs and to take maximum advantage of existing relationships with other governmental agencies, as well as the regulated community.

There should be no Federal mandate for enforceable control requirements. In many cases, the most implementable alternatives involve cooperative working relationships that can be seriously

damaged by insistence on early commitment to specific enforcement requirements.

The State should not be required to conform to a one-size-fits-all Federal best-management-practices guidance, such as is included in the Coastal Zone Management Act. While such guidance is valuable, inflexibility in application will significantly reduce the implementability and cost-effectiveness of the individual plans.

States must be allowed to target priority watersheds to address the specific needs of those States.

If we are given that flexibility and the funds to carry out the programs that are necessary in the States, we can support requirements to hold us accountable for demonstrable and continuing progress toward water quality goals.

We are also very concerned about the House bill's impact on the State's primary authority to establish water quality standards. States are in the best position to define the standards and other regulatory controls that are needed to carry out goals and mandates of the Federal statute. We have generated the vast majority of the monitoring data, stream surveys and other information that are necessary to translate Federal criteria documents into appropriate water quality standards. Federal documents are based on very general assumptions that may not be applicable to the State.

Finally, in each State, requirements for adoption differ significantly. The presumptive applicability and the regulation-by-default provision of the bill raise serious legal questions about the use of such standards in N.P.D.E.S. permits and other controls.

We oppose any expansion of the current promulgation authority allotted to USEPA under existing statute, and we feel that the proposed revisions will have a negative impact on the State's primary authority.

We would support the concept of requiring States to consider Federal criteria within a certain time frame. This would be done before USEPA-initiated promulgation proceedings. However, we think that a five-year review cycle for water quality standards is more in line with the essential requirements for public input and involvement that are necessary at the State level.

For this reason, we would also support changing the 305(b) reporting cycle to five years.

Finally, I would like to talk a minute about the groundwater provisions. Under the proposed legislation, these discharges to groundwater would be potentially subject to regulation under N.P.D.E.S. permitting programs, if the potential for hydrologic connection between groundwater and surface water exists. Both the discharger and the State would incur extraordinary costs to document this connection, and little environmental benefit would be derived from such a program.

In Illinois, our extensive ambient surface water monitoring systems do not indicate any significant link between the types of discharges to groundwater that would be covered under this provision and surface water quality problems. While there are instances of surface water impacts from major groundwater pollution sources, they are generally regulated by land pollution control regulations such as RCRA and CERCLA.

These statutes, along with appropriate groundwater regulations developed to address State needs, will provide an adequate basis for protection of both ground and surface water from pollution from discharges onto the ground and into the groundwater.

Thank you for this opportunity to provide testimony.

The CHAIR [presiding]. Thank you very much Mr. Park.

We next call on Mr. James Moseley, the National Association of State Departments of Agriculture. Mr. Moseley is the Director of Agricultural Services and Regulations at Purdue University.

Mr. Moseley.

Mr. MOSELEY. Thank you, Mr. Chairman. I am Jim Moseley, Director of Agriculture Services and Regulations at Purdue University, and in that capacity, I am representing the National Association of State Departments of Agriculture in this hearing today.

We at NASDA are very much appreciative of your invitation to appear today to discuss water quality concerns related to agricultural activities. As members of NASDA, we recognize the vital link we hold in administering what must be done if we are to maintain the positive direction that we have already started towards addressing agricultural nonpoint source concerns.

I want to return to that point momentarily, but first I want to also comment that I wear more hats today than just representing NASDA. While I represent NASDA in the State of Indiana in the regulatory arena, I am also a farmer, and just three days ago I finished planting for the first time at least about 1,500 acres of corn. And I will share with the committee that today the world looks a lot better because we were worried about water quantity, the kind that falls from the sky, as much as we were about water quality. Yesterday, we got an inch of rain, and my wife declared me fit to live with again.

The importance of revealing this fact is that I view the world from that perspective. I spend a considerable amount of my time thinking like a farmer, as well as time with farmers in both social and business settings. However, in the middle of my business career, I took a detour.

For a time, in the last five years, I had the privilege to sit on the Federal Government side as well. From an EPA perspective, when I served as agriculture advisor to Administrator Bill Reilly in the last administration, and subsequently as Assistant Secretary for Natural Resources and Environment at USDA from 1990 to 1992.

Those experiences have been invaluable to me as I have now gone back home to Indiana with a much different view of the world—both the problems and solutions and, more importantly, how we in government most effectively and efficiently, not necessarily manage or control, but rather serve the public to get from where we are on any particular issue to where we, in our best judgment as policymakers, think we ought to be. So I bring a very personal perspective to this issue.

Frankly, water quality and wetlands are issues I have thought about in considerable detail, perhaps as much since I left Washington as when I was here. With that perspective, then, I would like to briefly summarize a few of the more important points from my formal testimony that has been submitted for the record.

First, I would refer back for a moment to the point I made earlier about the extent of the problem. When I was Assistant Secretary, I flew frequently across this country, most often, on my way to the Pacific Northwest to deal with the spotted owl issue. I hope that my credibility today is not directly linked to my ability to solve that problem.

Everyone does different things on an airplane to pass the time. Some read, others sleep, but on clear sunny days I study rivers, streams, and lakes. From 30,000 feet you get a good overview of the country and differences in watersheds, depending on land use and management. Then, and I think to a lesser extent today, you could see visual evidence of soil erosion from agricultural land.

It is impossible for me to sit here and say either as a farmer or as a State agricultural official that water quality problems from agriculture is not a concern. It is. Yet along with that recognition at the 30,000-foot level is the understanding that nonpoint source water quality concerns can be managed, they can be minimized, but they cannot be completely eliminated.

I think the key question that this committee finds itself struggling with is how to best make progress at minimizing the effects of agriculture nonpoint source over the long term. Looking at this issue from the airplane level, though, I found is only one perspective. It is a lot different when the plane lands and you have to formulate solutions at the ground level.

Up high, the solutions are broad and they seem to be a little bit simpler. But when you get to the ground level, which is the role the States find themselves in, things become more personal and seemingly more complex.

We all want clean water. Yet the fact is there are trade-offs, and how we manage those trade-offs at the State and local level really takes us right to the heart of this issue.

I read a summary before I came yesterday of EPA Administrator Browner's comments to the committee of a couple of days ago. If reported correctly, she expressed a need for strong measures to be incorporated in the legislation, and she stated, quote, "If we do not do something about these problems, they are only going to get worse."

To me, that statement is revealing. If one believes that water quality is quickly deteriorating, that nothing positive is happening in agricultural production—in other words, there are no new technologies being developed, no best-management practices being adopted on the land, farmers are completely ignoring the issue—it would be easy to assume such measures are perhaps appropriate. However, I can't believe that, based on my experience at looking at impressive data about all the changes that are occurring, particularly when it is backed up by personal observations as I now travel around the country.

The change in my own community in the past five years has been dramatic. Though I am an optimist and generally view the good in human nature, it has exceeded even my own optimistic expectations. At worst, if you want to believe those who see the glass as half empty, we have a stable situation. And I think I can argue convincingly that the glass is more than half full, that we have

turned the corner on agriculture nonpoint source pollution problems and started towards improvements.

An important point that I think I can make with some credibility is that you can't ignore the significant differences in both attitude and behavior change that are occurring amongst farmers and ranchers in this country right now.

So if I could offer one plea, it is very important right now for this committee to make sure they fully understand what is happening in the agricultural community and avoid any action that might undermine the significant improvements that are being made within the context of existing law and programs. Build upon it, consolidate, simplify, but please don't undo what is starting to work.

Of course, the question is, is every farmer and rancher convinced? No, not yet, and we likely will never get 100 percent. There are still going to be a few resisters, as we have in any sector of our economy or society. They are going to fight, even legally, having to make any changes but let's not allow the generalization of that attitude to go to the majority. Doing so could precipitate a serious legislative mistake. Depending then on the view that you have, whether it is like Administrator Browner's, that the situation is declining precipitously, or that we have turned the corner and are making significant progress towards addressing the concern would lead us to two different directions legislatively.

Again, Mr. Chairman, I have spent considerable time thinking about this issue and how we most effectively get accomplished what we want to over the long term. And I am yet to be convinced—and I think I speak on behalf of every member of NASDA—that Federal Government regulatory enforcement authority will get us where we need to be any quicker, and certainly with far greater political turmoil, than an approach that has its primary focus in education, technical expertise and financial assistance. In fact, even if you regulate your way through this, we still have to back down and do education and technical support.

Frankly, what I have learned in the last couple of years in working closely with State environmental agencies is that they have the existing enforcement authority anyway to deal with those few individuals who go beyond any reasonable sense of societal responsibility. What seems to be lacking are resources for them to do the job they have already been asked to do.

But at least that is the level at which we can begin to make better decisions about who should fall under a regulatory snare as contrasted to the many who should not.

Representing the commissioners and directors from each State who serve as a vital link between State environmental agencies and agricultural producers, we are far more interested in working with producers and environmental officials to stimulate the adoption of new ideas and technology, to generate understanding about agriculture water quality problems than be driven unwillingly into the role of enforcer.

Give us, the States, the time necessary to evaluate our current and potential water quality problems, to give us the time and opportunity to design programs, plans, and practices that can be implemented efficiently and effectively at the ground level; and give

us the opportunity to assess the likely success of putting those programs in place against benchmarks, not mandates.

Mr. Chairman, I want to thank you for this opportunity to appear.

One final point is that it is important for agriculture that this committee act and pass legislation this year. We gain nothing by delaying the decision. Unfortunately—and I am out there visiting with farmers—some of them believe that this committee, this Congress, is going to regulate them anyway, and they are waiting on the new rules. And, frankly, that is standing in the way of additional progress that we could be making today. That is counterproductive, and it is time to move on.

Thank you.

The CHAIR. Thank you very much, Mr. Moseley.

At this time, let me call on Mr. Thompson, the Secretary of Transportation, State of Wisconsin, representing the American Association of State Highway Transportation Officials, AASHTO.

Mr. Thompson.

Mr. THOMPSON. Thank you, Mr. Chairman. I represent the State of Wisconsin as its Secretary, and I am also Vice Chairman of the Standing Committee on the Environment for the American Association of State Highway and Transportation Officials, more commonly known as AASHTO; and on behalf of AASHTO, I would like to take this opportunity to say thank you for your invitation to testify.

Today, I think we have an outstanding opportunity to make sure that the Clean Water Act works well for States and offers the mechanisms need to achieve our clean water goals. At this time, I would like to review several concerns we have about H.R. 3948 and its substitute amendment, and then I will offer some constructive suggestions to address these concerns.

Frankly, both H.R. 3948 and its substitute are teeming with murky language that effectively prevents anyone from truly understanding the implications of the bill for the States. It is particularly important for us to have this information, because we want to provide you and your committee the best possible data for the potentially massive costs of these mandates for transportation.

At this point, we are making several assumptions on what this legislation will require, and based on the Coastal Zone Act Reauthorization Amendments of 1990, we estimate that we will be required to install sediment detention ponds for nearly every project in the 1996 State highway program. In addition, Wisconsin DOT has determined we need to install devices such as grass waterways and vegetative filter strips on all projects that do not require an urban controls section. Cold weather States have to reduce roadway salt on a Statewide basis. This will increase, in our State of Wisconsin, deicing costs substantially from some $30 per ton for salt to about $100 a ton on average for nonsalt deicers.

We are assuming H.R. 3948 will require municipal stormwater discharge permitting in all urban areas serving populations of 50,000 or greater. We are also assuming that nonpoint requirements will be required Statewide, but it remains unclear whether impaired or threatened waters are targeted. And we have made no attempt to calculate cost of retrofitting existing facilities, because

we have absolutely no information at this time about where and what measures would have to be installed. Without retrofit costs included, our estimated costs of compliance are probably quite conservative.

So using these assumptions, then here are the conservative estimates we have on how much it would cost to comply with CZARA and the reauthorization of the Clean Water Act. These figures are over and above the $49 million we spend now to comply with the current Clean Water Act, which is better than 10 percent of our net construction projects each year.

For Wisconsin DOT, we estimate that current CZARA requirements alone will total approximately $43 million; and if the CZARA management measures are required under the reauthorization of the Clean Water Act, then those costs may triple. For example, the nonpoint source pollution and stormwater management sections of H.R. 3948 would cost our 1996 highway improvement program an additional $69 million to $103 million. This range of costs depends on whether coastal zone management measures will be required Statewide or only in targeted areas.

To summarize, current CZARA requirements and the provisions of H.R. 3948 would cost 1996 highway improvement program in the range of $112 to $146 million. In comparison, EPA has been claiming that CZARA requirements will cost $27 million per year on a national basis.

Just the two State DOTs of Wisconsin and Michigan have CZARA estimates of $43 million and $90 million, respectively.

As you recall, this does not include any retrofit costs that may be required by CZARA or reauthorization of the Clean Water Act. In addition, these figures do not include any of the costs that will be incurred by communities and counties, which also promise to be significant.

We have two other concerns about H.R. 3948. First, the bill does not supersede the requirements of CZARA. The Clean Water Act does not override coastal zone requirements. It will force States to implement two separate nonpoint and storm water programs—one in coastal areas and one in the rest of the State.

Second, the bill was unclear whether efforts are targeted or they are applied Statewide. It appears that the control measures required by one provision in the nonpoint section of the bill will be required for all nonpoint sources of pollution and in all watersheds, regardless of the water quality. However, the section on watershed management attempts to target impaired or threatened waters. These and other concerns are discussed in more detail in the written statement I have provided.

Now, I would like to talk about solutions. In Wisconsin, we are already doing an excellent job on erosion control, as are many other States in this country, from the transportation segment. We strongly believe that a Clean Water Act can be crafted that can lead to significant water quality gains without harming other public and private activities. We have five general suggestions for improving H.R. 3948, which will allow the State DOTs to make the best possible use of the funds invested in clean water efforts:

First, the Act needs to be clarified regarding its requirements and where they apply. Right now, we are relying on over-the-phone

interpretations and the last-minute fax received on May 24th. We don't feel that is good enough from a DOT standpoint to understand the current proposed law.

Recently, EPA told us that retention ponds were not required, but at the same time, we were told that reduction of total suspended solids can be "designed into" projects. We are not quite sure what that means. These kinds of shaky interpretations and misunderstandings will continue to dog this legislation until the language is clarified so that we can better understand what the committee is headed for.

Until this is done, the EPA will not have the information needed to understand what will need to be implemented, and States and localities will not be able to calculate the costs and other impacts you need to understand before the legislation moves forward.

Second, the Clean Water Act should take a targeted water quality-based approach instead of mandating across-the-board requirements.

Third, it should give States more flexibility in designing the compliance methods.

Fourth, the Clean Water Act should supersede CZARA 1990.

Finally, we need more reasonable and clear time lines for compliance.

Whatever bill includes these five points, we can live with. So in conclusion, we need specific statutory language that promotes improved flexibility for States and an emphasis on water-quality-based approaches, promises to give States much better tools for improving water quality across the Nation.

Before we forge ahead with this critical initiative, we need to take a step back and look at the potential implications, particularly the costs for States and local governments. States and localities already are strained to provide mobility to citizens with existing road resources. Unfunded mandates could jeopardize the highway programs across the Nation.

Once this legislation is clarified, I urge you to work with the State and local officials regarding the impacts of this proposal.

At their April meeting, the AASHTO board passed a resolution in which they expressed a resolution to support the Clean Water Act reauthorization which expressed AASHTO's desire for legislation that is adequately funded, provides a targeted approach to improving water quality, provides flexibility for State program development, and provides reasonable timeliness.

Thank you very much for this opportunity.

Mr. APPLEGATE [presiding]. Thank you.

Ms. Garvey.

Ms. GARVEY. Thank you very much, Mr. Chairman. It is a pleasure to be here to join my colleagues to discuss an issue of such importance, not only to the transportation community, but the Nation as a whole. I know both the Secretary and Administrator Slater appreciate the committee's invitation to have the Department of Transportation represented on this panel.

Before I begin, Mr. Chairman, I hope that you will allow me to publicly thank Chairman Mineta, Chairman Rahall, Congressman Petri and Congressman Shuster for their support yesterday with the National Highway System designation bill. It was a wonderful

day for those of us in transportation, and we are very grateful for your strong support. Thank you.

Mr. APPLEGATE. Well deserved. Thank you.

Ms. GARVEY. Thank you.

Let me begin by saying that protecting our Nation's waters from the impact of transportation programs is an integral component of Secretary Pena's commitment to environmental stewardship. It is a commitment that is reflected in our strategic plan. The Department of Transportation and the Federal Highway Administration wholeheartedly endorse the primary emphasis of the President's clean water initiative to reduce pollution and to protect priority waters through performance- and incentive-based State programs.

The State programs will emphasize targeted and streamlined planning, management, and enforcement mechanisms. We are pleased to note that the bill before the committee, H.R. 3948, includes many of the administration's goals for a strengthened Clean Water Act. This new State-based approach to protecting and enhancing our Nation's water resources strikes a familiar chord within the transportation community.

The Federal-aid highway program, as you know, Mr. Chairman, specifies State and local management of transportation priorities. Needless to say, the program has achieved tremendous results, results measured in mobility and access tailored, if you will, targeted to local and regional needs. At the same time, national consistency and system continuity is not sacrificed. Witness both the Interstate System and the proposed National Highway System.

Although designed to be implemented at the State and the local level, these systems achieve a uniform national result because of the broad national direction of transportation legislation.

Management and control programs targeted at the watershed level are immediately relevant to any existing water quality problems and will be effective in controlling new potential sources of pollution. We are encouraged that the committee in H.R. 3948 has embraced the watershed concept in various programs of the proposed legislation, including the measures to manage stormwater and control nonpoint source pollution.

The Federal Highway Administration has long been an advocate of area-wide measures to solve access and mobility problems. We have a rich history of coordinating regional transportation planning and management programs. We firmly believe the same approach can be used to address many of our Nation's environmental issues, including water quality.

There are several provisions within the Intermodal Surface Transportation Efficiency Act of 1991 which mandate environmental protection and enhancement measures, but I think what is unique about these provisions is that they are characterized by nationally directed but locally implemented programs which relate directly to the Clean Water Act; and I want to mention just a couple of these provisions.

First of all, ISTEA says that contributions to Statewide wetland plans and wetland banking efforts are eligible for funding under both the NHS and the Surface Transportation Program (STP). More than two dozen State transportation departments have used Federal-aid highway funds to establish wetland banks.

Second, the mitigation of water quality impacts due to stormwater runoff from highways is a designated environmental enhancement category eligible for set-aside funds under STP. Several State transportation departments, I am happy to say, implemented water quality improvement projects using this source of funding.

Section 1057 of the ISTEA directs the department to develop broad erosion control guidelines to assist the State transportation agencies in developing and implementing their own practices and procedures to control the impacts of erosion at highway construction sites. We are in the process of rulemaking, as you know, but we certainly listen to the States; and the final publication of the guidance is expected before the end of the year.

Finally, ISTEA directed the Federal Highway Administration and the Federal Transit Administration to develop Statewide and metropolitan transportation planning procedures, and I think those were referred to earlier in the day. Rules establishing these procedures were published in October of last year. Our procedures stress the need to coordinate transportation plans with area-wide environmental planning and management programs, including plans developed under the Clean Water Act.

It is clear that watershed programs as envisioned by H.R. 3948 and the administration's initiative will involve interaction with the development of transportation plans.

We have long been associated with efforts to bring about State-directed watershed planning, and thus, we pledge our support for the committee's efforts to incorporate such concepts into the Clean Water Act. We suggest that for the watershed-based programs to be effective, one, that we provide the States a variety of incentives to embark upon watershed-based programs. Incentives should include flexibility, as called for in the President's Clean Water Initiative, to define targeted programs, reduction or streamlining of direct Federal mandates and more flexible funding.

Second, State watershed programs should be developed under broad Federal guidance that not only allows but encourages the States to develop equally effective site-specific management controls for nonpoint sources.

Third, States must have the flexibility to identify selected pollutant sources and implement targeted control remedies to meet environmental objectives, and inherent in this flexibility is the latitude to use scientifically valid information to establish priorities of sources requiring control. Furthermore, such information can also be the basis of selected best-management practices for pollution abatement.

I hope that I have been clear about our support for flexibility and targeting. I am pleased to note that H.R. 3948 adopts a similar approach.

If the flexibility inherent in the President's initiative is included in the reauthorization, we would expect that transportation programs would experience some cost savings due to the changes in the current law, which would in time bring all Phase II stormwater sources under the permitting regulations. However, we would also expect localized cost increases that are associated with projects

having the clear potential to produce significant water quality impacts and with projects located in sensitive water resource areas.

Again, we want to emphasize that both we and EPA are sensitive to cost concerns and we want to avoid sweeping Federal requirements that are costly and inflexible.

We are committed to working cooperatively with the States, with EPA, and other Federal agencies to develop reasonable cost projections for management practices to reduce nonpoint source pollution and control stormwater runoff subject to the permitting requirements.

With respect to wetlands, reauthorization of the Clean Water Act presents a real opportunity to move wetlands protection forward through the enhancement of a balanced, common sense, workable set of improvements. We are pleased that the bill contains many of the provisions in the administration's wetlands plan. This plan stresses improved administrative flexibility to resolve the 404 permitting issues. We support the administration's decision to defer consideration of changes in the criteria of wetlands delineation pending the completion and evaluation of the National Academy of Sciences study.

The administration's plan also endorses the use of mitigation banks under appropriate circumstances. The FHWA and many State departments of transportation have had a significant amount of experience with the use of mitigation banks for unavoidable, often small impacts to wetlands along roads and highways. Banking can help address small, cumulative losses in an effective and efficient manner.

The Federal Highway Administration actively pursues the administration's emphasis and focus on improving interagency coordination and streamlining. I would add that our agency has been working with other Federal agencies to streamline the 404 permitting process as we evaluate proposed Federal-aid highway alignments.

To illustrate the success of the wetland banking and other mitigation strategies in the highway program, we have provided copies of a new publication, "Wetlands and Highways" and I hope committee members will have the opportuniy to take a look at it.

In closing, Mr. Chairman, the Federal Highway Administration is mindful of two important national goals: to improve the quality of our environment and to foster a productive economy. Highway programs present an opportunity, some would say a responsibility, to support both of those goals, and we endorse legislation that establishes a targeted, flexible and State-based approach to improving water quality.

We would very much like to work with the committee on that issue. Once legislation is enacted and signed by the President, we pledge to work closely with EPA, with our colleagues at the States, to carry out such an approach in ways that are cost-effective and manageable.

I want to thank the committee for this opportunity to appear before you and say that we would be pleased to answer any questions that you may have. Thank you.

Mr. APPLEGATE. Thank you very much, Ms. Garvey.

And to each of you, thank you very much for your statements.

We are going to recess the committee for about 20 minutes. We have just two votes, and I can promise you there will be no more interruptions because that is going to be it for today. But if you will stick around, we do have a few questions that we would like to ask.

So we will recess the committee for approximately 20 minutes until 5:00 o'clock.

[Recess.]

Mr. APPLEGATE [presiding]. Okay, I thank the committee for sticking around, or at least four-fifths of you, but I think that will be adequate, and I am going to yield at this time to Mr. Petri.

Mr. PETRI. I just wanted to thank you all for coming, and I know that it has been a long day and there are those that have different travel arrangements.

Mr. Thompson, my highway commissioner from Wisconsin, has asked me to apologize for leaving, but he had missed three earlier connections today, so this was basically his last chance to catch a flight. He and his staff will be very happy to respond in writing to any questions that there are so that there can be a complete record; or if something needs to be rescheduled at a later date, he will appear. But he wanted me to say that he appreciated the opportunity to be able to testify and called upon me to apologize for his having to make his last connection.

Mr. APPLEGATE. Okay. Thank you, Mr. Petri.

Let me just say, with apologies, too, that these hearings sometimes get pretty extended. And I know we started at 9:30 this morning, but there are always a lot of speeches that have to be made, statements, and there are long questions and long answers, and it just goes throughout the day. So you can see how these things—the same way it went on Tuesday.

And to the panel that yet has to come up and sit, we extend our apologies to you also.

At this time I would recognize the Chairman of the committee, Mr. Mineta.

The CHAIR. Thank you very much, Mr. Chairman. Let me just throw out a general question.

Where would we be, from your respective points of view, agencies you represent, or kind of work that you do, where would we be without any legislation this year? Start with you Mr. Wagner.

Mr. WAGNER. I will jump in and start to answer that. If I understand your question, where would we be next year if there were no legislation this year? We would be, in the opinion of AMSA, in a very difficult position. We very much are looking forward to the kinds of relief that are provided in your bill, Mr. Chairman.

The provisions for watershed management offer a mechanism for a flexible approach, a site-specific approach; it offers the promise of fully utilizing the existing tools within the Clean Water Act, of developing new classifications that are appropriate for individual water bodies developing use attainability analyses and site-specific standards, if appropriate. We would be scraping even more desperately for funds.

I mentioned the AMSA survey. That shows in the next five years AMSA members are going to spend over $32 billion in improvements. We would continue on this imbalanced and unlevel playing

field, if you will, where the tendency is to continue to pressure point sources, which in many cases account for an insignificant amount of water quality impairments, while not having an effective program for nonpoint sources.

And if I can just hold on to my soap box a few minutes longer. It is curious to hear testimony about the effectiveness of nonpoint source controls at the State level. It is curious from the perspective of a municipality, because three-quarters of the remaining water quality problems in this country are from nonpoint sources. So if those programs are so effective, they have yet to be demonstrated to be so.

I know from my personal experience in New York State, it is true that States are being much more aggressive in the area of nonpoint sources, and we see a process of comprehensive planning which includes nonpoint source controls where voluntary approaches, innovative approaches, site-specific approaches are encouraged and allowed, but without having the ultimate requirement, the ultimate ability to enforce against nonpoint source discharges, we do not think they will come to the table as cooperatively or move as quickly as is needed for this Nation.

The CHAIR. Director Moseley, let me be the administrator of the EPA and you are the associate administrator, instead of being assistant secretary of agriculture, as you were for Natural Resources and Environment. We have had people yesterday coming in saying that—and these were representatives of a number of industries, who expressed their view that it is long overdo in terms of Congress' heightening the contribution of agriculture and other sources of nonpoint pollution to improving our Nation's water.

I am just wondering, how would you advise me to explain to them that the nonpoint program will remain voluntary, while industry and municipal point source dischargers would be still subjected to enforcement measures or requirements?

Mr. MOSELEY. Well, first of all, I would answer the first question that you brought forward prior to this second question, related to the getting on with the process. And I think I made comments in my closing remarks that I was up here and testified before this committee, I think in 1991, on a Clean Water Act. My sense is that it is time for action.

Agriculture has been wondering what is going to happen here. We keep hearing about the potential of this committee and Congress to regulate, and, frankly, there are some individuals out there within the agricultural complex that are saying, why should I do anything? Why do I not just wait and see what the ground rules are going to be and then I will figure out a way to comply with them. I think that, in some circumstance at least, is holding up progress.

I think related to the regulatory question, and I have heard that brought up a couple of times today from some other folks in terms of point source and nonpoint source. Agriculture is, obviously, nonpoint source, and that does require a different set of criteria. It is a different problem that we are dealing with here.

It is my sense that we have begun, outside of a regulatory framework, to make some fairly substantial progress, and I really would like for this committee to take a close look at what is going on out

there in the countryside. Fairly rapid progress has been made within the last, even two to three years in terms of implementation of conservation tillage, and of other best management practices.

I am not surprised that we are not seeing significant changes in the data yet, in terms of the impact of agriculture nonpoint source, because those practices have not been on the ground long enough. But if we believe all the best management practices do make a significant difference, then I think you are going to see within the next five to seven year time frame fairly significant changes in the products that come from agriculture nonpoint source, or, better said, the lack of contaminants that are coming from agriculture nonpoint source in rivers and streams.

I guess that is what we are kind of sitting here as agriculturalists saying," we have started to do some things—do not come along and all of a sudden bring on a regulatory program with heavy enforcement that really puts us in an antagonistic relationship rather than one of cooperation. I think we can get a lot done outside of that kind of approach.

One additional comment that I would make is that I have heard very little said today about working with the infrastructure that already exists out there that deals with the agricultural community extensively, that is the Soil Conservation Service, and to a lesser extent the Extension service. And I think it is imperative that this committee take a look at those two agencies and what they can do in terms of making sure we get something done.

The CHAIR. H.R. 3948, or under the watershed management approach, though, for delineation, we do put that responsibility with the Soil Conservation Service in H.R. 3948. Are you familiar with that portion of it?

Mr. MOSELEY. No, I was not familiar with that. That is a very positive step and a step in the right direction. There is no need for us to develop another infrastructure out there.

The CHAIR. The kinds of things we heard people say were, I don't want EPA tromping around on my property; or I don't want the Corps of Engineers tromping around my property. And so under the watershed what we did was to put it under the Soil Conservation Service.

Mr. MOSELEY. I thought you were talking about primarily nonpoint source and I have been informed that is under the wetlands. That does not surprise me. I spent a lot of days——

The CHAIR. I switched gears on you.

Mr. MOSELEY [continuing]. Days and weeks dealing with wetlands when I was assistant secretary, and I am well aware of SCS's role in that regard. But I think there is another—the whole area of nonpoint source pollution, SCS is in a perfect position to get a job done that needs to happen.

The biggest problem that SCS has, quite frankly, as I administered that agency is again, as you have heard all day long—is it is a matter of funding and setting priorities. The Soil Conservation Service has had a number of other things to do, in particular conservation compliance, but now water quality is going to move to the top of their priority list.

The CHAIR. I think the other thing, too, I forget who it was that mentioned it, but some of the things we did were to take it from

the Coastal Zone Management Act so that we do not have duplication in terms of what we wanted to do under the Clean Water Act. I think it was the State of California, I think something like 67 percent is already under coverage of the CZMA.

Mr. MOSELEY. I am aware of that. In fact, I will be turning over to the staff today a final document whereby the State departments of agriculture have drafted a document that will help State Department agriculture officials go out and work with CZMA and make sure we get it implemented at the State level.

I have some problem with CZMA and the way it is administered, but beyond that, we are trying to make sure that that program does work now that it is law.

The CHAIR. Maybe we can pick up on that conversation sometime and maybe it would be helpful to us as well.

Mr. MOSELEY. Thank you.

The CHAIR. Mr. Park, did you have any comments?

Mr. PARK. Yes, I will just add to that, that I think it is very important that we send a strong message that we have to make continuing and accelerated progress in nonpoint source controls. And that we are going to be held accountable for improvements associated with those controls.

But I think it is also equally important to recognize that nonpoint source issues are not the same as point source issues. They are widely varied from State to State, the types of impacts and the types of problems are highly variable from State to State and they do not really lend themselves to a one-size-fits-all approach to solving the problem.

There has to be the ability, the flexibility to develop programs that are targeted toward important problems in a State and to work with the infrastructure that is already in place in that State, the departments of agriculture, the soil conservation services, the soil and water conservation districts who are very involved on a day-to-day basis with these problems.

So I was very encouraged to hear that maybe we are closer than we thought we were in intent of the language. I think it is very important for us to make sure that there is not any continuing confusion in this area, and to that extent we are certainly willing and anxious to work with the Chairman on the bill.

The CHAIR. We believe that this exchange did not occur.

Ms. Garvey, let me ask, is there any reason some of the unmandated Federal highway funding could or should not be used by States to offset the cost of controlling polluted runoff from highways?

Ms. GARVEY. Well, as I mentioned, Mr. Chairman, in my testimony, both the STP program and the transportation enhancement program give States the flexibility to use those funds and many States have taken advantage of it.

Next week, on June 4, or June 2 rather, we are having an open conference for States and for environmentalists and others who have had some real success in those programs to talk about that. So I think there is some real potential there and some wonderful flexibility.

ISTEA has been described as the carrot, if you will, and we talked earlier today about the need for a carrot, and I think there is a great deal of potential within the ISTEA legislation.

The CHAIR. Great. Thank you, very much.

Mr. Chairman.

Mr. APPLEGATE. Thank you very much, Mr. Chairman. Mr. Hutchinson.

Mr. HUTCHINSON. I told you I did not have a question but I do have one.

Mr. APPLEGATE. Okay, it is your time.

Mr. HUTCHINSON. Mr. Moseley, I think I heard you say, if I did not misunderstand, in response to the need of a Clean Water Act this year, that we need that because there are many who are out there not doing anything, waiting to see what the new ground rules are going to be. But I thought I also heard you say that there is a great increase in the instituting of best management practices and that we are going to see the good results of that in the years to come because there has been such great compliance. I am trying to reconcile those two. If that is happening then why is it so imperative that we take action?

Mr. MOSELEY. Well, I think there is one key word there. You said many. Maybe I did state it that way. If I did, I want to correct it. There are some. I am out with farmers, I talk to them, and, frankly, for a few their attitude is, "hey, I am not going to do anything until government makes some decision and tells me what I have to do."

On the other hand, though, I think we can demonstrate, with a lot of good data now, that we have achieved 92 percent, for example, in conservation compliance. Additionally, there are some good numbers coming out of CTIC about the amount of conservation tillage that is now on the land. Most farmers are making significant progress towards addressing this issue.

When I was assistant secretary and we were preparing some testimony for the Hill, I asked Farm Journal to do a little survey for me Over a five-year time frame I asked them to just take a look at the articles that they were writing and review the content of those articles. The point of that was that they are going to write what farmers demand. They are in that to make money, as a business. And what we found out was that there was a tremendous increase in the demand for articles about environment and specifically water quality.

The point is, farmers are concerned about this in spite of some people saying they are not doing anything. The demand is clear. We are making progress. I am just suggesting to you that there are some that are going to be willing to sit there and wait and not do anything and that impedes progress.

Mr. HUTCHINSON. Is there a risk in us overreacting on the Federal level in the reauthorization of the Clean Water Act when we do not have all of the evidence in yet on how effective current actions being taken by the agricultural community are? Is that not a risk for us, to overregulate, overfederalize that solution?

Mr. MOSELEY. Well, there is clearly a risk if you overregulate. I am not suggesting that. I guess I am suggesting that it is okay—I think it is time for us to get a clean water bill out there on the

table. Now, if it is a bad bill, I would retract that statement. But I think it is time for this committee and the Senate side to also take their bill to the Floor and take action. It is okay with us to do that.

Mr. HUTCHINSON. I guess a bad bill is in the eye of the beholder.

Mr. MOSELEY. Absolutely.

Mr. APPLEGATE. Mr. Gilchrest.

Mr. GILCHREST. I will put aside my question, because I think we can get them answered later, particularly at the time it is right now and we have one more panel left. But I have been here all day and I was here all day Tuesday, and I just want to say that most of the concerns I have heard expressed today, in my interpretation of the bill have been met in the bill. And I really, truly, my reading of the bill shows this flexibility, shows this time frame.

And everybody talked about a time frame. I was going to ask how long do we need to have the State set priorities with incentives to target those waterways that need to be addressed, the nonpoint source pollution, the groundwater and everything else?

I just want to make a comment that I think your concerns have been expressed and resolved in this particular bill, in the Chairman's bill. Thank you.

Mr. APPLEGATE. Thank you very much, Mr. Gilchrest, and you make a very good point.

I thank the Members and I certainly thank the panelists for appearing before the committee. You were very good and we certainly will be utilizing the information that you gave us. We have a lot of work to do. Thank you very much.

Now on to the final panel and land use issues. And we are going to need 10 chairs up there to take care of these folks.

We have Pete Wenstrand, the National Corn Growers Association; Jerry King of the National Pork Producers; Dr. Gary Colliver, the National Council of Farmer Cooperatives; Larkin Martin, National Cotton Council; Ferd Hoefner, Sustainable Agriculture Working Group; William Jeanes, farmer; Leland Eikerman, Missouri farmer; Ralph Grossi, American Farm Trust; Thomas Jorling, International Paper; Dr. Margot Garcia, of the American Planning Association, and Dr. Garcia had to leave and her statement will be made a part of the record.

In fact, each of your statements will be made a part of the record, and so if you can make your statements as briefly as possible, we would appreciate that very much and, again, we apologize for the long wait. I know some of you have been here a long, long time, as we have, but your testimony is important to us, otherwise we would not be holding the hearing in the first place.

So thank you for being here and we will begin with Mr. Pete Wenstrand of the National Corn Growers Association.

TESTIMONIES OF PETE WENSTRAND, PRESIDENT, NATIONAL CORN GROWERS ASSOCIATION; JERRY KING, CHAIRMAN, ENVIRONMENTAL COMMITTEE, NATIONAL PORK PRODUCERS COUNCIL; DR. GARY COLLIVER, MANAGER, AGRONOMY SERVICES, FARMLAND INDUSTRIES, INC., CHAIRMAN, SCIENTIFIC AND TECHNICAL ADVISORY PANEL, NATIONAL COUNCIL OF FARMER COOPERATIVES; LARKIN MARTIN, FARMER ON BEHALF OF THE NATIONAL COTTON COUNCIL OF AMERICA; FERD HOEFNER, WASHINGTON REPRESENTATIVE, SUSTAINABLE AGRICULTURE COALITION; WILLIAM JEANES, JR., FARMER, CECIL COUNTY, MD; LELAND EIKERMAN, OWNER AND OPERATOR, EIKERMAN NATURAL FOODS FARM, BOURBON, MD; RALPH GROSSI, PRESIDENT, AMERICAN FARMLAND TRUST; THOMAS C. JORLING, VICE PRESIDENT, ENVIRONMENTAL AFFAIRS, INTERNATIONAL PAPER; DR. MARGOT GARCIA, AICP, ASSOCIATE PROFESSOR, DEPARTMENT OF URBAN STUDIES AND PLANNING, VIRGINIA COMMONWEALTH UNIVERSITY, ON BEHALF OF AMERICAN PLANNING ASSOCIATION

Mr. WENSTRAND. Thank you, Mr. Chairman, and we certainly appreciate your efforts and diligence today and yesterday and over the course of working on this issue.

Mr. Chairman, thank you for the opportunity to testify today on behalf of the National Corn Growers Association, the American Soybean Association, and the National Association of Wheat Growers. Our organizations have a combined membership of more than 100,000 producers.

Needless to say, I want to stress that our organizations are all for cleaner water. We do understand that some farming practices can adversely affect water quality. We recognize that State assessments suggest nonpoint source pollution is our leading water quality challenge.

We are pleased that in H.R. 3948 that it contains provisions such as, one, long range time line, to the year 2010; recognition of the need for site-specific planning; and the encouragement of watershed planning. However, our vision of what it takes to get cleaner water, a perspective based on years of experience on the farm, is quite different from the overall approach in H.R. 3948.

For the next few minutes my colleagues on this panel and I would like to outline what we in agriculture need to achieve, what we all want, more progress toward meeting water quality goals around the Nation. I am going to concentrate for a few minutes on perhaps the major factor, and that is time.

We did not get into a situation where nonpoint source pollution became a problem overnight and it is simply not realistic to expect that we can eradicate it overnight. And like it or not, that will be the case even if Congress adopts a very strict regulatory approach.

Let us look first at the time the States will have to develop strategies under the bill. With only 18 months, many States may simply go to the shelf and pick up the Environmental Protection Agency's Coastal Zone Management Act guidance. While that may be appealing, and in some cases it may work, the fact is that CZMA is still an unproven program that does not have to be fully in place until 1999.

Now, for the time that will be needed to implement the best management practices and measures, the bill gives landowners three years to develop and put in place site-specific management measures, beginning two years after enactment.

I would like you to consider the case of conservation compliance, which was part of the 1985 farm act. It required farmers with highly erodible land to implement soil saving measures to remain eligible for Federal farm program benefits. Farmers had nine years to implement these plans with the aid of the Department of Agriculture's Soil Conservation Service, and SCS, as you know, is an agency formed specifically to give direct technical assistance to producers and with offices in nearly every county in the United States.

H.R. 3948 could target many more farms than those subject to conservation compliance and has no specific role for SCS. It is highly questionable whether effective and workable site-specific plans could be developed in the time allotted.

Finally, the bill allows far too little time to judge the effectiveness of best management practices. States would have to assess water quality only one year after full implementation of BMPs and would be forced to require additional BMPs in watersheds of water bodies out of attainment. Experience shows that this is unrealistic given the nature of nonpoint source pollution and the BMPs used to manage it.

For example, evaluations of the rural clean water program which was run between 1980 and 1990, show that there frequently can be time lags of several years between implementation and water quality improvement. Variations in weather, for which of course we have no control, can also significantly affect performance and skew the data used to measure their effectiveness.

I said at the outset that agriculture is willing to continue—and I stress continue, because there is a lot going on out on our farms today—to take necessary steps for cleaner water. We feel it can be best done through cooperative partnerships with States that encourage farmers to adopt more environmentally friendly practices, and not by community programs that risk having them do no more than the minimum to meet the standard that may be necessary to keep them from being fined or to face litigation.

Thank you, Mr. Chairman.

Mr. APPLEGATE. Mr. King.

Mr. KING. Thank you, Mr. Chairman. We certainly welcome this opportunity to comment on H.R. 3948. My oral testimony this afternoon is presented on behalf of livestock and poultry producers. I do ask that my full written statement on behalf of the National Pork Producers Council be accepted into the official record.

As the committee works to reauthorize the Clean Water Act, nonpoint source pollution is the focus of debate, with many calling for mandatory command and control measures instead of voluntary programs. I would argue, however, that we have not given section 319 programs enough time or opportunity to work. There are hundreds of examples across the country where section 319 projects are having a positive impact on the environmental management within the livestock industry.

For example, in Missouri—the State Department of Natural Resources is setting up local watershed alliances which will bring in-

terested and affected parties to the table to develop watershed-based solutions. The 1987 act directed States to develop and implement nonpoint source pollution programs, and even though Congress has not responded with the necessary funds, States have struggled to follow the mandates of the law.

This brings us to where we are today, with a complex and delicate piece of legislation before us. The new provisions of the Clean Water Act may have great implications for the long-term viability of livestock production in this country.

As we continue to face heavily subsidized foreign competition in the international marketplace, we simply cannot afford to require untested measures that are inflexible, prescriptive in nature, and require unnecessary capital investment. In this vein, we offer the following comments on H.R. 3948.

Antidegradation. The bill requires each State to develop a statewide antidegradation policy within two years of enactment of this legislation. If the quality of water is better than fishable and swimmable, then that level must be maintained, even if it is cleaner than needed, to maintain existing designated uses.

These provisions have the potential to limit the growth of livestock production. We believe that the antidegradation provisions of current law are more than sufficient to protect water quality.

The enforcement provisions of H.R. 3948 significantly expand EPA authority and focus on punitive measures rather than encouraging compliance. The bill would also require minimum civil penalties against polluters equal to any economic benefits derived from the violative discharge.

The problem with this provision is that there are many situations where the violator did not knowingly or willfully pollute.

We are also concerned about the bounty hunter provision of the bill. Bounty hunters could receive up to $50,000 for bringing in violators. We believe that we should focus the limited resources we have on water quality improvement and not on defending ourselves against lawsuits.

In that regard, we would recommend that the committee exempt nonpoint agricultural sources of pollution from lawsuits filed under the Clean Water Act.

U.S. livestock producers recognize the important role we must play in protecting the environment. We are ready to work with the committee to support voluntary programs that are having a positive effect on both industry and the environment. I thank you.

Mr. APPLEGATE. Mr. Colliver.

Mr. COLLIVER. Mr. Chairman, it was my impression that the lady from the cotton council would go next and then I will go after her.

Mr. APPLEGATE. That is fine, however you want to handle it.

Ms. MARTIN. Mr. Chairman, my name is Larkin Martin, and I farm 5,200 acres of cotton, and 750 acres of corn, 650 acres of soybean, and approximately 200 acres of wheat on our family farm in Courtland, Alabama. I am also on the board of Trust for the Nature Conservancy of Alabama. Today I am representing the National Cotton Council of America, the central organization of the United States cotton industry. Our members include producers, ginners, oilseed crushers, merchants, cooperative, warehousemen, and textile manufacturers.

Mr. Chairman, as Mr. Moseley mentioned earlier, the past 10 years have brought a tremendous change in farming methods and practices across the cotton belt. All of the emphasis today is to find ways to till the soil less, to decrease erosion, to decrease chemical use, and to decrease the cost of production. Every farm publication I read has at least one article on minimum tillage or no-till farming methods. Controlling soil erosion economically is the major focus of most farmers in my area. The judicious use of inputs is the number one cost-cutting step we can take in our operations.

Despite this shift in emphasis in our production practices, I still must maintain high yields per acre on my farm in order to turn a profit. If I cannot farm efficiently and productively, I will not be farming long. As I understand it, the clean water legislation this committee is considering will have long-term effects on my ability to continue farming. I would like to suggest that programs work best when they are based on cooperative, voluntary approaches, coupled with sufficient technical assistance, education, and funding.

Producers will continue to adapt their farming practices to environmental goals if, first, they are convinced there is a need to do so; second, they are given the flexibility to achieve a stated goal in a manner that best suits their farm; and, third, and most importantly, they can remain profitable. Programs need to be economically achievable.

Some of our major concerns with the primary bill before this committee are: First, the bill appears to subject all nonpoint sources to mandatory controls by either the State or Federal Government whether or not there is impaired water. Second, it is on too short a timetable to be realistic. Third, it makes no provision for the inevitable shortage of funds available to carry out the myriad of programs required. And, with respect to nonpoint source pollution control, the bill defines best management practices without a clear enough reference to whether the burden of the practice will render the financial operation unprofitable.

The economically achievable portion of the definition needs to be clarified. For example, such measures and practices should take into account the economic condition of the person responsible for implementing the management measure, the economic burden imposed on such a person as a result of the management measure, and the reasonableness of the relationship between the ultimate cost of the management measure to such a person and the environmental benefits derived.

We have reviewed the alternative proposal the committee is also considering. That bill, we believe, offers more flexibility to producers and would be less financially detrimental overall than the primary bill before the committee. It is a step in the right direction.

I would like to stress that farmers are environmentalists and conservationists. We work hard to preserve the soil and keep our water clean. We are proud of our accomplishments and believe that a cooperative involvement in environmental issues is essential. We want to continue our positive role in taking care of our natural resources and when we want to continue to be productive.

Mr. Chairman, thank you for the opportunity to present this testimony on behalf of the National Cotton Council of America and I would be happy to answer any questions.

Mr. APPLEGATE. Now, Mr. Colliver.

Mr. COLLIVER. Yes. Thank you, Mr. Chairman. My name is Gary Colliver. I am an agronomist. I work for Farmland Industries in Kansas City, Missouri. And as an agronomist for Farmland, I work for farmers like these sitting on both sides of me as well as a lot of others that farm out in the 21 States in which we have members across the heartland of the U.S., Farmland being the largest farmer-owned supply marketing cooperative in the country.

Today, I am here to testify as a representative of the National Council of Farmer Cooperatives, which is an even larger cooperative-based organization, and I feel that we bring a message from our membership that says that our farmers are willing and able and eager to participate in the process of dealing with clean water issues. We are not a reluctant group to participate.

You have heard from these farmers and they represent many. I support what they say. You have heard people like Jim Moseley state that time is required for things to happen. Things do not happen quickly on the farm, either due to business or other constraints, and also due to the fact that the soil and that cropping system out there is a very complex biological system and things do not happen quickly or easily in many cases. You heard Mr. Poshard state that his growers in Illinois needed time to make changes and time to see the effects of those changes.

Rather than repeat some of the things that have already been said, I am going to focus in on one issue that has already been addressed today, and I am not sure we all still have a complete understanding of it as yet, and that is that important issue of time. We have tried to visualize that time schedule of implementation and the things that happen at various times in the prepared statement.

I don't know whether you have these in hand or not, but in our prepared statement we have an exhibit, Exhibit 3, on the very last page. If you have that piece with you, it is a chart showing the time lines for assessment and implementation across the quintiles, so to speak, of the 20 percent of the prioritized water bodies as time progresses.

If you have that, and can refer to it, you will see the time frame of course describes enactment in 1994 out to the goal of 2009, being the 15-year total period. And there are 2 years to get started, and then those stairsteps on the right side of the diagram show the 20 percent of the impaired waters coming in, in order of priority each year, over that several year period.

Now, if you look at those, the three-year implementation schedules stairstep down and cross a horizontal line at year six. There is also one at year 11. These represent the 5-year reassessment time frames in the bill. And, in fact, you will notice that those later quintiles of enactment of BMPs, et cetera, have not even proceeded to be implemented or had time to act before there is an assessment. So we find some discrepancy in that happening.

Even with the quintile approach, the three-year time frame is an extremely, extremely aggressive approach for any kind of an agri-

cultural practice. Again, as Jim Moseley said, it takes time to make things change on a farm, and the five-year time frame is one that, again, asks a great deal of change to occur that is really not well documented as feasible.

The question I guess that we are still dealing with is, and one again that was discussed earlier, is the question of what happens when these five-year assessments occur. And the term "reasonable progress" was discussed earlier as indicating that as long as there was reasonable progress, additional BMP's would not be required.

I refer to the bill, and I go to Page 60, and in paragraph K, I drop down to line 22 and it says: If based on a revised assessment under subsection A, navigable waters within a watershed or area are not meeting applicable water quality standards under section 303, the State shall require the implementation of such additional BMPs and measures as may be necessary for such navigable waters to meet such standards.

We are reading that to say that we really have a five-year time frame, and waters are not meeting standards at that point then there must be additional measures implemented. That is the crux of the question I think that we are dealing with on that time issue, and perhaps there is some explanation that can clarify how this is intended to work.

Those items, then, coupled with the issues that my colleagues have mentioned here, are the things I think we wanted to emphasize here.

To make a brief summary of the first four of us here on the panel, we would state that it is our collective desire to see pragmatically constructed legislation move forward. We do not want to be obstacles. Producers on the clean water firing line can be partners rather than subjects of such legislation.

As presently designed, we are deeply concerned H.R. 3948 sets up a system of requirements, deadlines, and enforcement actions that, in combination with some possibility of funding shortfalls, is likely to fail with farmers as the victims.

We say again that we appreciate the efforts of the Chairman and the committee; that appropriate funding is certainly desired and is authorized in this bill. If another committee, however, makes those appropriations or does not make those appropriations, the real question is what happens? Is there any provision—and we read it as not—to take care of the inability to meet the bill's deadlines without proper funding?

Out of all this we hope that a reasonable consensus can be built from the most workable provisions of both 3948 and the bipartisan alternative that has been submitted. We think this can be accomplished because after reviewing the extensive testimony focusing on these two packages, it seems that a solid foundation does exist on which a consensus-building process can proceed in the context of workable reform for clean water.

The common principles of agreement would appear to include: One, the need to fully fund and increase section 319 authorization to assist producers in managing nonpoint source pollution; two, watershed planning to empower local partnerships; three, 15 years to do the job; and four, States delegated to lead the responsibility to implement nonpoint source programs.

There are some issues, however, that need to be resolved, and one is whether or not the clean water goal line is a moving target.

We also have questions about the degree of prescriptiveness in the legislation where we do not see quite as much flexibility for the States, as has been discussed earlier. Our concerns include: Targeting of impaired waters. We feel that targeting is a key issue. Actions required of agricultural sources and others. What are the interim deadlines? The enforcement actions affecting producers, and whether or not to adjust the enforceable deadlines in the event of significant Federal funding shortfalls.

As we understand it, States have essentially asked Congress to place the Clean Water Act mandates and accountability on their shoulders; to provide some assistance in a partnership role; and leave the details to the States in determining how best to go about doing the job. If Congress were to concur with this conceptual approach, many of the specific concerns threatening to hold up the process would dissipate. A number of issues could be resolved.

We, too, in agriculture have been working to develop our own consensus on solutions to water quality challenges in an ad hoc agricultural clean water working group. The agricultural organizations represented here today, as well as other members of that coalition, stand ready to offer more specific recommendations and work to address concerns. We think the clean water goals can be accomplished. We hope to work with the Chairman and Members of the committee toward enactment of a Clean Water Act reauthorization package that allows American agriculture to be both part of the solution and to remain economically viable in the process.

We thank you for this opportunity.

The CHAIR [presiding]. Thank you very much, Mr. Colliver.

Let me now call on the Sustainable Agriculture Working Group, Mr. Ferd Hoefner, Washington representative.

Mr. HOEFNER. Thank you, Mr. Chairman, for this opportunity to present our views. I am Ferd Hoefner, Washington representative for the Sustainable Agriculture Coalition, which is a coalition comprised of 10 Midwestern-based farm and rural organizations that work together on Federal policy reform in support of sustainable agriculture.

We believe the Clean Water Act reauthorization represents an important opportunity to deal effectively with nonpoint source pollution prevention. We believe a clear, strong, and flexible site-specific planning mechanism is both achievable and, if properly implemented, can help foster the mutual goals of clean water and thriving farms.

There has been a great deal said today about the relative merits of a regulatory versus a voluntary or a cooperative approach. I guess it is the belief of our organization that what we really are presented here with is a three-legged stool. You have voluntary research, education, and technical assistance programs; you have a second leg of the stool which is financial assistance and incentive programs; and you have the third leg of the stool which is an overarching regulatory framework. While you can accomplish a good deal with just two legs of the stool, the stool stands up better and you get more progress, in our view, if you have all three legs represented.

In this context we support a requirement that landowners and operators in impaired watersheds adopt integrated site-specific plans that give them a large degree of flexibility to meet water quality goals. Farmers should have the option of having a single plan meet all environmental conservation and commodity program requirements.

Farm plans should encourage the use of integrated farming systems or sustainable agriculture approaches and should not prescribe one way to farm nor require high cost, high-tech practices. Farmers who have already gone through resource management processes that protect water quality should be exempt from additional requirements.

We applaud H.R. 3948 for including essential nonpoint source pollution issues, including watershed planning, site level plans, groundwater, monitoring, and improved authorization for funding. It incorporates, in our view, most of the ingredients for an improved nonpoint program. However, we think significant improvements could be made to the bill, and I would like to outline those briefly.

First, we would recommend a unified approach be taken to nonpoint source pollution reduction. There should not be vastly different basic standards, procedures, exemptions and the like depending on where farmers or other landowners happen to reside. The bill's two-track approach to nonpoint programs, the basic section 319 provisions and then the optional watershed program, appears to us to be a recipe for confusion and inequity.

Second, we are also concerned within the optional program with the pollution trading provisions. We believe that farmers are willing and able to make increased efforts toward pollution prevention, but we believe that such goodwill that does exist could dissipate quickly if they are required to take on more than their fair share of the burden, and we would hope that the language on trading would be improved.

Combining the best of the proposed optional program with the revised section 319 in a unified approach would, in our view, result in a better bill. We feel that the presumption for watershed-based approaches and for pollution prevention approaches could be stronger in the bill. We also believe the bill could more carefully describe the relationship between management measures and site-specific management plans.

It is critically important to our community that there be language in the bill allowing farmers to implement alternative management practices and systems that can be demonstrated to be at least as effective as whatever measures and practices are included in Federal and State guidance. There are at least two reasons for this concern.

First, farmers are, in many instances, are way ahead of conservation organizations and agencies and government-funded research and education institutions in developing innovative systems to address pollution prevention. And, second, there is a growing consensus that single objective best management practices are not the best approach to pollution prevention but rather that farming systems approaches are necessary.

So on those grounds we would urge you to consider adding alternative measures language to the 319 provisions.

We applaud the bill for the provision giving credit to farmers participating in qualified USDA and State conservation water quality programs. This will help avoid unnecessary duplication and will help increase interest and funding for these important voluntary incentive programs.

The bill's landowner exemption language is a serious problem. We strongly support exempting landowners and operators, land areas, and classes of activities that are not contributing significantly to pollution problems. The overall process needs to be as focused and as targeted as possible. However, as currently drafted, the bill allows exemptions for any reason. This may well lead to arbitrary decisions, ill-will and, quite possibly, the destruction of the community spirit in which successful watershed programs must operate.

In closing, we would stress that in our experience most farmers will support sensible and practical water quality requirements. There needs to be a considerable degree of consistency and certainty, with reasonable knowledge of what will be expected and a fair sharing of the burden. In addition, there needs to be maximum flexibility and clear provisions for alternative practices and systems.

H.R. 3948 achieves many of these goals but is inconsistent in others. On the other hand, the recently available draft alternative bill put forth for discussion appears to us to substantially miss the mark on all of these basic goals. The alternative bill appears to offer little certainty or consistency. It is not clear who will be in and who will be out of the process and who will be subject to what kinds of measures when.

The alternative bill draft fails to include any alternative management language, does not provide credit for existing water quality program participation, and does not provide for single integrated farm plans. The bill is not sufficiently watershed based nor carefully targeted and does not incorporate groundwater that is hydrologically connected to surface water.

Finally, and most importantly, I guess, the alternative bill, in our view, does little to change the status quo, and, thus, does not include a strong likelihood that water quality goals will be met. We would, therefore, strongly urge the committee to work towards improving H.R. 3948 along the lines we have suggested rather than taking up the alternative bill.

Attached to my statement is a letter we recently sent to the Chairman and to the Committee from the Sustainable Agriculture Coalition, the National Family Farm Coalition, and the American Farmland Trust that spells out in detail how we think the bill could be further improved.

Thank you for allowing us to present our views and I would be happy to answer questions.

The Chair. Thank you very much, Mr. Hoefner.

Let me call on now Mr. William Jeanes, Jr. of Cecil County.

Mr. JEANES. Thank you, Mr. Chairman. Mr. Chairman, Members of the committee and guests, my name is Bill Jeanes, and I come before you today to describe briefly what farmers in our area are

currently doing to control and reduce nonpoint source pollution through best management practices and other conservation techniques.

I raise corn, soybeans, and wheat on 400 rolling, but very productive, acres in Cecil County, Maryland. I rent over two-thirds of this acreage.

BMPs are practices utilized to efficiently and economically reduce crop inputs while enhancing the surrounding environment. While some BMPs are simple, such as a grass buffer strip adjacent to a body of water, others are considerably more complex, such as waste management systems for livestock operations. In certain instances, BMPs are necessary to keep lands consistently productive, but in all forms they are designed to benefit water quality and substantially limit soil erosion.

Conservation plans written by the Soil Conservation Service define the types of tillage and cropping rotations a farmer may use and they are designed to minimize soil erosion and protect water quality. While they are required only on land classified as highly erodible, many farmers in our area already have a plan in force. Some practices generally used are conservation tillage, where there is always some form of crop residue left on the field; cover crops, which entails sowing a winter hardy crop after the initial crop is removed; and contour farming, where the crop is planted along the contour of the field. Crop rotation is widely practiced as well to break the pest cycle, thus requiring much less pesticide use. They are popular practices due to their proven agronomic benefits.

These plans also deal with land improvements such as grassed waterways and buffer strips. In Maryland, there is a good deal of tillable land near the Chesapeake Bay and its tributaries. It has been recognized by farmers that buffers along the water's edge helps stabilize the shore and filter out some sediment and nutrients. Grassed waterways also decrease the flow of sediment to the Bay. These improvements are cost-effective while enabling the land to be stabilized.

One of the most important goals of Maryland's Tributary Strategy Program, which I will talk about later, is the reduction of nitrogen into the Chesapeake Bay. The Nutrient Management Plan defining recommendations on fertilizer placement, quantity, and timing of application for each crop are of great importance to all farmers. It is here where the possible reduction of costly fertilizer may be achieved. Through soil testing and subsequent nitrogen testing, it can be determined exactly how much fertilizer needs to be applied and whether or not a particular field will need further applications later on during the growing season. The savings from these tests can have a great impact on a grower's net profit, and indeed more and more farmers are getting plans written.

Another important and cost-saving practice is integrated pest management. Here, specialists scout the farmer's fields and make specific recommendations on the types and quantities of pesticides needed. This sounds rather simple, but it can provide enormous benefit to the grower and can reduce drastically the amount of pesticide applied to a farm.

The specialist can determine what pests are present in a field and can advise whether the economic threshold has been reached.

This means that if there are not enough of a particular pest in the field, the grower would not use any pesticide. This has obvious benefits to both the farmer and the environment. The program does pay for itself.

I would like to talk briefly now about Maryland's Tributary Strategy Program and its application to my discussion. It is a program of different options for the reduction of nutrients entering our waterways. The strategy is to develop a grading system for various practices designed to make the overall goal of a 40 percent nutrient reduction attainable. These estimates that you see in your appendix are for the upper Eastern Shore tributary system.

Of all the 30 or so options listed, the top three practices for the maximum amount of nitrogen reduction are: nutrient management planning, conservation tillage, and cover-cropping. If implemented, these three practices could make up more than half the goal of the upper Eastern Shore tributary system. That is only one area of Maryland, but it is representative of other agricultural areas with similar nutrient problems.

I would like to emphasize that these options are meant to be voluntary. Their adoption depends upon the successful implementation of the practices and any incentives that may be funded to encourage further participation. Currently, the ASCS is offering incentive payments through the water quality incentive program to farmers who agree to sign a long-term agreement for three years. Again, the schedule of rates is included.

This is an excellent program to encourage farmers to begin the practices which will reduce nonpoint source pollution. As with any new program, farmers must be assured that it will benefit their already thin profit margin. It must also be an ongoing effort, not something that may be terminated after a few years. Farmers are willing to do their part in this effort and will work toward water quality enhancement.

Thank you, Mr. Chairman. I will answer any questions later if needed.

The Chair. Thank you, Mr. Jeanes.

We now call on Mr. Leland Eikerman from Bourbon, Missouri.

Mr. EIKERMAN. Good afternoon. Thank you, Mr. Chairman, Members of the committee, staff, and visitors. I am owner and operator of Eikerman Natural Foods Farm in Bourbon, Missouri. My farm is a highly diversified food-producing operation with most of our production being sold directly to consumers within a 60-mile radius of our farm.

Earlier was referred to a study in wetlands. There is one study called Soil and Water Quality that I would recommend for you to look through. Ninety percent of our soil has lost 60 percent of its organic matter, and this is some of the problems we have with runoff. Five percent organic matter soil will absorb a six-inch rainfall in a 24-hour period with 197,000 gallons per acre in the soil.

A 1.5 to 2.5 percent organic soil will only absorb a half to one inch rain of that six-inch rain in this same period and have only 37,000 gallons of water in the soil. So as the balance of that water runs off, it takes clay particles that have combined with herbicides, chemical fertilizers, and various other elements.

Also, we have wind erosion and I can get something on my farm connected to the dust particles in the wind erosion, that has been applied several hundred miles away. So what I do have on my farm—unless the problem is addressed otherwise, I can't be entirely sure of what I have on my farm.

Today, we not only have acid rain, but attrazne rain and many other contaminants. The area of the world once known as the Fertile Crescent, that includes parts of Iran and Iraq, had a stable and productive agriculture. This area has become a virtual graveyard. This was the result of erosion and not taking proper care of the soil and its organic content.

A one million population city produces 600 tons of finished compost a day. Instead of flushing this down the river or burying it in a landfill, we should treat it as a valuable natural resource; that is, putting it back on the land where it becomes fertility rather than a waste that then becomes a pollutant. And you can look at these landfills around the country with the leachate running out the side, causing water quality problems.

While we do not want our "Fertile Crescent"—the Midwest farm belt—to become a graveyard, last summer we watched Mississippi floods wipe out millions of acres of crops and thousands of farms in the Midwest. I had 87 inches of rain on my farm. This April, in Missouri, we had a record rainfall, 15 inches that I had on my farm; Vernon County, Missouri, had 25 inches.

It is like we drained a pond, and they tried to work it after it has dried a little bit. It cracks on top, it gets bricked up with mud about an inch underneath. So it is a very tough situation.

Part of the reason for this disaster was agricultural practices and wetlands destruction that promoted flooding and high water. How high would the levees had to have been if they hadn't started breaking and let it spread out 10 miles like the river was intended to do? This committee should implement clean water policies that will get water to walk off the land instead of run off the land.

Today, soil organic matter still remains as the undisputed key to soil productivity. Of all the wealth in this world—jewels, precious metals, and all that man considers valuable—none is so priceless and so vitally important as the organic matter content of our soil. I am not talking about just being an organic farmer, but when you get below 2.5 percent organic matter, even the chemicals don't work right.

The entire farming operation is generally conducted as a soil mining operation with little attention paid to maintaining a proper organic matter supply in the soil. An Ohio University study increased yields sevenfold just five years after a piece of farmland was converted to raised organic beds. Five hundred pounds of tomatoes were grown on a 100-square-foot bed. That translates into about 55 tons of tomatoes using only half of the acre and the other half for paths.

If the water is held in the soil rather than running off, the soil particles also stay in place and protect streams rather than eroding and pouring into our waterways. The elasticity and workability of the higher OM soil is much better. The earthworm population returns and starts working the OM into the soil, releasing phos-

phorus and potash, making all elements more available, as well as storing nitrogen in their bodies for later release.

The microbe population increases, which has the ability to detoxify and recycle wastes in the soil. Plants are then fed by the soil rather than chemicals from a bag or bottle. The OM and humus have a gluelike substance which holds the soil particles together, decreasing erosion and improving soil structure.

The nutrient content and flavor of the fruits, vegetables, and grains is probably better. Yields actually increase, even though many people say we can't feed the world without the chemical system of agriculture. World hunger has actually grown worse since the introduction of the green revolution. Many countries are going back to more natural methods of agriculture. Many countries with agriculture systems thousands of years old—China, for instance—with much more dense populations, recycle all wastes with the land staying highly productive.

Many acres of land in this country after being farmed only 150 years are entirely useless or almost so. We have looked only at production rather than nutritional value for animals, people, or the health of the soil. Restoring the health of the soil will greatly improve our water quality, as well as restoring the health of our soil by raising OM and humus.

We need to look at some other changes in agriculture. Different cropping systems to reduce runoff and pesticide use, not growing crops in unsuitable environments, such as strawberries in Florida. We have to use excessive fungicides there. The 48-Hour Program, if you saw that last week, you know, it should kind of open your eyes up. And there is also in the NAS book of Pesticides in the Diets of Infants and Children.

Restoring shelter belts, rotational planting, green manure crops, grazing livestock closer to food sources so manure can be safely recycled. Chicken, hogs, and cattle are basically foragers and are healthier when not penned and fed. This adds fats to our diet that we don't need. They are an important part of a sustainable agriculture when used as a means of storing low-grade forages and grains for future use by humans and as a start for the composting process, replacing cultivated crops with forages on erodible soils and more regional food systems. This is not something to be talked about but an important process that must be started immediately.

We can help by requiring mandatory site plans, cost-sharing, and other things. We must have some visionary thinking, attitude changes, and a new definition of what progress really is, not just for the good of someone's bottom line next week.

We are in a rut with our thinking and attitudes. A rut is merely an open-ended grave from which we must climb. Our present agricultural food system is a continuous bleeding process which will eventually run out of blood—nonrenewable resources, clean water, and healthy soil—unless we change direction. We have the opportunity to do that with the Clean Water Act.

We have built up a great biological debt, but nature is very patient and will eventually settle the debt, but will homo sapiens be here to witness this event? Just remember, we all live downstream and nature bats last.

The CHAIR. Thank you very, very much Mr. Eikerman.

Let me now call on Mr. Ralph Grossi, President of American Farmland Trust.

Mr. Grossi.

Mr. GROSSI. Thank you, Mr. Chairman. If you don't mind, I will just summarize my comments and ask that I be able to submit the entire written testimony for the record.

The CHAIR. Without objection, so ordered.

Mr. GROSSI. Mr. Chairman, my name is Ralph Grossi. I am President of the American Farmland Trust, and I am a California farmer whose family has been in the dairy and beef cattle and grain business for over 100 years. I appreciate the opportunity to testify here today.

American Farmland Trust and many farmers we work with have come to the conclusion that support of the nonpoint source provisions in H.R. 3948 is a reasonable way to make agriculture a full partner, helping to meet the challenge of cleaning up America's waters.

Many farm-based pollutants arise from what we used to think of as normal farming practices. But today normal farming practices are not good enough. We know that the American public expects more of farmers today than the production of a safe, abundant food supply, which we do very well; they want us to produce conservation as well.

Most farmers in America have already begun to incorporate practices to minimize environmental impacts in their day-to-day farm operations. Farmers changed their farming practices to meet the mandate of the 1985 Food Security Act. The Soil Conservation Service reported that more than a billion tons of topsoil a year is staying where it belongs: on the land.

But more can be done with additional incentives and the right measure of regulation. I stress the right measure of regulation.

The American Farmland Trust is actively involved in monitoring the implementation of the 1985 Food Security Act, and we agree much has been accomplished in reducing soil loss, but not in all regions of the Nation. And other areas of concern, such as nutrients or agricultural chemical loading, are still in need of additional improvement. We believe the lesson to be learned is that by providing a comprehensive natural resource planning process, technical and cost-share assistance, and clear consequences if they fail to adopt appropriate practices, farmers will continue to respond positively to the ever-changing demands of our society with a strategy that will work to reduce the degradation of our waterways.

I also acknowledge there is considerable concern over the impact of new water quality legislation on individual farm enterprises. I think much of this concern is a result of the difficulty in understanding how H.R. 3948 would be implemented. With minor revisions to the bill, these questions can be clarified, revisions that increase farmers' flexibility and coordinate water quality initiatives with other USDA conservation efforts. I have enclosed specific language that addresses these issues in an attached letter for the committee.

H.R. 3948 provides considerable authority to EPA and the States to develop standards, BMPs and other program specifications. We encourage Congress to use the report language accompanying the

bill to provide guidance to this process in the form of guiding principles modeled after those developed by the Soil and Water Conservation Society, a copy of which is also attached to my formal testimony.

We understand it is your intention to provide technical assistance and cost-share funds to help farmers implement BMPs that would otherwise prove too costly. This is absolutely critical to maintaining the delicate balance of shared responsibility between family farmers and American taxpayers. The consequences of heaping too much of the cost on individual farmers are great. The American Farmland Trust has studied development pressures on farmland across the country. Our research has shown that the farmlands with the greatest potential to impact water quality are the same farmlands most threatened with nonfarm development, development that will add to the volume of polluted stormwater runoff.

Farming is the preferred land use in most watersheds. Recent trends toward cutting Soil Conservation Service and USDA cost-share program budgets lead us to believe that we cannot assume the financial assistance to farmers envisioned in H.R. 3948 will actually be there when farmers need it.

You have heard much about the implementation time here today, but frankly my greater concern is the resources necessary to accomplish that implementation. With the right resources, we can get the job done in five years. With a lack of resources, we can't get the job done in 20 years. And without those resources, this legislation will fail in its objectives.

Therefore, we strongly encourage you to pressure both EPA and USDA to provide funding for assistance to farmers. We believe the resources are available and that the American public is having a hard time understanding expenditures of $40 million a day on commodity support programs and only pennies on conservation. A modest shift in funding priorities would reflect your new commitment to conservation.

The provision providing for pollution trading concerns us greatly. In reality, it will create in our view very strong pressure to establish excessively tough mandatory BMPs on farmers in order to lower costs of reducing point source discharges normally passed on to consumers, taxpayers, and ratepayers.

The result of the pollution trading scheme as it is currently written will be to concentrate costs on a few farmers rather than a sharing of the burden throughout the community. And those farmers may be put out of business.

Let me stress that we do support the concept of trading pollution credits, but not in their current form in this bill.

In conclusion, my message is that most American farmers share their community's concerns over water quality and most will voluntarily do their share to reduce nonpoint source pollution if they are given the opportunity and the tools to do so. But as in every other sector of our society, there are some farmers who will not take on the task of reducing nonpoint source pollution unless there is a clear penalty for failing to meet community standards.

Please don't penalize many for the sins of a few. We believe H.R. 3948 contains the framework for a program that can achieve the

level of water quality sought by the American public, as long as the public accepts a fair share of the cost.

Thank you.

The CHAIR. Thank you very much, Mr. Grossi.

We would now like to call on Tom Jorling, Vice President of Environmental Affairs for the International Paper Company.

Mr. Jorling.

Mr. JORLING. Thank you, Mr. Chairman. I come before you today as a student and a practitioner of the Clean Water Act. Twenty-five years ago—that is at the beginning of this hearing today—I served as the Minority Counsel for the companion committee in the U.S. Senate and spent many hours around this very table with your predecessors and your staff's predecessors in negotiations in conference on the Water Quality Improvement Act of 1970 and the Clean Water Act of 1972 and I suspect I was put last on the agenda today because that is the proper way to treat former Senate staff.

I followed that with service during the Carter administration as Assistant Administrator for the water program during the period 1977 and 1979. And following that, I have recently completed seven years as the responsible official for environmental programs, including the clean water program, in the State of New York. And now having become Vice President for Environmental Affairs at International Paper, I am responsible for environmental compliance and environmental policy at a major corporation—International Paper—that has 237 manufacturing facilities across the country, including 26 paper mills, with 11 of those being bleach mills.

So I have seen the Clean Water Act from many vantage points, and there is a lot I would like to share with the committee concerning that.

I have prepared remarks that I have submitted and I won't read them or repeat them, but just touch on a couple of key themes because it is very late in the day.

First of all, Mr. Chairman, I urge you and your colleagues to focus on what has worked in the Clean Water Act. I share the view that many have given today, including the Mayor of Rutland, that this is the best of the environmental statutes. It is a statute that has worked and is working, and therefore you need to consider carefully what has worked and basically leave those elements alone. I think the industrial and point source program has been and is especially successful.

Second, you need to make a careful review of what water quality problems remain. And there are some. In preparing for this hearing, I went back and took advantage of my earlier activity and took New York State's impaired waters report, the section 305(b) report. I went through every region in New York that has impaired the waters.

In only two instances of all of the impaired waters in New York, is the impairment due to an industrial point source. There are still some waters impaired because of publicly owned treatment systems, but the bulk cause of impaired waters are contaminated sediments, nonpoint sources and in many instances air-borne deposi-

tion. That kind of information tells the committee, I think, a great deal about where it needs to focus its attention.

And then, third—and it need not be said to you as I heard your comments, Mr. Chairman, about the resources that you had available to spend in San Jose—you are making by the decisions that you will make—and they are appropriate decisions to be made by Congress—an allocation of very scarce public and private resources. And this is a time of very scarce resources. When you make that allocation, you are not making it in a vacuum.

I am not just talking now in the terms of the Clean Water Act. I am talking in terms of what in the Clean Water Act is competing for: scarce resources and it is in competition with the other array of environmental activities and laws that have been created over the last couple of decades, as well as with other social needs.

So my plea to you is to focus like a laser on what is needed and focus only on what is needed. What I think needs attention is the State revolving fund and its reauthorization. I am very concerned in that case that if that authorization is not made, and this Congress concludes without having reauthorized it and because those monies are under the budget cap, they are going to be competed for by other social needs and lost to the water quality program. If any or all are lost we will see tremendous backsliding in this country, and that is something that I don't think this Congress wants to be associated with.

We need to focus on nonpoint sources. And we need to focus in very careful ways that build upon what has been accomplished and is being accomplished and give it focused direction. That is where the intersection of the watershed planning and the nonpoint source control program comes in. You need to craft it very carefully.

Third, I would say keep your proposal as simple as possible. We do not need to go through another iteration of making consultants, lawyers, and the courts preoccupied with implementing another round of the Clean Water Act. It does not need that. Keeping it as simple and understandable as possible, I think is incumbent at this stage of implementation of the Clean Water Act.

You have to remember it is obvious that we can't do everything, that we must target very carefully. There is a very real fact that what you do in this case is going to determine a lot of consequences.

For instance, if agriculture or forest practices have costs imposed on them that make it increasingly difficult to sustain the carrying costs of engaging in those activities, that land will increasingly be lost to those two practices and it will become suburbanized sprawl. That is the alternative land use. That would be devastating not just for clean water, but for a whole array of other social benefits that both agriculture and working forest landscapes provide.

So when costs are imposed, they should be imposed very carefully so as to improve the quality of the Nation's waters, but not to be so onerous as to cause those land use activities to be forgone and that landscape lost forever to uses which are much heavier on the earth. These two land use are, in my judgment, the only two sustainable economic enterprises that can occur on the landscape.

So my plea—and I will wrap this up, leaving the prepared remarks to speak to some specifics—don't let either complexity, stri-

dency, or the search for the perfect to become the enemy of the good deter you from what I believe you want to do and what you must do, and that is amend the Clean Water Act in very careful ways and make practical, prudent public policy choices that will produce continued achievement in the program under the Clean Water Act, so that the Nation's waters will continue to improve and that we will all be the beneficiaries of that improvement.

Thank you, Mr. Chairman.

The CHAIR. Thank you very much, Mr. Jorling.

Let me first turn to my very fine colleague from Arkansas, Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

And thank all of you for your testimony. I know the hour is late, and while—I have a lot of questions, I will forgo them, but let me ask this one question of Mr. King.

Way back when you testified a while ago, you made reference to voluntary programs. I think you are speaking on behalf of, you said, poultry and pork production. Could you expand some on what kind of voluntary programs in the area of nonpoint source pollutants have been implemented, what is going on? What kind of success has there been?

Mr. KING. Yes. I would like to make it clear before I start my comments that any answers to any questions I give now will only represent the National Pork Producers Council, and I certainly do not want to speak for those other organizations that I was representing in my earlier comments.

Yes, I think that when we talk about voluntary programs working, as several of the previous panel members have commented, the 319 programs are working. I think it is—it takes time; as Jim Moseley said earlier, nature works very slowly. I think those are things that we need to continue, and those programs—in the seven years, I think we have funded them to the total amount of $270 million; and if we can move forward and fund them at a higher level, I think we can see those programs work.

I can think of a number of things that our industry has done in the past two years. We have established a program of environmental workshops where we have brought producers in with concerns. They sit down across the table from members of the Environmental Protection Agency Soil and Water Conservation districts, State Departments of Natural Resources, and we have had a conversation to say, where is the problem and how can we solve it, and we have made great progress. They have been very well accepted. We currently have had those workshops in 13 States and reached nearly 5,000 members.

A few years ago a great concern in our industry was to create and provide a wholesome and nutritious product to the consumers of this country. We were concerned about drug residues. We formed a pork quality assurance program which is a voluntary program in our industry that has been tremendously accepted. In fact, this past year we had no violative residues in our products.

We have done similar activities in other areas. We have produced an environmental guide which I have a copy of here. We have distributed 160,000 of these to our industry, to our members, and to various people that are involved in the pork industry. It is not a

textbook, but it is a handbook that provides information concerning those issues that we producers need to concern ourselves with on a daily basis, and if we are expanding or changing our operations.

In closing my comments, I would say I firmly believe that you can attract more bees with honey than with vinegar. I am convinced that the voluntary approach can work.

Mr. HUTCHINSON. Is there a kind of enlightened self-interest at work here, when they know what to do and know there is a problem that there is a willingness and a desire to fix it? Is there a high level of compliance and do you have figures on that?

Mr. KING. I might comment about another thing which we have not implemented yet, but we are working on and hope to be able to implement next spring. This is an environmental assurance program which should be an ongoing educational program that we would offer to our various members throughout the country. And I think this program can illustrate some of the problems that we are faced with, especially if we try to have one program fit everybody. Since we have worked to develop this program, we have realized that it is going to have to be different as we present it to the producers in Maryland or North Carolina than it might be in North Dakota, in Illinois or Iowa, because of the various differences in our production, the soil types, and the climates.

And, therefore, that is where we really see the voluntary approach, where it gives us the opportunity to incorporate new technologies that we are working on.

Mr. HUTCHINSON. With the Chairman's indulgence, let me ask the entire panel one last question.

Would anyone on the panel object to providing a stronger role for SCS in the section 319 nonpoint source program? I think that only EPA is referred to by name in the bill. What would be the—how would the panel feel about that? Would anybody comment on that?

Mr. WENSTRAND. There would be no objection.

Mr. HUTCHINSON. Anybody on the panel?

Ms. MARTIN. We would feel positively about it at the Cotton Council. Right now, farmers report to the ASCS and the Soil Conservation Service on lots of issues. It would be very difficult to add a third agency. If it could all be brought under the Soil Conservation Service, it would be efficient.

Mr. JORLING. I would add, from a State regulator's viewpoint, if integration with the ASCS and SCS is not included, it would not work. I point to New York City's watershed protection efforts in New York. Until the SCS and the apparatus of the Department of Agriculture and the State agriculture department were brought into that process, there was no achievement. When they were brought in, there was achievement on getting BMPs adopted by the agriculture community in that region.

Mr. HUTCHINSON. Thank you.

I thank the panel for your wonderful endurance today. Thank you, Mr. Chairman.

The CHAIR. Thanks. Mr. Gilchrest.

Mr. GILCHREST. Thank you, Mr. Chairman. I am not sure I will have anything to add after this enlightened testimony. I think this particular panel not only enlightened us on their concerns—and that is what we need, to understand specific concerns so that we

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mold and shape this bill; it can always be improved. There is one word that I guess is the key to understanding successful farming and that—well, two words, I guess; that is, flexibility and improvisation.

I am not sure there is any farmer on the face of the earth that can go 10 minutes in a day's work without some type of improvisation to make his farming day successful.

I have one—I also want to make a comment because several people have said here farming is different in North Dakota, Alabama, Mississippi, Maryland, and I think we need to recognize that.

Understanding that if—and it is the case, and I know that best-management practices could mean something to one person and something else to another person, but I do think that Soil Conservation Service has worked enough with farmers in this country so we have some general idea of what best-management practices are in Maryland, in Alabama, or Missouri or Florida.

And I think, and I agree with the fact, that they should be voluntary; this program, for the most part, has been successful up to this point because of the cooperation between Soil Conservation, ASCS, the farmer, local, State agencies, and so on. And I would like to see the voluntary measures continue.

My question is, I guess, we have a goal and I know we don't want—and I never can get this quote straight, "Don't forgo the good for the perfect," I always get that, but I understand what you mean in that. In 15 years, we want to have some strategy for agriculture in the United States so that we have less degradation of the water resources and we have better soil for better productivity. And this is over a 15-year period.

I know there are some incrementals—five-year, five-year, five-year and so on—but several people have said we need more time.

So in the interests of time, if each person could give some sense of how much more time, given the fact that you might agree with we need to reduce nonpoint source pollution, we need to improve water quality, we need to improve groundwater, we need to reduce degradation and so on, how much time do we need to implement some of these programs? We are looking at a period of five years, five years, and five years.

So if you would like, could each of you give us just a quick shot about the length of time that would be necessary to implement these programs?

Mr. WENSTRAND. I think at least the people at this end of table—I think our primary concern was with the five-year interim schedule. Because of the nature of agriculture and the delayed impact and benefit after you implement BMPs, sometimes you don't see those results for several years, even five years or ten years. And so it just—those five-year periods, we are having some problems trying to figure out because those things would—if you are not meeting the goals or the standards, it is going to require additional BMPs, but because of the nature, again, of agriculture, we are just not going to see the positive results within those five-year time periods. The overall 15-year time period seems very, very workable and very reasonable.

Mr. GILCHREST. Would you say that grain farmers could make it in five years, but pork producers need six years, cotton growers can do it in one?

Mr. WENSTRAND. No. What I am saying—take the case of, like, a nitrogen management plan. In some instances, in some areas of the country, some soil types, you put a nitrogen management plan in place and you may see results in three years or five years or ten years, and in some places you are not going to see results for a long, long time or maybe ever.

It just that there are varying conditions throughout the country and throughout farms and so the results of those BMPs, the results of those changes in management measures, seeing those results, you may see them—you will just see them at varying lengths of time periods; and so that is why those five years were at least causing us questions and some problems. The 15 years seems very workable.

Mr. GILCHREST. Okay.

Mr. KING. I think my comments would follow along that same line if we looked at conservation compliance. You know, it took five years to design and five years to implement, and we are beginning to see those results today. I think the one thing that makes nonpoint source somewhat different than point source is that it is primarily a weather-related phenomenon that can be managed, but feasibly, we can't totally eliminate it; and I think we could demonstrate that from the weather we had in the Midwest with the floods last summer.

Speaking for my industry and, I think, all of agriculture, we are going to do these things regardless of the mandates that may come from Congress.

Agriculture is moving forward and if some think that agriculture is not changing, you have a wrong misconception because the changes that are occurring today in agriculture are astounding. And I live in it and I am a part of it.

Mr. COLLIVER. Just briefly, the issue would be being asked to do more at the end of the five-year assessments if some standard had not been met. And the standards are going to be based on soft science; they are not huge databases, there are not a large amount of databases and there is a chance of being wrong.

The issue is, let's take the time to monitor over a longer period of time than the five years and get good data, get good science to base conclusions on, and not be asked to make additional BMP changes at the end of five years.

Ms. MARTIN. The issue of time is complex as is this entire issue of clean water. There are so many different variables—soil, source, types of agriculture involved—to dictate a five-year time frame for a practice that would take, if implemented tomorrow, ten years to show improvement is very difficult for us to see as realistic.

And the various areas across the country have—I think the bill needs to give some flexibility where the time frames could be tailored according to area, according to practice, and specifically according to the funding available from the government to help the farmers implement them. That might have a lot to do with the timing.

Mr. HOEFNER. I think there are two major time line issues for us. One is that the five-year iteration, we think, should be geared to milestones measuring progress toward attainment rather than attainment itself. I think that would make for a sounder provision.

The second one is that plan implementation is three years without reference to plan development, and we would prefer to see that be a period of time for development and a period of time for implementation.

I think those are the two major time line issues.

Mr. JEANES. As I mentioned, Congressman, in my testimony, going through the nutrient reduction strategy with tributaries, their goal is by 2000 to reduce all nutrients by 40 percent. Historically, we have started this base load from 1985. We are essentially half there already with practices, and I would think that the type of agriculture that we are facing in Maryland—six-and-a-half years or 2000 or whatever—is quite reasonable, and I would see no problem in that.

Mr. EIKERMAN. On my farm, if I can't see results in less than the time frame we are talking about, I will do something different. I think it is a delay tactic to put off; and we tend to put things off, and I saw this happen with the yard waste in Missouri. The cities just didn't have their plans in place when it was time to do it; and you give them another year, and they still don't have their plans in place. And it is a continuing thing. It is just human nature to put stuff off as far as you can.

So if you are not seeing results in a shorter time frame, I think you had better be looking at doing something different.

Mr. GROSSI. Just briefly, I think you have got two real problems with the time and implementation issue and one is, there is so much variability among farm enterprises and the practice, the state-of-the-art practices that would be used to correct the given problem, that you have to find a way to build some flexibility and yet some accountabilities into this time structure so that for those operations that can meet a certain deadline, like five years, then there ought to be some way of enforcing that and give some flexibility where we are still learning a lot about BMPs or whatever the proper practice is.

The second part of that issue is—and I will come back to what I said in the statement—is that time is going to mean nothing if the committees and this Congress don't put the resources into getting the job done. You might as well make it 25 years if you don't put the money out there that is going to be required to put practices in place, and give the technical assistance and the education that is necessary out on the farm.

Mr. JORLING. I would only add that the time question really is the wrong question.

The real question is, can you identify areas through the impaired waters report or others that deserve focus and then target that area in an intense way. If you ask a State to develop a nonpoint source control program for its entire State, it will paralyze the bureaucracy. What we need is targeting to the water quality problems, identify that geography and apply problem solving to that area in a focused way. That would be a much more effective way.

For instance, Chesapeake Bay is an impaired water. The traditional Chesapeake Bay States, like Virginia and Maryland, come to New York and Pennsylvania and say, we need help on the nutrient fluxes through the Susquehanna River. They are asking New York to impose BMP practices to the Susquehanna basin in New York.

If you then say, okay, we are going to take the Susquehanna basin on and try to get a real program, producing real results there, then you can establish time lines for that and measure achievement.

But if you just say to the State of New York, put in a BMP program for all the State of the New York, you will basically collapse the bureaucracy into paper shuffling.

You need to focus it, then, to judge whether or not you are making progress with that intensity. You can't do everything at once. That is a different way of applying the principle about not letting the perfect be the enemy of the good.

Mr. GILCHREST. I would assume at this point and maybe—I want to thank Mr. Jeanes for coming today. He is a farmer that lives across the creek from me, although this is the first time or maybe the second time we have met—I guess, at a few Farm Bureau dinners.

In Maryland, there are certain, very specific, identifiable problems with nonpoint source pollution that we have developed some pretty good strategies to handle; and maybe I am assuming that many of the other States have pretty—I don't want to say "easily identifiable" problems that there are plans to correct.

But I would assume Soil Conservation Service has a number of strategies, best-management practice plans, to eliminate some of the problems with cover crops, and so on.

But we have to—I guess, then, what you are saying and what people are saying here is, put in this bill, which I think, to a large degree, it is in this bill to create enough flexibility so that the State can target those areas that are in most need of a plan. And unless we do it on the Federal level—for example, the Chesapeake Bay, we do need some help from New York and Pennsylvania and Virginia and Delaware and so on to make sure that we all have this broader picture of where the problems are arising. Because, after all, this is the Clean Water Act; and a watershed approach to it is absolutely essential, because somebody said, I think up here, everything flows downstream.

I just want to close with a comment that this testimony, at least to me, has been extremely useful and productive to target those areas of the bill that I think we can pay very close attention to.

Mr. JORLING. Let me just add on this problem of focus, if you go to a group of wise men—and farmers are wise—and say, we want you to apply best-management practices, and they say, yes, but there is a mine or construction site right over there and unless you fix that nonpoint source, anything we do is irrelevant.

So you need to focus and get at all of the practices that will produce the effects in the water that have to be addressed. When you can show them that you are addressing all of the sources, then you can get that kind of participation. But if you just go out and say, okay, we are going to do blanket BMPs across the board, you

lose that focus, you lose that integration and you lose the sort of persuasiveness you need.

Mr. GILCHREST. I think there is a good deal of discussion in the bill about point solution, whether it be from a mine or a factory, that is taken into consideration for the State to assess its program. But thank you.

Thank you, Mr. Chairman.

The CHAIR. Thank you very much.

Let me just comment that, you know, all through this thing all of us have been meeting with a lot of different groups; and I guess this nonpoint source pollution has really been the most vexing, because when we discuss this with the livestock groups, they say that the real problem is pesticides that come from the farmers. When we talk to the crop farmers, they tell us, oh, no, no, the real problem is animal waste that gets into our water. And then the Farm Bureau says, there is no problem.

So I guess my question is—a rhetorical question is, who is right? I think that is the thing we are trying to wade through as we go through all of this. So I really appreciate the testimony that all of you have given, but more importantly, at quarter to 7:00 on this Thursday evening, I just want to thank you for your patience. We appreciate very much your adding to our knowledge.

As Wayne said earlier, you have been very, very helpful in terms of where we are going to go. I appreciate it.

Okay. Let's see. Who would like to testify next?

The CHAIR. There being no further business before the committee, we stand adjourned.

[Whereupon, at 6:52 p.m., the subcommittee was adjourned.]

National
Council of
Farmer
Cooperatives

BEFORE THE

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC

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HEARING ON

"REAUTHORIZATION OF THE

FEDERAL WATER POLLUTION CONTROL ACT"

****

TESTIMONY PRESENTED BY

DR. GARY COLLIVER
FARMLAND INDUSTRIES, INC.
KANSAS CITY, MISSOURI

ON BEHALF OF THE
NATIONAL COUNCIL OF FARMER COOPERATIVES

MAY 26, 1994

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Serving America's Family Farmers

Mr. Chairman and members of the Subcommittee and Committee, I am Dr. Gary Colliver, and I am Manager of Agronomy Services with Farmland Industries, Inc. which is headquartered in Kansas City, Missouri. I am pleased to testify today in my capacity as chairman of the National Council of Farmer Cooperatives' Scientific and Technical Advisory Panel, which is the science-based arm of the National Council of Farmer Cooperatives' Environmental Policy Committee.

I am pleased to testify today on behalf of the National Council of Farmer Cooperatives, which represents farmer-owned cooperatives across the United States, and to share our views on reauthorization of the Federal Water Pollution Control Act (Clean Water Act, or CWA).

INTEREST OF THE NATIONAL COUNCIL

The National Council of Farmer Cooperatives (National Council) is a nationwide association of cooperative businesses that are owned and controlled by the farmers they serve. The National Council represents about 90 percent of the nearly 4,300 local farmer cooperatives in the nation, with a combined membership of nearly 2 million farmers.

- Cooperatives are in the important business of manufacturing and supplying farmers with fuel, fertilizers, crop protectants, feed, seed and other important farm inputs. Cooperatives supply about 40 percent of all fuel, fertilizers and other production inputs used by American farmers.

- About one-fourth of the fruits, nuts and vegetables on supermarket shelves, and ultimately on dinner tables, arrives there through the efforts of cooperatives.

- Cooperatives account for over three-fourths of the milk and a large portion of the cotton, wheat, feedgrains, oil seeds and rice produced and marketed in the United States.

Farmers and their cooperatives have a great deal at stake in the water quality policy debate. Farmers are directly impacted by both point source (e.g., livestock and poultry confinement facilities, etc.) and nonpoint source (NPS) pollution policies and requirements. Farmers are also impacted by the significant point source requirements placed on farm input manufacturing and food processing facilities owned and operated by their cooperatives. To the extent that incremental costs related to point source requirements translate into reduced earnings for the cooperative business, farmers are impacted either through reduced patronage dividends or a reduction in the value of their investment in the cooperative.

Cooperatives are uniquely accountable in the agribusiness community, in that farmer-members are not only the customers, but also the owners of these farm supply, processing and marketing cooperatives. Cooperatives are also an active part of the solution in addressing water quality challenges. As farmers become increasingly aware of environmental challenges, they are turning to cooperative management to help provide them with sound information and technical assistance.

Farmland Industries, Inc.:

Farmland Industries, headquartered in Kansas City, is the largest farmer-owned farm supply and marketing cooperative in the United States with membership in the 21 states of the American heartland. Farmland buys, processes and markets a wide variety of products such as wheat, beef and pork which are sold in the U.S. and in 44 countries. Farmland also is a major producer and distributor of petroleum products and all types of fertilizer used by farmers. We are a large distributor of agricultural chemicals as well.

But what I would emphasize for the Subcommittee's perspective is the fact that we are farmer-owned and controlled. As producers, our owners are constantly seeking to reduce input costs. They expect us to help them achieve that objective. Our farmer-owners also expect the Farmland System to help them meet sound environmental objectives. They expect us to bring expert knowledge to the environmental policy making process so that the end results of legislation are, to the maximum extend possible, based on science and sound agronomic practices. They also expect the Farmland System to advise them on state of the art environmental practices today and to help them meet any new practices that will be required of them by future environmental statues such as the Clean Water Act. So we come to the table seeking to serve both these objectives.

AG-21 is an innovative program formally initiated last year by Farmland to use today's best, environmentally driven technologies in developing enhanced partnership arrangements including the regional cooperative, local cooperatives, and ag producers to merge economical and sustainable crop production with safety to the environment.

CWA POLICY RECOMMENDATIONS

The National Council places a high priority on development and implementation of policies that maintain and enhance the quality of surface and ground water resources through effective management of NPS pollution from agricultural activities, where problems are identified, in a manner compatible with food and agricultural policy objectives.

EXHIBIT 1 is a "Statement of Principles" endorsed by the National Council and other agricultural organizations last year, which we believe identifies the NPS challenge confronting agriculture and conveys important concepts which form the basis for effective solutions. The National Council's participation in the ongoing clean water policy debate continues to be guided in large part by these important principles. [1]

[1] The National Council submitted comments for the record as part of the hearings conducted in the spring of 1993 before this Subcommittee, in which we offered a description of the nature of NPS pollution management challenges, the critical role of crop nutrients and protection tools in modern production agriculture, ingredients to successful NPS pollution management, and ongoing efforts by cooperatives to assist farmer-members in implementing BMP's.

While the National Council has direct interest in both point source and nonpoint source (NPS) issues, our comments today are focused on measures directed to agricultural NPS pollution, as proposed in H.R. 3948 and the bipartisan alternative discussion draft (bipartisan alternative).

In exploring alternative policies on NPS pollution as they affect agriculture, it is vitally important to recognize that economic viability is a critical dimension of environmental stewardship. Importantly, it is now generally recognized that the reverse is equally true. Sound environmental stewardship is a critical component of economic viability. This is the primary reason--not mandates or regulations--that BMP's are being implemented across the rural landscape, with or without a Clean Water Act. That's good news for water quality.

"Good Actor" Philosophy:

The Subcommittee faces a critical philosophical choice in its search for policies that will achieve nonpoint source pollution management objectives on the farm. Should the emphasis be on prescriptive, "command-and-control," with imposition of solutions reinforced by penalties? Or should the emphasis be upon voluntary, incentive-based measures?

There may well be a place for both approaches over the long term. However, at this stage in the process, the National Council would strongly urge that the latter approach be used as the framework for policies targeting nonpoint source pollution and agriculture. The emphatic message being sent to cooperatives by our farmer-members is that they are aware of NPS pollution concerns being raised by others and directed toward agriculture, and that they are anxious to be part of the solution.

We respectfully submit that far more environmental gains for funds invested will be achieved by seeking a partnership with the overwhelming majority of farmers who are willing to respond, especially in light of likely budgetary constraints and the uncertain and highly variable nature of NPS management responses. In seeking to impose requirements at this juncture on farmers who may be regarded as "bad actors," one risks alienating the willing population, and diverting disproportionate funds away from education and assistance to enforcement. The superfund debacle, with most funds going to attorneys instead of to cleaning up sites, is an experience not to be repeated in the water quality arena.

Criteria for Success:

From agriculture's perspective, the "bottom line" litmus test of any proposed water quality policy changes is whether they will allow agricultural producers to continue to seek intended environmental benefits, and remain profitable while doing so. In keeping with this fundamental view, we believe there are certain key principles which must be adhered to in any CWA reforms targeting agricultural operations.

At the **federal** level, they include:

- Maintenance of clear and *constant goals* and standards for clean water;
- An increased commitment and delivery of *funds* commensurate with the high priority indicated for nonpoint source runoff;
- Delegation to *states* of responsibility and accountability to bring waters impaired by nonpoint source runoff into attainment;
- Provision for *flexibility* needed for states to work with agricultural producers; and
- A safeguard against *unfunded mandates*.

Furthermore, we respectfully submit that policies at both the **federal and state** levels must be consistent with the following:

- Emphasis on a cooperative *partnership* between federal, state and local governments and land owners--including increased use of *watershed planning* to empower local partnerships.
- Primary reliance on a voluntary, incentive-based program which facilitates *site-specific BMP's* that are *economically achievable* for the individual producer.
- *Targeting* scarce resources and requirements to impaired waters.
- *Adequate time* for producers to get the job done, taking into consideration time lags inherent between implementation in the field and measurable water quality improvements. Producers shouldn't be asked to do more until benefits of initial BMP's are measured.
- A more effective means of providing agricultural producers with *sound information, technical assistance* and *incentives*.
- *Crediting* agricultural producers for BMP's already implemented, including conservation compliance plans.
- Full utilization of *agricultural programs* and services, as well as cooperative agribusiness expertise.

In keeping with the points just described, **EXHIBIT 2** represents our attempt to evaluate the two legislative alternatives before this Committee--H.R. 3948 and the bipartisan discussion draft. We are pleased that both are essentially consistent in:

- Recognizing that *states* must play a *lead role*, and that they are to be held accountable for results.

- Authorizing significant *increases in funding* for Section 319, SRF and other programs.

  - We are concerned that limits placed by H.R. 3948 on cost-share activities may prevent states from providing needed assistance to producers on more capital-intensive improvements, such as for animal waste management.

- Targeting about *15 years* as overall time frame for attaining water quality goals.

- Encouraging *watershed planning*.

With regard to watershed planning, we would sound a cautionary note. The experience to date has been positive. However, it is unclear whether in practice future watershed planning efforts will continue the true partnership process. If watershed planning becomes the way of doing business, who will make final decisions? For example, might the approach be subject to abuse, with local power politics imposing a shift of burdens and costs from the urban majority to rural America? Are economic achievability, site-specific criteria and adequate time ensured in this process? We would urge the Subcommittee to examine these questions carefully in the design of watershed provisions.

H.R. 3948 provides for site-specific plans. The bill also recognizes economic achievability in development of the Environmental Protection Agency's (EPA) guidance document for best management practices and measures.

The National Council's concerns about H.R. 3948 include:

- *Prescriptive* nature of directives to states.

- Mandatory, default requirement that *all nonpoint sources* be 'addressed,' rather than targeting impaired waters, at least in the initial round.

  - While states may establish limited exemptions, including for economic hardship, time frames are inadequate for states to make specific findings required for such determinations.

- As illustrated in **EXHIBIT 3**, the approach taken is essentially a modified amendment of that legislated in the Coastal Zone Act Reauthorization Amendments (CZARA).

  - This is an approach legislated by another Committee for coastal zones, which has yet to be implemented in the field.

- The 'quintile' approach does attempt to break up the compliance burden for states and agricultural producers.

- *Unworkable time frames* (3 years) for practical development and implementation of site-specific BMP's.

- In effect a *5-year goal*, rather than 15-years, for impaired waters. Agricultural producers would be required to implement additional BMP's every 5 years unless water quality standards under Section 303 standards are achieved.

- *Enforceable mechanisms*, including injunctive relief, that can be used to punish producers who fail to meet prescribed deadlines for implementing BMP's, even if reasons are beyond their control.

- In light of enforcement provisions, absence of adjustments to deadlines in event of *funding shortfalls*.

- Failure to credit CCP's and bring USDA, SCS and other resources to bear. Programs credited are only for "pollutants regulated."

- *Statewide antidegradation* measure that could gridlock rural development. The state could not obtain a waiver for any reason unless all NPS activities are regulated. This raises a question in particular about how areas in the fifth quintile would be affected.

- Failure to address serious *property rights* questions.

The bipartisan alternative differs from H.R. 3948 in three critical respects:

- *CWA goals*, the standards for attainment, remain constant.

- Instead of prescriptive interim *time lines*, the alternative would hold states accountable for demonstrating progress toward attainment by establishing a schedule for making 'reasonable progress toward the attainment of standards.' 'Interim goals and milestones' would be based on a combination of (1) measurable improvements in water quality; and (2) documented implementation of voluntary or enforceable NPS control measures.

- Instead of dictating measures and enforcement requirements at the federal level, such *implementation decisions are deferred* to states.

The National Council's concerns on a number of specific issues are significantly diminished in examining the bipartisan alternative because it avoids most of the problems raised by H.R. 3948, leaving states to make decisions closer to the operational level.

Cooperatives' experience in working with states is that they generally endeavor to work in partnership with agricultural producers, targeting impaired waters where nonpoint source runoff is a contributor. The agricultural community will certainly be making every effort to work in partnership with states in developing and implementing their programs, in keeping with the ingredients to success, which we have advocated--such as incentive-based partnerships, site-specificity and economic achievability.

One potential concern that we do wish to raise involves variances in point source permits as an incentive for watershed management. It would appear that under Section 312(b)(1) a state may issue a section 402 permit that does not meet applicable standards in a case where a watershed management plan includes enforceable requirements for NPS pollutant load reductions.

This could engender a situation in which municipal or industrial point sources might be pitted against farmers and other NPS activities in a highly politicized process, with the argument being to enforce load reductions on farmers to avoid treatment costs. Enforcement thus becomes the first option, rather than the last. Furthermore, farmers are being judged thus far on participation in implementation of BMP's, not on measures of load reduction. This is due to the inability to pinpoint measurement of NPS runoff and the inexact science of NPS management. Could farmers implementing BMP's in good faith be penalized if measures of load reduction fell short?

While the National Council is a strong advocate of pollution trading as a process which can yield the greatest environmental benefits for funds expended, we would also emphasize that it must be based upon mutual agreement among the parties affected. For example, a successful program might involve voluntary, contractual agreements where, for example, a point source could avoid much higher costs and achieve the same environmental benefits by financing farmers' implementation of BMP's. On the drinking water side, the City of New York working with farmers in its watershed serves as a positive example. Pollution trading offers much promise. We would urge the Subcommittee to look carefully before it leaps in this promising direction to ensure that pollution trading involves mutual agreement with workable measures for success.

UNIQUE COOPERATIVE ROLE

The National Council would like to emphasize that agricultural cooperatives are uniquely positioned to be part of the solution. In the search for means of providing assistance to agricultural producers, cooperatives offer an invaluable outreach capability and level of credibility in rural America.

Farmer cooperatives are a prominent and integral part of this nation's agricultural landscape and culture. Farmers began banding together through cooperatives early in this century, combining their individual limited resources to address both input and marketing challenges as a means of helping them remain viable as farmers. Although specific needs may have changed greatly over the years, this role remains the basic charge of cooperatives.

Today, four out of five farmers belong to one or more cooperatives. Cooperatives work in partnership with the farmers and ranchers who are their member-owners as they strive to address NPS pollution and other environmental challenges. Cooperatives by definition are self-help organizations.

This Subcommittee is already painfully aware that resources at the federal and state level, as well as in agriculture, are far too scarce to accomplish all that we might like in the water quality arena. Thus, we would urge that the Subcommittee seek means of augmenting and energizing existing resources and outreach systems, such as those in cooperatives. Incremental investments in such systems could yield tremendous environmental benefits more quickly than might otherwise be possible.

SUMMARY & RECOMMENDATIONS

It is the National Council's desire to see pragmatically constructed legislation move forward in which producers on the clean water firing line can be partners, rather than victims. As presently designed, we are deeply concerned that H.R. 3948 sets up a system of requirements, deadlines and enforcement actions that in combination with likely funding shortfalls is preordained to fail, with farmers the victims.

If forced to choose today, the National Council would opt for the bipartisan alternative, as it addresses many of our concerns and offers the flexible approach we believe is necessary for states and agricultural producers to work together in achieving clean water objectives.

However, we must emphasize that it is our sincere hope that such a choice is not necessary. We would instead urge the Chairman and members of the Committee to work to assemble a consensus bill incorporating the most workable provisions from both H.R. 3948 and the bipartisan alternative.

We are cautiously optimistic that this can be accomplished because after reviewing the extensive testimony focusing on these two legislative packages, it seems that a solid foundation exists upon which a consensus building process can proceed expeditiously, within the context of what is needed for workable CWA reforms.

Common **principles of agreement** would appear to include:

- The need to upgrade efforts to manage NPS pollution.
- Increased authorization for Section 319, SRF and related programs.
- Watershed planning to empower local partnerships.
- 15 years to do the job.

- States delegated lead responsibility to implement NPS programs.

Issues to be resolved include:

- Whether to move the CWA goal line.
- Degree of prescriptiveness in federal legislation vs. state flexibility, including--
  - contents of state management plans.
  - targeting of impaired waters.
  - actions required of agricultural sources & others.
  - interim deadlines.
  - enforceable actions affecting producers.
- Whether to adjust enforceable deadlines in event of significant federal funding shortfalls.

As we understand it, states have essentially asked Congress to (1) place CWA mandates and accountability, including interim benchmarks to measure progress, on their shoulders; (2) provide some assistance in a partnership role; and (3) leave the details to states in determining how best to go about doing the job with their constituents.

If Congress were to concur with this conceptual approach, many of the serious specific concerns threatening to gridlock the legislative process would disappear, with a number of issues to be resolved ultimately in the decision-making process at the state level.

We too in agriculture been working to develop our own consensus on solutions to water quality challenges through the ad hoc agricultural Clean Water Working Group. The agricultural organizations represented here today, as well as other members of that coalition, stand ready to offer more specific recommendations. We believe that clean water goals can best be achieved by focusing scarce resources in assisting producers who want to be 'good actors.' We hope to work with the Chairman and members of the Committee toward enactment of a workable CWA reauthorization package that allows American agriculture to be both part of the solution to water quality challenges and economically viable at the end of the process.

Thank you for the opportunity to testify. We would be pleased to respond to any questions.

Exhibit 1

PRINCIPLES STATEMENT OF THE CLEAN WATER ACT WORKING GROUP
CLEAN WATER ACT REAUTHORIZATION

In the reauthorization of the Clean Water Act, Congress should adhere to the following principles:

1. The Clean Water Act (CWA) does not stand alone in protecting America's waters from nonpoint source (NPS) pollution Other ongoing programs at the federal, state and local level must be funded fully, coordinated with and not superseded by the CWA This includes, in particular, the soil conservation and water quality provisions of the 1985 and 1990 farm acts and the state groundwater and surface water protection programs of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

2. Recognizing the 20-year commitment our country has had to eliminating point-source pollution, success in reducing the more complex and diverse NPS pollution will require similar time and resource commitments. However, management of this problem will require a different approach than that of point source pollution elimination because, unlike point source pollution, NPS pollution is primarily a weather-related phenomenon that can be managed, but not feasibly eliminated. NPS pollution is caused by the inadvertent discharge of pollutants from a wide variety of society's most essential activities.

3. The central focus on NPS management solutions should be a reasonable and voluntary approach based on incentives, education and technical assistance as the primary means of managing NPS pollution.

    - NPS pollution management program should (a) emphasize the protection of water resources and state-designated water uses, including state-designated agricultural uses, and (b) recognize the importance and needs of individual agricultural producers and other landowners affected by the CWA.

    - This approach emphasizes the use of locally designed and applied, economically feasible, site-specific best management practices which do not infringe on private property rights. Implementation of these farm management options over a realistic time frame will further the goal of reaching or maintaining designated uses of water bodies.

    - It is inappropriate to link USDA commodity, conservation or disaster program payments to the success or failure of management programs for NPS pollution authorized under the CWA.

4. Current CWA language contains valuable provisions for NPS management embodied in Section 319. Although this NPS section has been historically underfunded and has been hampered by bureaucratic roadblocks, all states now have approved Section 319 assessments and approved management programs. Within the CWA, it is the

preferable vehicle for management of NPS pollution, and changes which occur during CWA reauthorization should reinforce these existing NPS provisions.

- The proper management of NPS pollution lies in state and local efforts. As such, states should continue to identify and resolve their priority NPS water problems through administration of Section 319 funds. With state oversight and approval, local organizations should continue to carry out these NPS programs. Agencies at the federal and state levels should harmonize objectives and coordinate funding for national and regional NPS management programs.

- State and local programs should provide for a mix of research, development, education and technical and financial assistance for both planning and implementing actions aimed at achieving state designated uses.

5. Management efforts funded by Section 319 of the CWA should be directed to priority areas based on scientific assessments that identify water bodies with impaired or threatened uses.

- Priority, as determined by states, should be based on the magnitude of risk to human health, the protection of designated uses, and likelihood of further significant and unreasonable water quality degradation if no action is taken.

- Strategies should be developed on a hydrologic unit, watershed-wide basis using an approach that includes the consideration of both surface and ground water quality.

- Programs should focus on cost-effective, site-specific practices for individual operations with flexibility for implementation.

- In order for Section 319 to work effectively for agriculture, USDA must play a lead role in the delivery of education and technical assistance at the state and local level.

6. An effective and cost-efficient response to water quality problems requires accurate and reliable information on (a) the source, extent, and impact of NPS pollution, as well as (b) the effectiveness, utility and economic feasibility of conservation measures and best management practices.

- Any Clean Water Act reauthorization should include a strong financial commitment to further research, monitoring and assessment projects.

- Monitoring should include before and after sampling as well as frequent sampling during storm events and assessment of natural and historic loadings.

- Scientific research and monitoring projects should follow protocols developed by the US Geological Service and should be conducted on a watershed basis with local and state input.

- Representative pilot projects aimed at achieving market based incentives on a watershed or regional level should be encouraged.

7. The Clean Water Act Reauthorization should not directly or indirectly create a federal water quality law or program which supersedes, abrogates or impairs state water allocation systems and water rights.

8. Section 319 management programs on federal lands should be developed and implemented by the specific agency statutorily charged with management of the lands in question, rather than by regulatory authorities independent of that agency.

9. It is inappropriate for a reauthorization of the Clean Water Act to provide the authority for citizens suits against individuals participating in NPS management programs.

ENDORSING ASSOCIATIONS:

American Farm Bureau Federation

American Feed Industry Association

American Forests & Paper Association

American Nurserymen

American Sheep Industry Association

American Soybean Assocciation

The Fertilizer Institute

National Agricultural Chemicals Association

National Association of Conservation Districts

National Association of State Departments of Agriculture

National Association of Wheat Growers

National Broiler Council

National Cattlemen's Association

National Corn Growers Association

National Cotton Council

National Council of Farmer Cooperatives

National Farmers Union

National Milk Producers Federation

National Pork Producers Council

National Turkey Federation

National Water Resources Association

U.S. Rice Producers

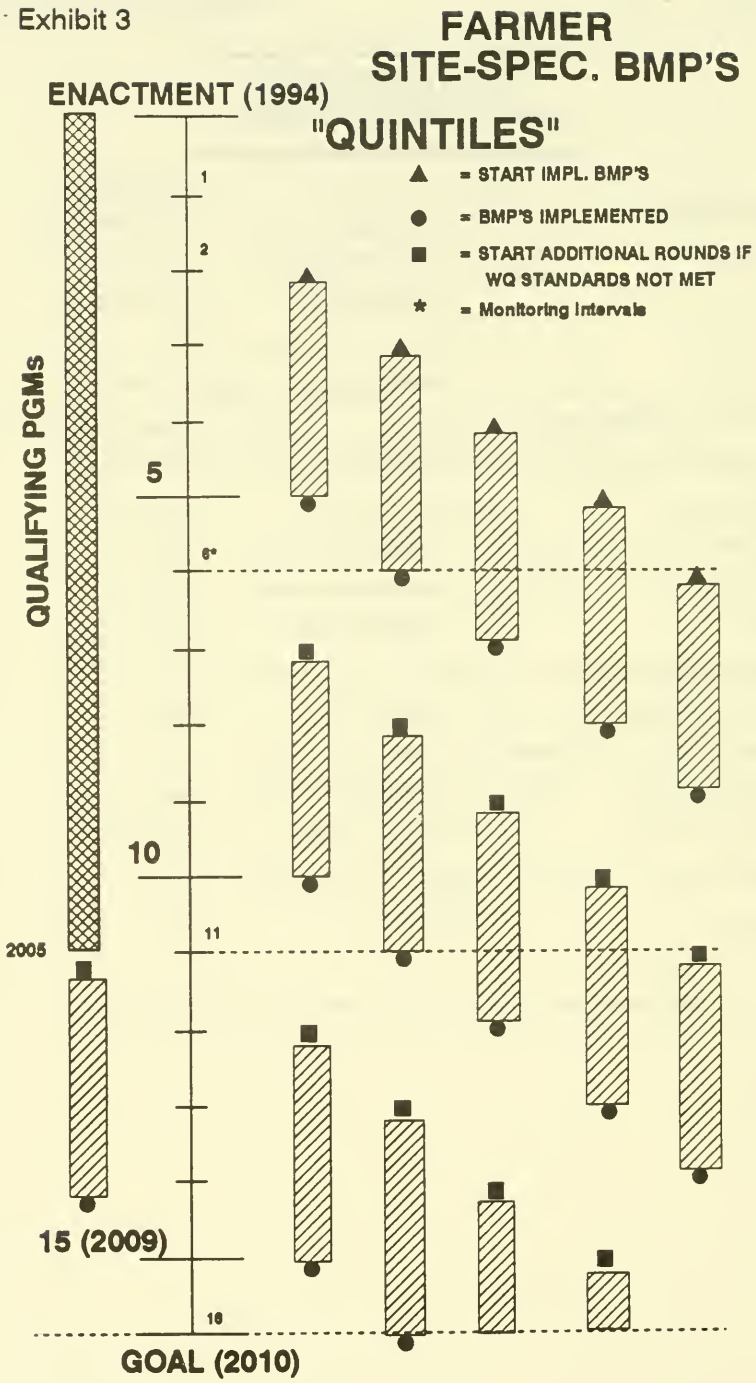
EXHIBIT 2

CWA ALTERNATIVES
MEASURES OF SUCCESS

AG CRITERIA	H.R. 3948	BIPARTISAN ALTERNATIVE
CWA GOAL	MORE STRINGENT	CONSTANT
FUNDING	INCREASED AUTH	INCREASED AUTH
STATES LEAD	YES	YES
FLEXIBILITY	PRESCRIPTIVE	FLEXIBLE
SAFEGUARD, FUNDING SHORTFALL	NO	DEADLINES ADJUSTED
WATERSHED PARTNERSHIPS	ENCOURAGED	ENCOURAGED
SITE-SPECIFIC	YES	SILENT [1]
ECONOMIC ACHIEVABILITY	YES/LIMITED	SILENT
TARGETING	ALL NPS SOURCES	SILENT
TIME	INADEQUATE	ACCEPTABLE
ON-FARM ASSISTANCE	YES	SILENT
CREDIT EXISTING BMP'S	PARTIAL	SILENT
ACCESS USDA/PRIVATE EXPERTISE	SILENT	SILENT
ANTIDEGRADATION	STATEWIDE	ONRW'S
WETLANDS REFORM	PARTIAL	HAYES, et al
PROPERTY RIGHTS	NO	YES
RISK-BENEFIT	NO	YES

[1] "Silent" indicates no specifics offered, with decisions on implementation specifics left to individual states.

Exhibit 3


FARMER
SITE-SPEC. BMP'S
"QUINTILES"
ENACTMENT (1994)
= START IMPL. BMP'S
= BMP'S IMPLEMENTED
= START ADDITIONAL ROUNDS IF WQ STANDARDS NOT MET
= Monitoring Intervals
QUALIFYING PGMs
1
2
5
6*
10
11
2005
15 (2009)
16
GOAL (2010)

NEWS RELEASE

FOR IMMEDIATE RELEASE
May 26, 1994
Contact: Lisa Keller
Director of Communications
202-626-8700

Cooperative Scientist Advocates Partnership Approach to Clean Water Act Programs Affecting Agriculture

Washington, DC — A leading cooperative agronomist told a House subcommittee today that water quality programs to manage nonpoint source runoff from America's farms can work only if they are flexible and they involve a partnership between government and agriculture.

Dr. Gary Colliver, manager of Agronomy Services with Farmland Industries in Kansas City, Missouri, made the recommendation as chairman of the National Council of Farmer Cooperatives'(NCFC) Scientific and Technical Advisory Panel, the science-based arm of NCFC's Environmental Policy Committee. Farmland Industries is the largest farmer-owned farm supply and marketing cooperative in the United States, with membership in 21 Midwestern states.

In testimony during hearings on Clean Water Act reauthorization before the House Public Works and Transportation Subcommittee on Water Resources and Environment, Colliver said, "Our goal is to ensure that farmers are partners in the search for water quality solutions, and not victims of an enforcement-oriented program that won't work. Farmers are willing to be part of the solution, but they want to remain economically viable while doing so."

The cooperative leader expressed concerns about prescriptive provisions and unworkable deadlines contained in H.R. 3948, the "Water Quality Act of 1994," and urged the Subcommittee to move toward consensus by incorporating more flexible provisions offered in a bipartisan alternative draft as a means of addressing agriculture's concerns.

Based in large part on concepts advanced by state and local government organizations, the bipartisan alternative places deadlines for results on states but is more flexible and less prescriptive than H.R. 3948 in telling states how they must do their job. Importantly, the

-more-

bipartisan alternative would not force states to impose mandatory, enforcement-oriented requirements on farmers for nonpoint source (NPS) programs. Most states are first expected to rely on a voluntary, incentive-based approach in working with farmers on NPS pollution problems before considering enforcement alternatives.

The bipartisan alternative was sent to Committee Chairman Norm Mineta (D-CA) by 14 committee members including James Hayes (D-LA), Bud Shuster (R-PA), Bill Emerson (R-MO), Pete Geren (D-TX), Bill Clinger (R-PA), Nathan Deal (D-GA), Tom Petri (R-WI), Mike Parker (D-MS), Greg Laughlin (D-TX), Glenn Poshard (D-IL), John Duncan (R-TN), William Zeliff (R-NH), James Traficant (D-OH) and John Mica (R-FL).

-30-

The National Council of Farmer Cooperatives represents nearly 100 major farmer marketing and supply cooperatives, the banks of the Farm Credit System, and 32 state councils of cooperatives. Its members, in turn, represent nearly 4,500 local cooperatives with a combined membership of nearly two million individual farmers.

MEDIA NOTE: NCFC President Wayne Boutwell is available for interviews. To set up an interview time, please call Lisa Keller, NCFC's director of communications, at 202-626-8700.

-END-

Testimony of Leland Eikerman

Good morning and thank you Mr. Chairman and members of the Committee. My name is Leland Eikerman. I am owner and operator of Eikerman Natural Foods Farm in Bourbon, Missouri. My farm is a highly diversified food producing operation with most of our production being sold directly to consumers within a sixty mile radius of our farm.

I appreciate the opportunity to be here today to present my concerns at a very busy time on our farm, not as a paid lobbyist, but because I felt compelled to share some very important thoughts and ideas with you regarding the Clean Water Act.

Last evening I heard EPA administrator Carol Browner on the radio saying, "no wonder people are getting sick from drinking water with the amount of contamination in our rivers and lakes where the bulk of our drinking water originates." Today I'll focus on two important parts of the Clean Water Act — wetlands and polluted runoff — two parts that you must not weaken, or Ms. Browner's statement will be true for our children and future descendants. Just like the need to have abundant food and a fertile soil for our very existence, we must also have clean water.

Today we not only have acid rain, but attrazne rain and many other contaminants picked up on the clay particles with wind and water erosion. My farm environment can be influenced by chemical applications hundreds of miles away as well as by what I specifically do!

The area of the world once known as the Fertile Crescent, that includes parts of Iran and Iraq, had a stable and productive agriculture. This area has become a virtual graveyard. This was the result of erosion and not taking proper care of the soil and its organic content.

While we do not want our "Fertile Crescent" — the Midwest Farm Belt — to become a graveyard, last summer we watched Mississippi floods wipe out millions of acres of crops and thousands of farms in the Midwest. Part of

the reason for this disaster was agricultural practices and wetlands destruction that promoted flooding and high water.

This committee should implement clean Water policies that will get water to walk off the land instead of runoff the land.

Today, soil organic matter still remains as the undisputed key to soil productivity. Of all the wealth in this world, jewels, precious metals and all that man considers valuable, none is so priceless and so vitally important as the organic matter content of our soil. The entire farming operation is generally conducted as a soil mining operation with little attention paid to maintaining a proper organic matter supply in the soil. An Ohio University study increasad yields seven fold just five years after a piece of farmland was converted to raised organic beds. Five hundred (500) pounds of tomatoes were grown on 100 square feet of raised bed.

We have a CRISIS OF GREED. About ten percent (10%) of the value of the world commerce is in chemicals along with a export frenzy to recover world markets at any cost. Only a few wealthy people, coporate CEO's, profit at the expense of the earth and the masses of people.

There are some solutions to the crisis we are experiencing although many learned people say there isn't any crisis.

Perserving wetlands, controlling polluted runoff and soil helps the farmer. These practices increase the organic and humus content of the soil. The soil's water capacity increases 500%. Technically speaking, a five percent (5%) organic matter (OM) soil is 197,000 gallons per acre as compared to 37,000 gallons of a one and a half percent to two percent (1 1/2% to 2%) OM soil. The 5% OM soil will absorb a six inch (6") rainfall in a twenty-four (24) hour period as compared to 1/2"-1" by the 1 1/2"-2" OM soil.

If the water is held in the soil rather than running off, the soil particles also stay in place and protect streams rather than eroding and pouring into our waterways. The elasticity and workable of the higher OM soil is much better. The earthworm population returns and starts working the OM into the soil releasing phosphorus and potassium, making all elements more available as well as storing nitrogen in their bodies for later release. The microbe population increases, which has the ability to detoxify and recycle wastes in the soil. Plants are then fed by the soil rather than chemicals from a bag or bottle. The OM and humus have a glue like substance which holds the soil particles together decreasing erosion and improving soill structure.

and more dense populations recycle all wastes with the land staying highly productive. Many acres of land in this country after being farmed only 150 years are entirely useless or almost so. We have only looked at production rather than nutritional value for animals, people or the health of the soil

Restoring the health of the soil will greatly improve our water quality. As well as restoring the health of the soil by raising OM and humus, we need to look at some other changes in agriculture.

1) Different cropping systems to reduce runoff and pesticide use, not growing crops in unsuitable environments.

2) Restoring shelter belts, rotational planting, green manure crops, grazing livestock closer to food sources so manure can be safely recycled. Cattle, hogs and chickens are basically foragers and are healthier when not penned and fed. This adds fats to our diet that we really don't need. They are an important part of a sustainable agriculture when used as a means of storing low grade forages and grains for future use by humans and as a start for the composting process.

3) Replacing cultivated crops with forages on erodible soils and more regional food systems.

This is not just something to be talked about but an important process that must be started immediately. You can help by requiring mandatory site plans, cost sharing. We must have some visionary thinking, attitude changes and a new definition of what progress really is, not just for the good of some ones bottom line next week. We are in a rut with our thinking and attitudes. A rut is merely an open ended grave from which we must climb! Our present agriculture food system is a continous bleeding process which will eventually run out of blood (non-renewable natural resources like clean water, and healthy soil) unless we change directionn. We have the opportunity to do that with the Clean Water Act.

We have built up a great biological debt but nature is very patient and will eventuallyy settle the debt but will Homo-Sapiens be here to witness this event?

APA

Statement by

DR. MARGOT W. GARCIA, AICP

on behalf of the

AMERICAN PLANNING ASSOCIATION

before a hearing of the

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

U.S. HOUSE OF REPRESENTATIVES

on

THE CLEAN WATER ACT REAUTHORIZATION: A PLANNING PERSPECTIVE

MAY 26, 1994

Chairman Mineta and members of the House Committee on Public Works and Transportation: I am Dr. Margot W. Garcia, AICP, an Associate Professor in the Department of Urban Studies and Planning at Virginia Commonwealth University in Richmond, Virginia. I am an environmental planner with a doctorate in Watershed Management from the University of Arizona.

Prior to election to the City Council of Tucson, Arizona, I served on the Planning and Zoning Commission, the Citizen's Advisory Planning Committee and the Tucson Board of Adjustment. As a member of the American Planning Association, I have been Chair of the Environment, Natural Resources and Energy Division. In Virginia I serve on the Waste Facility Management Operators Board which certifies landfill operators, and on the Citizen's Advisory Board to Virginia's Department of Environmental Quality.

I am pleased to testify on behalf of the American Planning Association and I respectfully request that the complete text of my statement be included in the official hearing record.

The American Planning Association (APA) is a national organization of over 28,000 members, including public and private planners, and elected and appointed officials at all levels of government as well as educators, students and interested citizens. Our members belong to 45 chapters covering every state and Congressional district.

APA was formed in 1978 when the American Institute of Planners, established in 1917, and the American Society of Planning Officials, founded in 1934, were consolidated. The Association's primary objective is to advance the art and science of planning for the improved development of the nation and its communities, states, and regions as well as to preserve its valuable natural resources. Within the APA is the American Institute of Certified Planners (AICP) which focuses on professional development and of which I am a member and have been elected to serve on its governing body to represent the south central region. Members of AICP are distinguished by having met experience requirements and having passed an examination on planning principles and practices.

Our testimony is based on APA's membership adopted policy on Environmental Quality and on Policy Implementation Principles (PIPs) on (1) Comprehensive Surface Water Management, (2) Groundwater Quality and Quantity Protection, and (3) Wetlands. APA's Policy on Environmental Quality seeks to achieve:

- the conservation of non-renewable resources -- such as minerals, petroleum and agricultural lands -- and the protection of renewable natural and man-made resources, such as surface and groundwater, air, topsoil, forests, and fisheries, from further degradation or destruction.

- special protection for sensitive areas -- wetlands and flood plains; areas supporting unique or endangered plant and animal species; sites of special scenic, historical, and archaeological significance; and lands or waters -- which would lose their value or be permanently impaired by human changes.

- the integration of environmental protection and environmental policies and programs into comprehensive and functional planning activities and their implementation.

We have applied these broad purposes to improving the Clean Water Act.

BASIC PREMISES

There are four premises that I would like to outline before providing specific comments on H.R. 3948. These are:

1. Water quality is fundamentally related to land use. And, land use is what physical and environmental planning is concerned with.

The quality of our nation's water is a historical reflection of land uses. The way we organize our communities -- the way we work, live, play, produce and consume -- influences and is influenced by land use. Our communities' land uses impact water quality. Water pollution comes from both point sources and nonpoint sources. Planning -- the effort to apply foresight to the way land is used -- influences water quality. Land use planning is undertaken by government, by business, and by individuals. As professional planners, we strive to integrate all the systems, -- economic, social, legal, physical -- as well as political factors into our plans to develop land uses that minimize water pollution.

2. Water quality and water quantity are directly interrelated. Water quality, therefore, is irrevocably tied to the amount of clean water available for drinking, industrial and agricultural uses.

Polluted water is water that is not available for drinking and often not usable for any number of industrial, agricultural, or habitat uses. Since surface and groundwater are linked, the quality of the groundwater can have an impact on surface water as springs feed the streams and rivers, especially in times of drought. The quality of the surface waters can impact the quality of groundwater as the river bed is often a channel for groundwater recharge. Groundwater pollution can be the result of overlying land uses, for example, use of fertilizers and chemicals in agricultural areas or poor management of manure.

3. We need to approach the problem of clean water from a systems point of view, meaning we need to deal with the complete hydrologic system of precipitation, surface and ground water, wetlands, lakes, estuaries and watersheds.

Water runs downhill and that simple fact leads us to understand the importance of watersheds, that is, the geographical area which drains to a single point. Most everything that happens within that watershed affects the water quality of the streams and rivers. The condition of the water, as it leaves one watershed, influences the water quality of the streams and rivers it joins. Watersheds are nested, with the smaller neighborhood streams being part of a small watershed; however, the stream and its watershed are also part of a larger river basin or watershed.

The impacts of land use are seen in water bodies as discharges from the ends of pipes permitted by a National Pollution Discharge Elimination System (NPDES). Impacts of land use can also show up in a stream or pond as the result of pollution picked up by water running over the surface of the land, picking up the fertilizers from the lawn, washing off the road bits of asbestos fibers from car brakes, or soil particles from ground disturbed by construction or forestry practices. Gone are most of the wetlands which, in the past, would have provided a place for the contaminants to settle out before water recharged groundwater and/or moved into the streams, onto the lakes, and into the estuaries and ocean.

4. Land use has been regulated at the local level through comprehensive plans, zoning and subdivision ordinances and a process for citizen participation that allows community discussion.

City and rural planning has been in practice for about 60 years and citizens are accustomed to dealing with community planning departments, citizen planning commissions and boards for hearing requests for variances. Most states require some sort of comprehensive planning for communities and some states have state-wide planning as an effort to integrate the needs of the local economy and citizen life-styles into a finite amount of space. The public is involved through hearing processes and local elections (more than one local election has been decided based on planning issues) in setting development goals and establishing the quality of life they wish to find in their communities.

RECOMMENDATIONS

Based on these premises, we would like to offer the following recommendations:

1. Watershed based planning and management for water quality must be mandatory and incorporate extensive citizen participation.

The reauthorization of the Clean Water Act should include mandatory watershed based planning and management which includes integrating point and

nonpoint sources of water pollution. The planning process must have extensive citizen participation with decision making at the local level and use existing institutions, such as the planning commission and local governing boards.

Using the watershed approach is an old idea whose value is being seen again. The Water Resources Planning Act of 1965 -- by creating a cooperative framework between the federal government, states, local governments and private enterprise -- established a Federal-State framework to manage and protect river basins. We need to build on that experience by requiring planning and incorporating citizen input.

A number of years ago, the Section 208 planning process was a first effort at understanding the extent of nonpoint pollution. However, the resulting analysis was never incorporated into water quality decisions.

The current experience of the state of North Carolina, in taking a watershed or basinwide approach to setting discharge limits for the NPDES permits on point sources, is very instructive. The North Carolina Division of Environmental Management Water Quality has divided the state into 17 major river basins. Activities in the Water Quality Program -- including permitting, monitoring, modeling, nonpoint source assessments and planning -- are coordinated and integrated by basin. Water quality and aquatic resources are assessed simultaneously throughout an entire river basin leading to the development of basinwide water quality management plans and strategies.

North Carolina found three major benefits from watershed planning and management:

A. improved efficiency as a result of a more focused effort of handling all the NPDES permits in one basin at a time.

B. increased effectiveness since the linkages between aquatic and terrestrial systems are addressed, and all inputs into the aquatic system and potential interactive effects are considered; and

C. consistency and equitability as a result of:

1) clearly defining long-term goals and approaches, and
2) promoting a more equitable distribution of the assimilative capacity of a watershed. Assimilative capacity is defined as the amount of pollutant(s) that a water body can receive (assimilate) from both point and nonpoint sources and still maintain the water standards established to protect the use of those waters. North Carolina officials have explicitly addressed the trade-offs among point and nonpoint pollutant sources with allowances for future growth.

States should be allowed to designate watersheds within their state. However, there is the problem that many rivers run through several states. These interstate watersheds need to have the cooperation of all the states that are involved. We have some good examples, such as the Chesapeake Bay watershed. Here the states of Pennsylvania, Maryland, Virginia, District of Columbia and the Environmental Protection Agency (EPA) are working together to restore the productivity of the Bay. Their approach has included federal, state and local governments in the effort. In Virginia, the Chesapeake Bay Preservation Act is implemented by local governments' incorporation of some basic strategies for pollution prevention into their zoning and subdivision ordinances. This means that local people and their elected officials had to learn about the connection between land uses and water quality and add it to their decision making criteria.

2. H.R. 3948 should support the concept of calculating the assimilative capacity of a watershed to maintain water quality standards.

A lot of progress has been made in cleaning up point source discharges through the NPDES permit system. However, all the waters of the U.S. are still not fishable and swimmable. To get to the next level of clean-up, the emphasis needs to be on nonpoint sources. Because nonpoint sources are harder to regulate, it has been easier in the past to require point sources to continually reach higher levels of clean-up and to ignore the nonpoint source. If the goal is clean water, then we should not care where the clean-up happens, only that it occurs. Therefore, a watershed approach provides an opportunity for tradeoffs between point sources and nonpoint sources. However, point source dischargers must be required to keep the existing level of pollution control found in their current NPDES permits. They can then work with nonpoint sources to develop the additional clean-up needed to bring a river to required water quality standards. This is a new concept that has not been fully worked out, but does seem worthy of further exploration.

3. Within the watershed approach to planning and management of water quality, there must be requirements for water quality goals with target dates so that progress can be measured.

Watershed based management allows for better accountability in protecting water resources. The watershed provides a logical basis for integrated, coordinated monitoring. Data can then be the tool to manage for environmental results by establishing priorities and goals within the watershed, evaluating the success of protection efforts, and focusing limited resources on the most effective approaches and actions.

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4. Categories of landowners and classes of activities by state nonpoint source management plans should not be excluded.

H.R. 3948 includes a provision in the nonpoint section which is very troubling. It allows the state nonpoint source management program to contain "a description of any category of land owners, class of activities, or areas which will be exempt from such measures and practices." While it is understandable that some states might want to exempt certain watersheds from planning where the water is pristine, this statement seems far too open to various types of mischief, such as exempting timber companies, building contractors or agri-business. Many states have soil erosion and sediment control regulations which should be built into a nonpoint source management plan; groups should not be allowed to be excluded.

5. EPA should be assigned as lead agency in developing and overseeing watershed planning and management.

While the Soil Conversation Service has historically been involved in working with landowners in a watershed context, they do not have experience in dealing with a regulatory situation. In addition, water quality is the job of EPA and, therefore, watershed planning and management for water quality should be under the jurisdiction of EPA.

CONCLUSION

The quality of our nation's water is of great importance to us all. No one wants to drink or swim in polluted water. Water quality is fundamentally linked to land use. And so it makes good sense to use a land-based region -- the watershed -- as the basis for planning and management of water quality.

Let me conclude by thanking the Chairman for providing me and the American Planning Association with this opportunity to testify. I would be happy to answer any questions.

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American Planning Association

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- Standard Land Use Classification Manual sponsored by Federal Highway Administration
- Subdivision Design in Flood Hazard Areas sponsored by FEMA
- A Guide to Wellhead Protection
- Changing Franchise Design sponsored by the Townscape Institute

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Statement of Jane F. Garvey, Deputy Federal Highway Administrator

Federal Highway Administration

Before the House Public Works and Transportation Committee

H.R. 3948, "Water Quality Act of 1994"

Thursday, May 26, 1994

It is indeed a pleasure to be here today on such a distinguished panel to discuss an issue of vital importance to the transportation community and the Nation as a whole. I am speaking, of course, of the efforts of Congress to re-authorize the Clean Water Act. I am accompanied today by Anthony R. Kane, Associate Administrator for Program Development.

Protecting our Nation's waters from the impact of transportation programs is an integral component of Secretary Peña's commitment to environmental stewardship as described in the Department of Transportation's National Strategic Plan. Goal Number Five of the Plan states that it is a Departmental policy to "vigorously...lead in the development of new programs to further enhance water quality."

My comments today demonstrate our full commitment to President Clinton's Clean Water Initiative, issued in February of this year. Federal Highway Administration (FHWA) staff actively participated in the development of the Administration approach to the Clean Water Act re-authorization, beginning last year about this time. After a period of extensive interagency coordination, the President's plan was delivered as a model for protecting and improving the Nation's water resources now and into the next century. The Department of Transportation and

the FHWA wholeheartedly endorse the primary emphasis of the plan to reduce pollution and protect priority waters through performance- and incentive-based State programs. The State programs will emphasize targeted and streamlined planning, management, and enforcement mechanisms. The Clinton Clean Water Initiative provides recommendations to slash unfunded mandates, increase flexibility, and cut red tape for States, municipalities, and the private sector so resources are targeted to the most serious water quality problems. We are pleased to note that the bill before the committee, H.R. 3948, includes many of the Administration's goals for a strengthened Clean Water Act.

This new State-based approach for protecting and enhancing our Nation's water resources strikes a familiar chord within the transportation community. The Federal-aid highway program, under this type of approach, specifies State and local management of transportation priorities. Needless to say, the program has achieved tremendous results -- results measured in mobility and access tailored, or if you will, **targeted**, to local and regional needs. At the same time, national consistency and system continuity is not sacrificed. Witness the Interstate System and the proposed National Highway System (NHS). Although designed to be implemented at the State and local levels, these systems achieve a uniform national result because of the broad, national direction of transportation legislation.

President Clinton's Clean Water Initiative stresses these same principles. It calls for providing the States with both the tools and the incentives to achieve local and regional water quality objectives. Individual State programs address localized concerns and needs, yet when taken

together form national solutions to our water quality problems. A key to the success of the Administration's approach is area-wide water quality planning and management. For water resource planning the most logical management unit has proven to be the watershed. All human activities occurring within the confines of a watershed have the potential to affect water quality in that geographical area. Therefore, management and control programs targeted at the watershed level are immediately relevant to any existing water quality problems and will be effective in controlling new potential sources of pollution. We are encouraged that the Committee in H.R. 3948 has embraced the watershed concept in various programs of the proposed legislation, including the measures to manage stormwater and control non-point pollution.

The FHWA has long been an advocate of area-wide measures to solve access and mobility problems. We have a rich history of coordinating regional transportation planning and management programs. We firmly believe the same approach can be used to address many of our Nation's environmental issues, including water quality. Piecemeal strategies and single-purpose mandates for resource management fail to recognize the ecosystem factors at work in natural systems, such as watersheds. It is clear that if we are to remain competitive in the global economy, transportation decisions in this country must be constituent-generated and coordinated, multi-interest, and regionally-based. So too, must our strategies for clean water.

Several provisions of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), mandating environmental protection and enhancement measures, are characterized by nationally

directed but locally implemented programs which relate directly to the Clean Water Act:

- ISTEA makes contributions to Statewide wetland plans and wetland banking efforts eligible for funding under both the NHS and the Surface Transportation Program (STP). More than two dozen State transportation departments have used Federal-aid highway funds to establish wetland banks.

- The mitigation of water quality impacts due to stormwater runoff from highways is a designated Environmental Enhancement category eligible for set aside funding under the STP. Several State transportation departments have implemented water quality improvement projects utilizing this source of funding.

- Section 1057 of the ISTEA directs the Department to develop broad erosion control guidelines to assist the State transportation agencies in developing and implementing their own practices and procedures to control the impacts of erosion at highway construction sites. Final publication of this guidance is expected very soon.

- ISTEA directed the FHWA and the Federal Transit Administration to develop Statewide and metropolitan transportation planning procedures. Rules establishing these procedures were published in October of last year. Our procedures stress the need to coordinate transportation plans with area-wide environmental planning and management programs, including plans developed under the Clean Water Act.

It is clear that watershed programs, as envisioned by H.R. 3948 and the Administration's Initiative, will involve interaction with the development of transportation plans.

Our reaction to the potential for the integration of watershed management and area-wide transportation planning is nothing but positive. In fact, we can't imagine one operating at maximum effectiveness without input from the other. The information generated, for example, during the transportation planning process will prove invaluable to watershed planners who must consider land-use changes and development trends when formulating their programs. Equally, transportation planners in the States and metropolitan organizations must be aware of the water quality priorities and control mechanisms that may limit certain design elements, or in some cases, determine the viability of proposed transportation improvements.

The effectiveness of erosion and sediment control management measures and practices is dependent on a variety of environmental, geographic and site specific variations. For non-point sources, the President's Clean Water Initiative calls for flexible State programs targeted to water quality problems and in conformance with broad national guidance establishing the best available management measures. This guidance should consider cost and pollution reductions achieved and should be broad and flexible enough to allow for local tailoring. A watershed management approach that identifies critical water quality areas and provides for the development of an integrated program of project planning and implementation, ultimately resulting in water quality improvements, would be the most cost-effective strategy.

The FHWA has long been associated with efforts to bring about State-directed watershed planning and thus we pledge our support to the Committee's efforts to incorporate such concepts into the Clean Water Act. We have participated in several interagency efforts to develop a national perspective on watershed management. These efforts culminated last year in the highly successful **Watershed '93** conference in Washington. The conference focused national attention on the need for watershed protection and management. We remain committed to moving forward in efforts to make watershed-based programs a reality in the Clean Water Act re-authorization.

We suggest that for watershed-based programs to be effective :

1.) We must provide the States a variety of incentives to embark upon watershed-based programs. Incentives should include flexibility to define targeted programs, reduction or streamlining of direct Federal mandates, and more flexible funding.

2.) State watershed programs should be developed under broad Federal guidance that not only allows, but encourages the States to develop equally effective site-specific management controls for non-point sources.

3.) States must have the flexibility to identify selected pollutant sources and implement targeted control remedies to meet environmental objectives. Inherent in this flexibility is the latitude to use scientifically valid information to establish

priorities of sources requiring control. Furthermore, such information can also be the basis of selected best management practices for pollution abatement.

To illustrate how research results and information based on past practices can be used to impart flexibility into State-operated programs let me offer the following example:

> Extensive research conducted by the FHWA and other entities indicates that the measured levels of certain pollutants of stormwater runoff from roadway surfaces are positively correlated to the average daily traffic carried by the facility being sampled. By relating pollutant loadings of the runoff to water quality standards, it may be possible to estimate the impacts of runoff on receiving water quality. It follows then, that these estimates can also be related to the traffic levels. Therefore, under a flexible approach we envision for the Clean Water Act, the States should be allowed to correlate information such as average daily traffic with available water quality monitoring information when establishing targeted pollution control strategies and programs and specific management measures. That is, facilities carrying higher levels of traffic could be targeted for controls and management measures. The specific level of traffic that would indicate the potential for water quality control measures should be determined on a State-by-State basis.

Based on this example and my previous discussion, I hope that I have been clear about our support of flexibility and targeting. I am pleased to note that H.R. 3948 adopts a similar

approach. Administrator Browner in her testimony on May 24 noted several areas for improvement, to which I would add FHWA's support, for a more targeted approach involving flexibility and risk-based concepts to address water quality problems.

There will always be costs associated with new and revised programs. Much has been said about added costs of measures to reduce water quality impacts on new and existing highway facilities which the new Act would impose upon transportation development agencies. Actual cost ramifications of H.R. 3948 are difficult to determine at this point because under both proposals, latitude would be available to the States in establishing their control programs. If the flexibility inherent in the President's Initiative is included in the re-authorization, we would expect that transportation programs would experience some cost savings due to the change in the current law which would, in time, bring all Phase II stormwater sources under the National Pollutant Discharge Elimination System permitting regulations. However, we would also expect localized cost increases that are associated with projects having the clear potential to produce significant water quality impacts and with projects located in sensitive water resource areas. Again, we emphasize that both we and EPA are sensitive to cost concerns, and we want to avoid sweeping Federal requirements that are costly and inflexible.

We are committed to working cooperatively with States, EPA, and other Federal agencies to develop reasonable cost projections for management practices to reduce non-point source pollution and control stormwater runoff subject to NPDES permits. The Administration currently projects that for all forms of pollution, the President's Clean Water Initiative would

save $29 billion over a strict interpretation of the current law. About $16 billion of these savings are due to the replacement of currently applicable Phase II stormwater requirements with improved and targeted non-point source programs.

With respect to wetlands, re-authorization of the Clean Water Act presents a real opportunity to move wetlands protection forward through the enhancement of a balanced, common sense, workable set of improvements. I am pleased that H.R. 3948 contains many of the provisions in the Administration's Wetlands Plan. This plan stresses improved administrative flexibility to resolve § 404 permit issues. The FHWA supports the Administration's decision to defer consideration of changes in the criteria of wetlands delineation pending completion and evaluation of the National Academy of Sciences (NAS) study. A member of FHWA's staff is participating in the NAS effort.

The Administration's plan also endorses the use of mitigation banks under appropriate circumstances. The FHWA and many State departments of transportation have had a significant amount of experience with the use of mitigation banks for unavoidable, often small impacts to wetlands along roads and highways. Banking can help address small, cumulative losses in an effective and efficient manner. The FHWA actively pursues the Administration's emphasis and focus on improving interagency coordination and streamlining. Our agency has worked many years with other Federal agencies to streamline the § 404 permit process as we evaluate proposed Federal-aid highway alignments.

In closing, the FHWA is mindful of two important national goals; to improve the quality of our environment and to foster a productive economy. Highway programs have an important responsibility to support both of those goals and we endorse legislation that establishes a targeted, flexible, and State-based approach to improving water quality. Once legislation is enacted and signed by the President, we pledge to work closely with EPA and the States to carry out such an approach in ways that are cost-effective and manageable. Yes, there will be some additional financial burden, but we believe the benefits of improved water quality are important enough to justify those costs.

I would be pleased to answer any questions you may have.

American Farmland Trust

Testimony of Ralph Grossi, President
Before the House of Representatives
Committee on Public Works and Transportation
May 26, 1994

Mr. Chairman and Members of the Committee, my name is Ralph Grossi. I am President of the American Farmland Trust and also a California farmer whose family has been in the dairy, cattle and grain business over 100 years. I appreciate the opportunity to appear before you today to discuss H.R. 3948, the Water Quality Act of 1994.

The American Farmland Trust and many farmers we work with at the grass roots level, have come to the conclusion that support of the nonpoint source provisions in H.R. 3948 is a reasonable way to make agriculture a full partner helping meet the challenge of cleaning up America's waters. We realize the agriculture industry can no longer avoid taking responsibility for reducing a significant portion of nonpoint source pollution. Many farm based pollutants arise from what we used to think of as "normal" farming practices such as plowing fields, spreading fertilizer, or raising cattle. But today, normal practices are not good enough, today we farmers must operate using "best management practices" that provide us the opportunity to farm profitably while being good stewards of the land. We know that the American public expects more of farmers today than the production of a safe, abundant food supply which we do very well. They want us to "produce conservation" as well.

Most farmers in America have already begun to incorporate practices to minimize environmental impacts into their day to day farm operations. Over the past two decades, many farmers adopted BMP's as a result of the assistance provided by the Soil Conservation Service and the Cooperative Extension Service. Many more farmers changed their farming practices to meet the mandate of the 1985 Food Security Act requiring farmers to obtain and implement a soil conservation plan if they wanted to participate in farm programs. Some farmers will tell you this is enough and all that is needed is time to see just how effective these measures will be. The Soil Conservation Service has reported that more than one billion tons of topsoil per year is staying where it belongs--on the land! But more can be done with additional incentives and the right measure of regulation.

The American Farmland Trust is actively involved in monitoring the implementation of the 1985 Food Security Act and we agree much has been accomplished in reducing soil loss, but not in all regions of the nation. And other areas of concern, such as nutrients or agricultural chemical loading are still in need of additional improvement. **We believe the lesson to be learned is that by providing a comprehensive natural resource planning**

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process, technical and cost-share assistance, and clear consequences if they fail to adopt appropriate measures, farmers will continue to respond positively to the ever-changing demands of our society with a strategy that will work to reduce the degradation of our waterways. We recognize too, that in fairness to those farmers who make the investments necessary to control runoff, and to taxpayers who fund them, there must be some "teeth" in the law that targets the small percentage of "bad actors".

Despite my earlier comments regarding farmers interest in and support for contributing to the improvement of water quality, I also acknowledge there is considerable concern over the impact of new water quality legislation on individual farm businesses. I think much of this concern is a result of the difficulty in understanding how H.R.3948 would be implemented. Would enforceable BMP's be ones the local farm community is familiar with or could there be new ideas? Would the economic practicality of BMP's be fully considered, or would water quality at any cost put farmers out of business? And would planning for water quality be integrated into the Soil Conservation Service conservation plans farmers are comfortable with or will there be a whole new water quality planning process and bureaucracy? With minor revisions to the bill, these questions can be clarified. Revisions that increase farmer's flexibility and coordinate water quality initiatives with other USDA conservation efforts. Specific language to address these issues is included in the attached letter.

H.R. 3948 provides considerable authority to EPA and the States to develop standards, BMP's and other program specifications. We encourage the Congress use the report accompanying the bill to provide guidance to this process in the form of guiding principles modeled after those developed by the Soil and Water Conservation Society. (attached)

We understand it is your intention to provide technical assistance and cost share funds to help farmers implement BMP's that would otherwise prove too costly. This is absolutely critical to maintaining the delicate balance of shared responsibility between family farmers and American taxpayers. The consequences of heaping too much of the cost on individual farmers--and forcing them out of business--are great. The American Farmland Trust has studied development pressures on farmland across the Country. Our research has shown that the farmlands with the greatest potential to impact water quality are the same farmlands most threatened with non-farm development--development that will add to the volume of polluted storm water runoff. Recent trends toward cutting Soil Conservation Service and USDA Conservation Cost Share Program budgets lead us to believe that we cannot assume the assistance to farmers envisioned in H.R. 3948 will actually be there when farmers need it. Without it this legislation will fail in its objectives. Therefore, we strongly encourage you to pressure both EPA and USDA to provide funding for assistance to farmers. We believe the resources are available and that the American public is having a hard time understanding expenditures of $40 million per day on commodity support and only pennies on conservation.

Testimony of Ralph Grossi, AFT
May 26, 199

A modest shift in funding priorities would reflect the new commitment to conservation.

The provision providing for "pollution trading" concerns us greatly. The provision allows higher point source discharges if significant nonpoint source reductions are achieved in the watershed. At first glance this may appear to be cost effective for the watershed and some municipalities. In reality it will create very strong pressure to establish excessively tough mandatory BMP's on farmers in order to lower costs of reducing point source discharges normally passed on to consumers, taxpayers or rate payers. However, the market driven economic realities of farming mean that farmers cannot pass increased costs along to consumers. The result of the pollution trading scheme will be to concentrate costs on a few farmers, rather than a sharing to the burden throughout the community. And those farmers will be put out of business.

In conclusion, my message is that most American farmers share their community's concerns over water quality and most will voluntarily do their fair share to reduce NPS if they are given the opportunity and tools to do so. In other words, farmers will do their part if reasonable standards are set and they are provided education, technical and planning assistance, and economic assistance to fairly spread the cost throughout the community and to protect the economic viability to the farm. But as in every other sector of our society, there are some farmers who will not take on the task of reducing NPS unless there is a clear penalty for failing to meet community standards. We believe H.R. 3948 contains the framework for a program that can achieve the level of water quality sought by the American public, as long as the public accepts a full share of the costs . Therefore, with the inclusion of the minor changes I have suggested, AFT supports the Water Quality Act of 1994.

May 12, 1994

The Honorable Norman Y. Mineta
U.S. House of Representatives
Washington, D.C. 20215

Dear Chairman Mineta:

As you prepare for hearings and markup of H.R. 3948, the "Water Quality Act of 1994," we urge you to incorporate a package of amendments to the nonpoint source management program title to better serve family farmers and the environment.

We applaud the bill for tackling essential nonpoint source issues, including watershed planning, site-level plans, groundwater, monitoring, and improved funding. In our opinion, section 311 of the bill contains most of the ingredients for improving nonpoint source programs. In its current form, however, it has not won endorsements from agricultural or environmental organizations. We believe that with appropriate changes wider support from these communities is still possible.

To reach more common ground, we recommend a balanced package of amendments to:

* clarify the general approach;
* increase flexibility;
* amend timelines; and
* close loopholes.

Before briefly addressing each of these areas, however, we would first make two general recommendations on the critical issues of funding and point-nonpoint trading.

Farmers want to know that funds for technical and financial assistance will actually be available if major new requirements are enacted. The bill includes authorization for substantial increases in the grant program. This is a good first step, but as you well know it means little if the money is not actually appropriated. If farmers and others are mandated to implement practices which will require substantial investments of time and money, financial and technical assistance programs must be available. We urge you to work out detailed agreements with your colleagues on Appropriations and with the Administration that will insure adequate funding *before* moving this bill to completion.

In our experience, farmers are very willing to contribute to the solutions to cleaner water, but that willingness will quickly disappear if it becomes evident they are shouldering an unfair burden to provide relief to industry and municipalities. The draft amendment in the nature of a substitute to H.R. 3948 includes a special state watershed program that permits transfers of responsibilities for pollution reductions. It is our belief that progress on reducing point source pollution should not slacken off as progress on reducing nonpoint sources grows. We therefore urge you to eliminate this trading provision.

We will oppose attempts to weaken water quality protection measures contained in the bill or in existing law. In that light, we hope our recommendations will be taken as constructive ideas that could and should be used to help formulate a revised mark or omnibus amendment. We would be happy to work further on specific language or to help in any other ways that might be requested. We look forward to continuing to work with you and the Committee to forge the best possible nonpoint source program revision package.

Sincerely,

Ferd Hoefner

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Recommendations for Changes to Section 311 of H.R. 3948

1. Clarifying the General Approach

Section 311 of the bill as drafted does not take any step to strengthen the presumption that state nonpoint programs will operate on a watershed basis. We endorse a strong presumption that programs be watershed-based and urge that appropriate language be added to section 319(b)(4) of the statute.

We also urge you to add language to clearly target watersheds that are impaired or threatened by nonpoint sources of pollution. As drafted, (2)(b)(K) could be read to allow threatened and impaired watersheds to be exempted while (2)(b)(L), at the other extreme, appears to require inclusion of all watersheds regardless of water quality condition (p. 54). Both should be amended to target problem watersheds.

Section 311 is also not entirely clear about the relationship of "management practices and measures" to "site-specific management plans." We endorse the concept of site level, site specific plans and urge you to consistently refer to measures and practices as being implemented through plans, or at least state a strong presumption for plans.

We also endorse a strong priority for pollution prevention over pollution control and mitigation. Therefore, we urge you to amend the key operational definition of practices and measures (p. 61) to specify pollution prevention and not just pollution control.

2. Increasing Flexibility

Farmers fear rigid, inflexible requirements. The bill, unfortunately, would not allow farmers or other landowners to implement alternative management systems that are demonstrably as effective or more effective than the best management practices and measures in state management programs. Farmers are in many instances far ahead of agricultural and environmental agencies in developing innovative systems approaches to pollution prevention. They should be given every opportunity to demonstrate and utilize alternative agricultural approaches. This is particularly critical in light of the growing disenchantment with best management practice approaches. We therefore urge you to add language to the site-specific plan provision (p.52) to allow for alternative management measures.

State programs for site-level planning to implement management measures should also contain adequate guidance on the process for revising site level plans and information on programs and processes for mediation of potential landowner-agency disputes and for landowner appeals of adverse decisions that an implementing agency may make. These are crucial components of any site-level planning process and should be required aspects of the state program. We therefore urge you to add appropriate language in the state program section.

We strongly endorse the language in the bill (p. 52-53) giving credit to farmers participating in USDA programs that require site-level plans and address water quality issues. We recommend adding the conservation compliance program to the list of qualified programs, as long as the qualifying language "with respect to pollutants and land areas regulated under the qualified program" is retained. In many instances, conservation compliance plans significantly reduce sediment run-off.

We urge that the January 1, 2005 termination date (p. 52) for qualified USDA programs be eliminated. It is not at all clear what land owners with qualified plans are meant to do after the termination date. More importantly, the additional measures requirement (p. 54) based on 5-year assessments applies to all land owners required to have plans, including those in qualified programs. That being the case, there is no need or rationale for ending the applicability of the qualified USDA programs.

Finally, we believe agriculture can and will help provide solutions to nonpoint water quality problems. It is critical, however, that the regulatory framework created by this bill in no way fosters economic concentration and decline of rural communities. We urge you to add language to the federal guidance subsection (p. 60) to direct that low-cost or cost saving systems approaches be recommended and that high cost, high tech requirements be avoided.

3. Amending the Timeline

Section 311(b)(3) of the bill appears to require state management programs to be submitted 18 months after enactment, the same time period provided in 311(h) for completion of the federal guidance. State program development and submission should clearly follow publication of federal guidance and we urge you to amend accordingly.

The bill would require full implementation of management measures within three years of watershed designation (p.51). This is an unrealistically short timeframe, given the considerable time and manpower needed for plan development and approval process. We urge you to amend the language to provide at least three years *after* plan approval for full implementation.

The overall goal within the bill (p. 55) for attaining "reasonable progress toward" water quality standards within targeted watersheds should be amended in two ways. The inclusion of the "reasonable progress toward" phrase leaves the new language as vague as current law and should be dropped. On the other hand, the single target date of December 31, 2009 is inappropriate since the bill would phase in watersheds/areas over five years. The goal should therefore be within ten to fifteen years from commencement of the revised program in a particular watershed.

Appropriate "milestones" for achieving and maintaining water quality standards within watersheds should be added to state program requirements of the bill within (b)(2)(C) on page 51. It is important that state programs contain milestones so progress can be assessed in stages as the attainment deadline approaches. Regular reports will reduce sudden shocks and surprises down the road.

On the other hand, the bill (p. 54) directs states to require implementation of additional management practices and measures if, based on revised assessments every five years, water quality standards are not being met. We believe this reference should be changed to refer to the milestones rather than attainment during the time prior to the attainment deadline. In addition, the timing should be changed so that the first 5-year assessment does not occur until after implementation of management practices and measures. As currently drafted (p. 49), the first assessment would occur before implementation of practices in most watersheds.

Currently section 319(h)(1) of the Act provides for "notice and opportunity for public comment" on a state's management program before it is submitted to the Administrator for approval. We are concerned that the state provide the same notice and opportunity for public comment on the revised state management program which are to be submitted every five years pursuant to section 311(h)(3) of this bill (p. 55). We urge you to add notice and comment language to this section of the bill.

4. Closing Loopholes

As drafted, the bill allows states to exempt landowners in targeted watersheds or areas from implementing measures and practices for any reason at all (p. 51-52). While we believe an exemption clause is needed and that only those landowners contributing to pollution problems in targeted areas should be required to have plans, we feel the bill's language is too open ended. We particularly oppose any exemption clause that would allow states to exempt mining, timber, development or other non-farm land uses that are contributing significantly to polluted runoff. We urge that the bill's broad exemption language be tightened to make exemptions only for categories of landowners, classes of activities, or areas that do not cause or contribute to polluted runoff in any significant way.

Provision for case-by-case economic hardships should also be included, but separately from the general exemption provision. By combining them, the bill mixes apples and oranges. Furthermore, economic hardship cases should in most instances be dealt with by alternative measures, longer implementation timelines, and/or targeted assistance rather than the bill draft's "all or nothing" approach. Appropriate revisions should be made.

A second exemption provision in the bill should be eliminated altogether. The bill (p. 52) requires states to select landowners who will be required to develop plans. With a properly functioning general exemption provision there should be no need for further affirmative selection of landowners. Eliminating this provision would also eliminate a major potential for real or perceived inequity in the process of determining who is in and who is out.

Attached is suggested language for dealing with these issues. Most timeline issues are not included as they are relatively straightforward.

Suggested Language for Amending
Nonpoint Source Management Program in H.R. 3948

Watershed Presumption

A new provision of the bill to amend section 319(b)(4) of the statute to read as follows:

> "(b)(4) A State shall, to the maximum extent practicable, develop and implement a management program under this subsection on a watershed-by-watershed basis within such State, unless such State demonstrates to the Administrator that a watershed approach is not appropriate."

Impaired and Threatened Watersheds

Revise the first sentence of (b)(2)(K) by deleting everything after "State" and inserting:

> "which have been identified as being impaired or threatened in whole or in part by nonpoint sources of pollution under Section 319(a)(1), Section 304(l) or 305(b)."

Revise (b)(2)(L) by deleting "all nonpoint sources of pollution in the State" and all that follows and inserting:

> "those nonpoint sources of pollution in watersheds in the State designated under subparagraph (K). The schedule shall address approximately 20 percent of such watersheds or other areas during each year of the 5-year period."

Conforming Change: Revise (b)(2)(C) by striking the words "for undertaking such practices and measures."

Site Specific Plans

See "alternative measures" below.

Also add at the appropriate place a definition of "site-specific management program" to clarify the relationship between measures and practices and plans:

> "For the purposes of this subsection, the term "site-specific management program" means a program, chosen by a landowner or operator under guidelines issued by the State, which provides for implementation of management measures and practices published pursuant to (b)(2)(H) or alternative management measures and practices which provide that are as effective or more effective in controlling nonpoint source pollution as the measures and practices pursuant to (b)(2)(H)."

Also revise (a)(1) by striking "and nonpoint sources for which the State may require site-specific management plans".

Suggested Language, Page 2

Pollution Prevention

Amend definition paragraph (o)(3), to include the words "prevention and" before the word "control" both times it appears, so that the aim is "pollution prevention and control" measures.

Alternative Measures

Substitute for the first sentence of (b)(2)(I), the following language:

> "(I) A description of the site-level implementation program, including a process for developing, approving, monitoring, and enforcing management measures through site-specific management plans the State will require land owners and operators in target watersheds to develop and implement. Site-specific management plans will be used to implement management measures and practices published pursuant to (H) or alternative measures and practices that land owners and operators may propose that are as effective or more effective in controlling nonpoint source pollution as the measures and practices published pursuant to (H)."

Revisions, Mediation, and Appeals

Further amend (b)(2)(I) by adding the following language immediately following the alternative measure language above:

> "The site-level implementation program shall include a description of the procedure that a land owner or operator may use to revise their site-specific management plan or the plan of a prior land owner or operator. The program shall also include a description of such mediation programs that may be available to help resolve potential disputes, and a description of a State appeals procedure used to appeal a State's adverse determination concerning implementation, including a provision that all final State determinations shall be reviewable by the Administrator and that all final decisions of the Administrator shall be reviewable by the United States District Court for the District in which the owner or operator is located."

Conservation Compliance

Add to the end of the list in (b)(2)(I) the following:

> "(vii) The Conservation Compliance Program established under subtitle B of tile XII of the Food Security Act of 1985 (16 U.S.C. 3811 et. seq.)."

Certified Programs

Further amend (b)(2)(I) by striking on page 52, line 7 and 8 the words "Before January 1, 2005, a land owner" and inserting in lieu "A land owner or operator".

Suggested Language, Page 3

Also, add before the colon on line 23 "unless a State finds them inadequate or not appropriate for a particular watershed".

Federal Guidance

Add the following new sentence at the end of the "In General" paragraph (o)(1):

"Such guidance shall include provisions to foster and encourage integrated, comprehensive systems approaches to site-specific management planning, shall identify and emphasize cost-saving and other cost-effective management and low capital cost measures and practices, and shall not favor larger enterprises or wealthier land owners or operators."

Procedure for Disapproval of Reports and Programs

Amend the language of (c) on page 55 to read:

"Section 319(d)(2)(D) is amended by striking "are not adequate" and all that follows through the semicolon at the end and inserting "will not result in reasonable progress toward the attainment of applicable water quality standards under section 303 as expeditiously as possible but not later than December 31, 2009 ten years after commencement of a revised management program for a particular watershed or area."

Exemptions and Economic Hardship

Amend the language in (b)(2)(H) and add a new (I) as follows:

"(H) A description of measures and practices of the program which will be applicable to land owners and operators and a description of any category of land owners and operators (including categories of landowners determined solely on the basis of economic hardship), class of activities, or areas which will be exempt from such measures and practices as a result of a determination by the State based on monitoring data that such category, class, designations, or areas does not cause or contribute significantly to the overall degradation of the target watershed."

"(I) A description of the procedures for granting extensions or other special assistance, or for providing alternative management measures and practices, in individual cases for which economic hardship can be demonstrated by land owners or operators and a description of the standards to be used to determine legitimate economic hardship."

Public Notice and Comment

Add to section 311(b)(1) after "5" the following:

"and by adding at the end the following:

"The Governor of each State shall also provide notice and opportunity for public comment on each state management plan that is required to be submitted every five years pursuant to section 319(c)(2) before it is submitted to the Administrator for approval."

SOIL AND WATER CONSERVATION SOCIETY

A National Nonpoint-Source Water Pollution Control Initiative

Guiding Principles

Pending reauthorization of the Federal Water Pollution Control Act of 1972, commonly referred to as the Clean Water Act, represents an opportunity for the nation to deal effectively with nonpoint-source water pollution as a means of ensuring public health, safety, and welfare. Water pollution control laws heretofore have focused primarily on point sources of pollution, and the nation has enjoyed a measure of success in addressing those so-called end-of-pipe sources of contamination. Success has been much more limited in dealing with diffuse sources of pollution that originate on agricultural, urban, forest, and other land. In fact, agriculture today is considered the single greatest source of water pollution in many regions of the country. Major agricultural pollutants include sediments from soil erosion, nutrients from fertilizers and livestock wastes, pesticides, and salts in irrigation return flows.

The Soil and Water Conservation Society believes the Congress, in reauthorizing the Clean Water Act, should deal more comprehensively with nonpoint sources of pollution than it has in previous versions of the law. Addressing the nonpoint-source pollution problem effectively and efficiently could be among the most critical steps taken in this nation's attempt to achieve sustainability in the use of agricultural and other land. SWCS thus offers the following principles to guide policymakers in their deliberations on the Clean Water Act:

- All important sources of nonpoint pollution--agricultural and otherwise--should be dealt with in the reauthorization of the Clean Water Act.

- A watershed-based approach to the pollution control effort should be employed that accounts for all sources of pollution--point and nonpoint--in a watershed and that recognizes the interaction of surface water and groundwater resources within that hydrologic unit.

- A national nonpoint-source pollution control initiative should be implemented to the extent possible through state and local governments, with federal financial assistance, guidance, and oversight.

- A comprehensive, ongoing national water quality monitoring program is essential to any national nonpoint-source pollution control effort--to document existing

feel aggrieved by a wetland determination; and it should provide for the use of an equivalent definition of "wetland" by all federal agencies, even if the establishment of such a definition must await completion of the study of wetlands now underway at the National Academy of Science.

- A national nonpoint-source pollution control program will require a well-trained workforce within USDA and at state and local government levels, with sufficient monetary resources to assist in the development and implementation of water quality plans. Any responsibilities associated with wetland protection included in the reauthorized act will add to these workforce, training, and funding needs.

- Reform of federal farm commodity programs should be pursued to determine how it might contribute to the achievement of national water quality goals. Programs that encourage more sustainable use of land resources, not unlike the Conservation Reserve Program, conservation compliance, and other policies included in the 1985 and 1990 farm bills, for example, could significantly aid national water quality improvement efforts.

- An aggressive, coordinated research and extension program must strive to improve understanding of the important cause-and-effect relationships regarding nonpoint-source water quality problems and seek new solutions to those problems. Research will also be needed to evaluate further questions of risk regarding human and environmental health.

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Adopted by the SWCS Board of Directors on December 16, 1993

SOIL AND WATER CONSERVATION SOCIETY

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water quality problems and thereby identify those watersheds and aquifers with impaired water resources and to establish trends in water quality. Physical, chemical, and biological indicators of water quality should be monitored.

- Because financial resources will likely be limited, the nonpoint initiative should be applied on a targeted watershed basis, with those watersheds having the most impared or especially valuable water resources receiving treatment priority. A timetable should be established for treating those watersheds with the most degraded water resources and all other watersheds requiring treatment to achieve the nation's water quality goals. Resources for planning or treatment should be allocated to those watersheds documented as having inconsequential pollution from nonpoint sources only if an imminent danger exists to water resources.

- A period of up to five years should be allowed following completion of plans for farmers and other land owners and managers to respond incrementally and in a voluntary fashion to the new nonpoint-source pollution control mandate. Cost-sharing or other financial incentives and educational programs should generally be made available to those who must implement water quality plans through federal and/or state programs, such as the U.S. Environmental Protection Agency's Section 319 program and the U.S. Department of Agriculture's water quality programs.

- The law should provide for effective enforcement measures to be triggered if the period for voluntary action passes and progress has been insufficient toward achieving water quality goals.

- Comprehensive natural resource management plans should be required for all farms and other land units identified as contributing to pollution problems within those watersheds with impaired or especially valuable water resources. Plans should be prepared first for those farms and other land units contributing the most to pollution problems, and all plans should be integrated with all other natural resource management plans required of farmers and other land owners and managers. The plans should be filed with, or certified by, an agency of USDA or its representative at the state or local level (state agency, conservation district, etc.). That single filing or certification process should constitute compliance with all applicable federal natural resource management requirements.

- Performance-based outcomes should be used in determining the success of the nonpoint-source pollution control effort.

- Any wetland protection measure included in the reauthorized Clean Water Act should provide for a more workable and effective policy than has been the case in the past. The law should clarify agency administrative responsibilities among Interior, EPA, U.S. Army Corps of Engineers, and USDA; it should place authority for making all wetland determinations on agricultural land within USDA's Soil Conservation Service, as the President has announced; it should establish an appeals process for farmers and other land owners and managers who

Sustainable Agriculture Coalition

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Testimony of the

Sustainable Agriculture Coalition

on Nonpoint Source Pollution Control Provisions

of the Clean Water Act Reauthorization

presented to the

Subcommittee on Water Resources and Environment

Committee on Public Works and Transportation

U.S. House of Representatives

May 26, 1994

Presented by

Ferd Hoefner, Washington Representative

Sustainable Agriculture Coalition

printed on recycled paper

Thank you for this opportunity to present our views to the Committee. I am Ferd Hoefner, Washington Representative for the Sustainable Agriculture Coalition. The Coalition is comprised of ten midwestern-based, farm, rural, and conservation organizations working together for federal policy reform to foster a more sustainable agriculture. The Coalition is part of a larger network of organizations, known as the Midwest Sustainable Agriculture Working Group, which in turn is allied with Sustainable Agriculture Working Groups in other regions of the country.

Attached to my statement are:

* an Executive Summary of a policy report issued by the Working Group, after extensive farmer consultations, on agriculture-related nonpoint pollution issues with particular reference to reauthorization of the Clean Water Act;

* a recent letter sent to the Chairman and to the Committee, from the Sustainable Agriculture Coalition, the National Family Farm Coalition, and the American Farmland Trust, addressing ways to improve on the nonpoint sections of H.R. 3948 to make them more farmer and environmentally friendly; and

* a timeline of the nonpoint source pollution control provisions of H.R. 3948 prepared for us by the Farmers Legal Action Group.

General Position on Clean Water Policy

We believe Clean Water Act reauthorization represents an important opportunity to deal effectively with nonpoint source pollution prevention. The sustainable agriculture movement seeks to improve both agricultural and environmental policies as a way to promote sustainable farming practices. We believe a clear, strong, and flexible site-specific planning mechanism is achievable and, properly implemented, can help foster the mutual goals of clean water and thriving farms.

In our view, federal policy to reduce polluted runoff and leaching must include a balance of at least four approaches -- voluntary approaches, especially improved and redirected research, education, and technical assistance; incentive and cost share programs; removal of existing policy barriers to enhanced water quality practices, including farm commodity program reform; and a coherent regulatory framework. While Clean Water Act reauthorization will not deal with each of these elements, it is critical that Congress take further action on each element in the next few years if clean water goals are to be met.

We support watershed-based polluted runoff programs, targeted to the most impaired watersheds first. Programs should be holistic, incorporating both surface and groundwater, all major land uses, both point and nonpoint sources, and both farm and nonfarm

sources of sediment, nutrients, and pesticides. Citizens should be involved in developing local watershed plans and in monitoring local water quality. EPA and state water agencies should set water quality goals, establish expanded water quality standards, and monitor progress in restoring watersheds. USDA and local government agencies should implement programs to help farmers and other land owners and operators meet those goals.

We support a requirement that landowners and operators contributing to pollution problems in impaired watersheds adopt an integrated, site-specific plan that gives them a large degree of flexibility to meet water quality goals. Farmers should be given the option of having a single plan meet all environment, conservation, and commodity program requirements. Farm plans should encourage the use of a farming systems or sustainable agriculture approach, and should not prescribe one way to farm nor require high cost, high-tech practices. Farmers who have already gone through a resource management process that protects water quality should be exempt from additional requirements.

To implement site-level planning requirements, a well-trained, committed service delivery team should be in place at the local level, with sufficient resources to do the job well. We are concerned that shortages and shortfalls in this area could hamper and discredit any new efforts. We therefore urge that reasonable timelines be enacted to phase in watershed programs and to allow sufficient time to develop, implement, and revise site-level plans. It would also help a great deal if existing federal water quality and water quality-related financial and technical assistance programs were better coordinated with revised state management programs.

Position on "Water Quality Act of 1994" (H.R. 3948)

We applaud H.R. 3948 for including essential nonpoint source pollution issues, including watershed planning, site-level plans, groundwater, monitoring, and improved authorization for funding. It incorporates most of the ingredients for improved nonpoint source programs. As noted above, we believe that enforceable site level plans are achievable and need not be administered in a way that is onerous to land owners and operators.

In our view, however, it is unfortunate that the bill adopts a confusing two-track approach to nonpoint programs, the basic section 319 provisions and the proposed optional state watershed program. We believe strongly that there should not be different basic standards, procedures, exemptions and the like for farmers that depends on which impaired watershed they happen to reside. Setting up a dual track system, with very different basic provisions, seems, to us, to be a recipe for confusion, inequity, and backlash.

We are also very concerned with the pollution trading provisions contained in the optional program. We believe most farmers are

ready and able to make increased efforts toward pollution prevention, but such goodwill that does exist will dissipate if the farm community is asked to shoulder additional requirements to reduce responsibilities for point sources. As currently very broadly drafted, the trading section leaves this a very real possibility and we would thus oppose it.

Combining the best of the proposed section 321 with a revised section 319 in a unified approach would result in a better bill. We feel that the presumption for watershed-based approaches and for pollution prevention approaches should be made stronger. We also believe the bill should more clearly target impaired watersheds and should more carefully describe the relationship of management measures to site-specific management plans. It is our hope that there will be a strong presumption for site-specific plans for farm owners and operators.

It is critically important to the sustainable agriculture community for there to be language in the bill allowing farmers to implement alternative management practices and systems that can be demonstrated to be at least as effective as whatever measures and practices are included in federal and state guidance. There are at least two reasons for this recommendation. First, farmers are, in many instances, far ahead of conservation and environmental agencies and government-funded research and extension agencies in developing innovative systems approaches to pollution prevention. Second, there is growing consensus that single objective best management practice approaches are not effective and need to be integrated into a farming system plan. On these grounds, we urge that language be added to the bill at several places to allow for this option.

We applaud the bill for the provision giving credit to farmers participating in qualified USDA and state conservation and water quality programs. This will help avoid unnecessary duplication and will help increase interest and funding for these important programs. We support in particular the language qualifying program plans "with respect to pollutants and land areas regulated under the qualified programs." However, we recommend adding the conservation compliance program to the list of qualified programs and we urge that the year 2005 termination date for qualified programs be removed.

With respect to the bill's timelines, we note in our letter attached to this testimony several points of confusion and inconsistencies that should be addressed. The bill should clearly designate a sufficient time period for both plan development and implementation and these should be consistent throughout the bill. We believe it is reasonable to state water quality standard attainment goals within a specified time, but urge that appropriate language for achieving "milestones" on progress toward water quality standards be added.

The bill would also be much improved by a reworking of the land owner exemption language. We strongly support exempting land

owners and operators, land areas, and classes of activities that are not contributing significantly to pollution problems. The process needs to be as focused and targeted as possible. However, as currently drafted the bill allows exemptions for any reason whatsoever. This will inevitably lead to arbitrary decisions, a great deal of ill-will, and quite possibly the destruction of the community spirit in which successful watershed programs must operate.

Finally, we urge that appropriate language be added to the bill to ensure that state programs include clear processes for revisions of site-level plans. This will inevitably be needed to respond to changing conditions. Provisions for an appeal process should also be included. These are customary features of farm and conservation programs and should be incorporated in the bill.

In closing, we would stress that, in our experience, most farmers will support sensible and practical water quality requirements. There needs to be a considerable degree of consistency and certainty, with reasonable knowledge of what will be expected and a fair and shared burden of responsibility. In addition, there needs to be maximum flexibility and clear provisions for alternative practice and systems. H.R. 3948 achieves some of these goals, but is weak or inconsistent in others. On the other hand, the recently available draft alternative bill put forth for discussion by some members of the Committee appears to substantially miss the mark on all of these basic goals. We would therefore strongly urge the Committee to work toward improving H.R. 3948 along the lines we have suggested rather than taking up the alternative draft bill.

Thank you for allowing us to testify. I would be happy to try to answer any questions you might have about our views.

CLEAN WATER AND THRIVING FARMS

MUTUAL GOALS IN SUSTAINABLE AGRICULTURE

Prepared by Loni Kemp for the
Midwest Sustainable Agriculture Working Group
January, 1994

85-427 95 – 36

Member Organizations who endorse this water quality report and policy recommendations:

American Farmland Trust

Center for Rural Affairs - Nebraska

Institute for Agricultural Biodiversity

International Alliance for Sustainable Agriculture

Iowa National Heritage Foundation

Izaak Walton League of America

Kansas Rural Center

Land Stewardship Project - Minnesota

Michael Fields Agricultural Institute - Wisconsin

Michigan Agricultural Stewardship Association

Minnesota Food Association

Minnesota Project

National Catholic Rural Life Conference

Northern Plains Sustainable Agriculture Society - The Dakotas

Organic Growers and Buyers Association - Minnesota

Sierra Club

Wisconsin Rural Development Center

Additional copies of this report are $5.00 each and are available from The Minnesota Project, 1885 University Ave. W., Suite 315, St. Paul, MN 55104, (612) 645-6159.

EXECUTIVE SUMMARY

CLEAN WATER AND THRIVING FARMS: MUTUAL GOALS IN SUSTAINABLE AGRICULTURE

The reauthorization of the Clean Water Act presents an opportunity to shape national policies that will simultaneously support the mutual goals of clean water and sustainable farming.

Successful as the Clean Water Act has been in controlling direct contamination of water sources, it has failed in many other regards, especially in the area of non-point source contamination, allowing river and lake watersheds to continue to decline. Groundwater is not even included in an overall national water policy and zero discharge of pollutants remains a distant hope. Agriculture has now emerged as the single largest contributor to water pollution. In too many instances agriculture, as it is now practiced, results in unacceptable environmental impacts.

However, not all farms contribute to these water quality problems. **Many conservation-minded farmers and those using sustainable agriculture methods are farming in ways that protect water quality.** Sustainable agriculture is often described as a system of farming that sustains the soil, the water, families and communities. It combines economic profitability with environmental protection and resource enhancement. Agricultural practices that degrade groundwater with chemicals or destroy rivers and lake habitats with nutrients are by definition not sustainable, for the farmers themselves or for their communities. Nearly every principle of sustainable agriculture has a primary or side benefit that protects water quality.

Public policy approaches that are necessary to reduce polluted runoff can be divided into **four categories: voluntary actions, incentives, removal of policy barriers, and regulation.** Experience has shown us that a balance of all four approaches is needed, reliance on only one type of policy or even any combination of two or three would be insufficient to cause the necessary changes.

> **Voluntary Actions** are preferable to regulation as a first line of defense. They can engage the creativity and commitment of farmers in a way that regulation never will.
>
> **Incentives** can forge a bridge between voluntary and regulatory policies. They must be carefully designed to include the following characteristics:
>
> 1. They should be targeted to those vulnerable lands where the most environmental benefit will occur per dollar spent.
> 2. They should be targeted to situations where farmer's options are limited, such that they need extra financial help in solving a problem.
> 3. They should be designed to foster (and sometimes require) a longer term commitment to the practice by the landowner, so that eventually the incentive may be phased out.

The **Removal of Barriers** is necessary because as long as commodity programs continue to reward destructive farming practices, environmental programs alone will never succeed. Positive rewards for sustainable agriculture practices will greatly accelerate their adoption.

Regulations are a necessary component of a public policy to provide the final nudge for reluctant land owners and to culminate in enforcement for the few "bad actors" who refuse to respond. Successful regulation must embody the following six principles:

1. Rules should be clear, simple and effective at reducing pollution.
2. The bureaucracy should be well-trained and committed, and have straight forward procedures.
3. Enforcement of regulations should be consistent, firm and fair.
4. Penalties should be set at a level that is neither so low as to be ignored nor so high as to discourage their use by regulators.
5. Rules should set environmental standards and allow the farmer flexibility to choose the best way to achieve that standard based on their particular circumstances.
6. Regulations should avoid imposing high capital costs that disadvantage small and moderate sized farms with limited resources relative to large and well endowed farms.

One policy approach that seems to capture the best of both the voluntary and regulatory approaches is that of *requiring* landowners (both farm and non-farm) who contribute to polluted runoff in targeted watersheds to prepare a site-level plan that addresses water quality problems. However the content of the plan would be left flexible to be designed by the individual farmer or other land owner to fit their unique circumstances.

It would be unfortunate if the debate over clean water is polarized between those who may push overregulation and inflexibility and those who push equally hard to resist any balanced approach that includes a regulatory component. Toward that end the **Midwest Sustainable Agriculture Working Group supports the following list of policy recommendations to address polluted runoff:**

1. Environmental and agricultural policies and programs should be integrated.
2. Polluted run-off programs should be watershed based. Problems need to be approached from a holistic point of view, meaning that precipitation, groundwater, surface water, wetlands, lakes, and all major land uses are taken into account. Both point and nonpoint sources of pollution in the watershed should be addressed, and progress on reducing point sources should not slacken off as progress on reducing nonpoint sources grows.
3. Limited resources should be carefully targeted to threatened and impaired watersheds.
4. Run-off programs should address major non-farm pollution sources with rigor equal to major agricultural sources.

5. Farmers and local citizens should be encouraged to be involved in the development of local watershed plans.
6. EPA and state water quality agencies should set water quality goals and monitor progress in meeting those goals. Generally USDA and local government agencies should implement the programs to help meet those goals.

7. Water quality standards should be set for both nutrients and sediment and should include both chemical and biological criteria.
8. Farmer and citizen water quality monitoring groups should be established.
9. Landowners who are contributing to pollution problems in threatened and impaired watersheds should develop integrated site specific plans that give them flexibility in determining their options to meet water quality goals, subject to the following points:

    a. Farmers should be given the option of having a single plan meet all environment, conservation, and commodity program requirements.
    b. Types of farms that are determined not to be contributing to the water pollution, by virtue of the type of system or certain landscape features, should be accounted for by states when requiring farm plans.
    c. Land owners, in conjunction with land renters, should be responsible for the water quality plan and the obligation to implement a plan should stay with the land, even if it is sold.
    d. Farm plans should be easily revisable, as long as water quality remains protected.
    e. Those elements of the farm plan that are required to be implemented should be clearly specified.
    f. Farmers who develop plans should be encouraged to use a sustainable systems approach. Farm plans should emphasize low-cost, effective practices such as crop rotation, soil testing, rotational grazing, manure management, composting, cover cropping, strip cropping, reasonable yield goals, biological pest control, spot spraying and banding of pesticides, contour strips, wetland preservation and restoration, and grass buffer strips along streams. Planning requirements should not favor large scale agriculture.
    g. The planning process should be designed to empower farmers to make better and more creative choices, it should not proscribe one way to farm nor limit farmers to a narrow set of BMP's.
    h. Wherever possible, farmers who have already gone through a resource management process should be exempt from additional requirements. For example, farm plans already approved under the Water Quality Incentives Program, the Integrated Crop Management Practice, the Integrated Farm Management Program and organic certification should be considered complete for water

quality programs, if water quality impacts are adequately covered. If sediment is the pollutant of concern, then conservation compliance plans may suffice, if soil loss standards are determined adequate to protect that watershed.

10. Before site-level plans are required, a well trained, committed service delivery team should be in place at the local level with sufficient resources to do the job well. If the Soil Conservation Service is selected to implement the farm planning process, then through training is needed so field technicians are prepared to work with farmers to develop sensible, workable plans. Field office technical guides should be upgraded to reflect multiple options and sustainable farming systems.
11. As EPA and the states develop guidance materials for site-level plans they should emphasize an integrated, comprehensive approach as much as possible, without focusing on specific practices or BMP's. Guidance should emphasize low capital cost practices as much as possible, and should not favor larger farms.
12. Farmers and others should be involved in commenting on the rules for the environmental programs to ensure that the spirit of the law is reflected in the reality of the program and to insure better acceptance by farmers.
13. Reasonable timelines should be allowed to develop programs.
14. Time extensions for implementing more expensive management practices should be allowed where individual land owners can demonstrate economic hardship.
15. Recognizing that livestock can have a significant impact on water quality, the minimum size of feedlots which are required to obtain a discharge permit should be reduced, also the ratio of animal units to acreage should be factored in to target facilities producing manure on insufficient land.
16. USDA and EPA should work more intensively to encourage manure management options that minimize capital costs and present options to smaller producers (e.g. buffer strips, rotational grazing, composting)
17. Where water quality would benefit, funding for cost-sharing of livestock waste management measures and structures should be increased and made more widely available.
18. Existing conservation incentive programs should be expanded to address water quality goals. Funding should be increased and new rules should be issued that consistently emphasize pollution prevention and source reduction.

May 12, 1994

The Honorable Norman Y. Mineta
U.S. House of Representatives
Washington, D.C. 20215

Dear Chairman Mineta:

As you prepare for hearings and markup of H.R. 3948, the "Water Quality Act of 1994," we urge you to incorporate a package of amendments to the nonpoint source management program title to better serve family farmers and the environment.

We applaud the bill for tackling essential nonpoint source issues, including watershed planning, site-level plans, groundwater, monitoring, and improved funding. In our opinion, section 311 of the bill contains most of the ingredients for improving nonpoint source programs. In its current form, however, it has not won endorsements from agricultural or environmental organizations. We believe that with appropriate changes wider support from these communities is still possible.

To reach more common ground, we recommend a balanced package of amendments to:

* clarify the general approach;
* increase flexibility;
* amend timelines; and
* close loopholes.

Before briefly addressing each of these areas, however, we would first make two general recommendations on the critical issues of funding and point-nonpoint trading.

Farmers want to know that funds for technical and financial assistance will actually be available if major new requirements are enacted. The bill includes authorization for substantial increases in the grant program. This is a good first step, but as you well know it means little if the money is not actually appropriated. If farmers and others are mandated to implement practices which will require substantial investments of time and money, financial and technical assistance programs must be available. We urge you to work out detailed agreements with your colleagues on Appropriations and with the Administration that will insure adequate funding *before* moving this bill to completion.

In our experience, farmers are very willing to contribute to the solutions to cleaner water, but that willingness will quickly disappear if it becomes evident they are shouldering an unfair burden to provide relief to industry and municipalities. The draft amendment in the nature of a substitute to H.R. 3948 includes a special state watershed program that permits transfers of responsibilities for pollution reductions. It is our belief that progress on reducing point source pollution should not slacken off as progress on reducing nonpoint sources grows. We therefore urge you to eliminate this trading provision.

We will oppose attempts to weaken water quality protection measures contained in the bill or in existing law. In that light, we hope our recommendations will be taken as constructive ideas that could and should be used to help formulate a revised mark or omnibus amendment. We would be happy to work further on specific language or to help in any other ways that might be requested. We look forward to continuing to work with you and the Committee to forge the best possible nonpoint source program revision package.

Sincerely,

Ferd Hoefner

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Recommendations for Changes to Section 311 of H.R. 3948

1. Clarifying the General Approach

Section 311 of the bill as drafted does not take any step to strengthen the presumption that state nonpoint programs will operate on a watershed basis. We endorse a strong presumption that programs be watershed-based and urge that appropriate language be added to section 319(b)(4) of the statute.

We also urge you to add language to clearly target watersheds that are impaired or threatened by nonpoint sources of pollution. As drafted, (2)(b)(K) could be read to allow threatened and impaired watersheds to be exempted while (2)(b)(L), at the other extreme, appears to require inclusion of all watersheds regardless of water quality condition (p. 54). Both should be amended to target problem watersheds.

Section 311 is also not entirely clear about the relationship of "management practices and measures" to "site-specific management plans." We endorse the concept of site level, site specific plans and urge you to consistently refer to measures and practices as being implemented through plans, or at least state a strong presumption for plans.

We also endorse a strong priority for pollution prevention over pollution control and mitigation. Therefore, we urge you to amend the key operational definition of practices and measures (p. 61) to specify pollution prevention and not just pollution control.

2. Increasing Flexibility

Farmers fear rigid, inflexible requirements. The bill, unfortunately, would not allow farmers or other landowners to implement alternative management systems that are demonstrably as effective or more effective than the best management practices and measures in state management programs. Farmers are in many instances far ahead of agricultural and environmental agencies in developing innovative systems approaches to pollution prevention. They should be given every opportunity to demonstrate and utilize alternative agricultural approaches. This is particularly critical in light of the growing disenchantment with best management practice approaches. We therefore urge you to add language to the site-specific plan provision (p.52) to allow for alternative management measures.

State programs for site-level planning to implement management measures should also contain adequate guidance on the process for revising site level plans and information on programs and processes for mediation of potential landowner-agency disputes and for landowner appeals of adverse decisions that an implementing agency may make. These are crucial components of any site-level planning process and should be required aspects of the state program. We therefore urge you to add appropriate language in the state program section.

We strongly endorse the language in the bill (p. 52-53) giving credit to farmers participating in USDA programs that require site-level plans and address water quality issues. We recommend adding the conservation compliance program to the list of qualified programs, as long as the qualifying language "with respect to pollutants and land areas regulated under the qualified program" is retained. In many instances, conservation compliance plans significantly reduce sediment run-off.

We urge that the January 1, 2005 termination date (p. 52) for qualified USDA programs be eliminated. It is not at all clear what land owners with qualified plans are meant to do after the termination date. More importantly, the additional measures requirement (p. 54) based on 5-year assessments applies to all land owners required to have plans, including those in qualified programs. That being the case, there is no need or rationale for ending the applicability of the qualified USDA programs.

Finally, we believe agriculture can and will help provide solutions to nonpoint water quality problems. It is critical, however, that the regulatory framework created by this bill in no way fosters economic concentration and decline of rural communities. We urge you to add language to the federal guidance subsection (p. 60) to direct that low-cost or cost saving systems approaches be recommended and that high cost, high tech requirements be avoided.

3. Amending the Timeline

Section 311(b)(3) of the bill appears to require state management programs to be submitted 18 months after enactment, the same time period provided in 311(h) for completion of the federal guidance. State program development and submission should clearly follow publication of federal guidance and we urge you to amend accordingly.

The bill would require full implementation of management measures within three years of watershed designation (p.51). This is an unrealistically short timeframe, given the considerable time and manpower needed for plan development and approval process. We urge you to amend the language to provide at least three years *after* plan approval for full implementation.

The overall goal within the bill (p. 55) for attaining "reasonable progress toward" water quality standards within targeted watersheds should be amended in two ways. The inclusion of the "reasonable progress toward" phrase leaves the new language as vague as current law and should be dropped. On the other hand, the single target date of December 31, 2009 is inappropriate since the bill would phase in watersheds/areas over five years. The goal should therefore be within ten to fifteen years from commencement of the revised program in a particular watershed.

Appropriate "milestones" for achieving and maintaining water quality standards within watersheds should be added to state program requirements of the bill within (b)(2)(C) on page 51. It is important that state programs contain milestones so progress can be assessed in stages as the attainment deadline approaches. Regular reports will reduce sudden shocks and surprises down the road.

On the other hand, the bill (p. 54) directs states to require implementation of additional management practices and measures if, based on revised assessments every five years, water quality standards are not being met. We believe this reference should be changed to refer to the milestones rather than attainment during the time prior to the attainment deadline. In addition, the timing should be changed so that the first 5-year assessment does not occur until after implementation of management practices and measures. As currently drafted (p. 49), the first assessment would occur before implementation of practices in most watersheds.

Currently section 319(b)(1) of the Act provides for "notice and opportunity for public comment" on a state's management program before it is submitted to the Administrator for approval. We are concerned that the state provide the same notice and opportunity for public comment on the revised state management program which are to be submitted every five years pursuant to section 311(b)(3) of this bill (p. 55). We urge you to add notice and comment language to this section of the bill.

4. Closing Loopholes

As drafted, the bill allows states to exempt landowners in targeted watersheds or areas from implementing measures and practices for any reason at all (p. 51-52). While we believe an exemption clause is needed and that only those landowners contributing to pollution problems in targeted areas should be required to have plans, we feel the bill's language is too open ended. We particularly oppose any exemption clause that would allow states to exempt mining, timber, development or other non-farm land uses that are contributing significantly to polluted runoff. We urge that the bill's broad exemption language be tightened to make exemptions only for categories of landowners, classes of activities, or areas that do not cause or contribute to polluted runoff in any significant way.

Provision for case-by-case economic hardships should also be included, but separately from the general exemption provision. By combining them, the bill mixes apples and oranges. Furthermore, economic hardship cases should in most instances be dealt with by alternative measures, longer implementation timelines, and/or targeted assistance rather than the bill draft's "all or nothing" approach. Appropriate revisions should be made.

A second exemption provision in the bill should be eliminated altogether. The bill (p. 52) requires states to select landowners who will be required to develop plans. With a properly functioning general exemption provision there should be no need for further affirmative selection of landowners. Eliminating this provision would also eliminate a major potential for real or perceived inequity in the process of determining who is in and who is out.

Attached is suggested language for dealing with these issues. Most timeline issues are not included as they are relatively straightforward.

Suggested Language for Amending
Nonpoint Source Management Program in H.R. 3948

Watershed Presumption

A new provision of the bill to amend section 319(b)(4) of the statute to read as follows:

> "(b)(4) A State shall~~, to the maximum extent practicable, d~~evelop and implement a management program under this subsection on a watershed-by-watershed basis within such State, unless such State demonstrates to the Administrator that a watershed approach is not appropriate."

Impaired and Threatened Watersheds

Revise the first sentence of (b)(2)(K) by deleting everything after "State" and inserting:

> "which have been identified as being impaired or threatened in whole or in part by nonpoint sources of pollution under Section 319(a)(1), Section 304(l) or 305(b)."

Revise (b)(2)(L) by deleting "all nonpoint sources of pollution in the State" and all that follows and inserting:

> "those nonpoint sources of pollution in watersheds in the State designated under subparagraph (K). The schedule shall address approximately 20 percent of such watersheds or other areas during each year of the 5-year period."

Conforming Change: Revise (b)(2)(C) by striking the words "for undertaking such practices and measures."

Site Specific Plans

See "alternative measures" below.

Also add at the appropriate place a definition of "site-specific management program" to clarify the relationship between measures and practices and plans:

> "For the purposes of this subsection, the term "site-specific management program" means a program, chosen by a landowner or operator under guidelines issued by the State, which provides for implementation of management measures and practices published pursuant to (b)(2)(H) or alternative management measures and practices which provide that are as effective or more effective in controlling nonpoint source pollution as the measures and practices pursuant to (b)(2)(H)."

Also revise (a)(1) by striking "and nonpoint sources for which the State may require site-specific management plans".

Suggested Language, Page 2

Pollution Prevention

Amend definition paragraph (o)(3), to include the words "prevention and" before the word "control" both times it appears, so that the aim is "pollution prevention and control" measures.

Alternative Measures

Substitute for the first sentence of (b)(2)(I), the following language:

> "(I) A description of the site-level implementation program, including a process for developing, approving, monitoring, and enforcing management measures through site-specific management plans the State will require land owners and operators in target watersheds to develop and implement. Site-specific management plans will be used to implement management measures and practices published pursuant to (H) or alternative measures and practices that land owners and operators may propose that are as effective or more effective in controlling nonpoint source pollution as the measures and practices published pursuant to (H)."

Revisions, Mediation, and Appeals

Further amend (b)(2)(I) by adding the following language immediately following the alternative measure language above:

> "The site-level implementation program shall include a description of the procedure that a land owner or operator may use to revise their site-specific management plan or the plan of a prior land owner or operator. The program shall also include a description of such mediation programs that may be available to help resolve potential disputes, and a description of a State appeals procedure used to appeal a State's adverse determination concerning implementation, including a provision that all final State determinations shall be reviewable by the Administrator and that all final decisions of the Administrator shall be reviewable by the United States District Court for the District in which the owner or operator is located."

Conservation Compliance

Add to the end of the list in (b)(2)(I) the following:

> "(vii) The Conservation Compliance Program established under subtitle B of tile XII of the Food Security Act of 1985 (16 U.S.C. 3811 et. seq.)."

Certified Programs

Further amend (b)(2)(I) by striking on page 52, line 7 and 8 the words "Before January 1, 2005, a land owner" and inserting in lieu "A land owner or operator".

Suggested Language, Page 3

Also, add before the colon on line 23 "unless a State finds them inadequate or not appropriate for a particular watershed".

Federal Guidance

Add the following new sentence at the end of the "In General" paragraph (o)(1):

> "Such guidance shall include provisions to foster and encourage integrated, comprehensive systems approaches to site-specific management planning, shall identify and emphasize cost-saving and other cost-effective management and low capital cost measures and practices, and shall not favor larger enterprises or wealthier land owners or operators."

Procedure for Disapproval of Reports and Programs

Amend the language of (c) on page 55 to read:

> "Section 319(d)(2)(D) is amended by striking "are not adequate" and all that follows through the semicolon at the end and inserting "will not result in reasonable progress toward the attainment of applicable water quality standards under section 303 as expeditiously as possible but not later than December 31, 2009 ten years after commencement of a revised management program for a particular watershed or area."

Exemptions and Economic Hardship

Amend the language in (b)(2)(H) and add a new (I) as follows:

> "(H) A description of measures and practices of the program which will be applicable to land owners and operators and a description of any category of land owners and operators ~~(including categories of landowners determined solely on the basis of economic hardship)~~, class of activities, or areas which will be exempt from such measures and practices as a result of a determination by the State based on monitoring data that such category, class, designations, or areas does not cause or contribute significantly to the overall degradation of the target watershed."
>
> "(I) A description of the procedures for granting extensions or other special assistance, or for providing alternative management measures and practices, in individual cases for which economic hardship can be demonstrated by land owners or operators and a description of the standards to be used to determine legitimate economic hardship."

Public Notice and Comment

Add to section 311(b)(1) after "5" the following:

> "and by adding at the end the following:
>
> "The Governor of each State shall also provide notice and opportunity for public comment on each state management plan that is required to be submitted every five years pursuant to section 319(c)(2) before it is submitted to the Administrator for approval."

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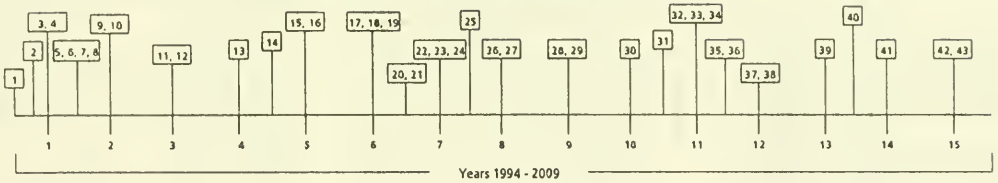
Time Line for Nonpoint Source Pollution Control Provisions of H.R. 3948 Introduced by Rep. Mineta on March 3, 1994



1 Date of enactment.

2 Administrator shall publish proposed guidance to identify best management practices (BMPs) and measures. § 311(h)(2).

3 Administrator shall issue guidance to states on development of state watershed management programs. § 322(c). These state watershed management programs appear to be voluntary. § 322.

4 State shall review, revise, and submit a state assessment report required pursuant to 33 U.S.C. § 1329(a) on this date and every five years thereafter. § 311(a)(3).

5 Administrator must approve or disapprove the state assessment report. 33 U.S.C. § 1329(d).

6 Administrator shall publish final guidance to identify BMPs and measures, which may be undertaken under management programs. § 311(h)(1) and (2). This guidance shall be reviewed and revised every three years. § 311(h)(2).

7 State must submit state management program to the Administrator by this date and every five years thereafter. § 311(b)(3). (This amendment is unclear. This is our best interpretation.)

8 Administrator shall report to Congress on the results of its study concerning transferring government-granted authority to discharge pollutants between different pollutants. § 322.

9 Administrator must approve or disapprove the state's management program. 33 U.S.C. § 1329(d).

10 State must address all nonpoint sources of pollution in 20 percent of the state's watersheds or other areas. § 311(b)(2)(L).

11 State must address all nonpoint sources of pollution in 20 percent of the state's watersheds or other areas. § 311(b)(2)(L).

12 Administrator shall publish additional water quality criteria for pollutants with an emphasis on nonpoint-source pollutants. § 308(e).

13 State must address all nonpoint sources of pollution in 20 percent of the state's watersheds or other areas. § 311(b)(2)(L).

14 Administrator shall review and revise final guidance to identify BMPs and measures. § 311(h)(2). (See note #6.)

15 State must address all nonpoint sources of pollution in 20 percent of the state's watersheds or other areas. § 311(b)(2)(L).

16 All categories and subcategories of nonpoint sources in watersheds or other areas designated pursuant to § 311(b)(2)(K) and (L) to undertake BMPs in year two must be utilizing BMPs. § 311(b)(2)(C).

17 State shall review, revise, and submit a state assessment report. § 311(a)(3). (See note #4.)

18 State must address all nonpoint sources of pollution in 20 percent of the state's watersheds or other areas. § 311(b)(2)(L).

19 All categories and subcategories of nonpoint sources in watersheds or other areas designated pursuant to § 311(b)(2)(K) and (L) to undertake BMPs in year three must be utilizing BMPs. § 311(b)(2)(C).

20 Administrator must approve or disapprove the state assessment report. 33 U.S.C. § 1329(d).

21 State must submit state management program to the Administrator. § 311(b)(3). (See note #7.)

22 Administrator must approve or disapprove the state management program. 33 U.S.C. § 1329(d).

23 All categories and subcategories of nonpoint sources in watersheds or other areas designated pursuant to § 311(b)(2)(K) and (L) to undertake BMPs in year four must be utilizing BMPs. § 311(b)(2)(C).

24 If water quality standards are not met in year six, § 311(b)(2)(K), the state must address all nonpoint sources of pollution in 20 percent of the state's watersheds or other areas as part of the second five-year period. §311(b)(2)(K) and (L). Additional BMPs will have to implemented within three years from this date. § 311(b)(2)(C) and (K).

25 Administrator shall review and revise final guidance to identify BMPs and measures. § 311(h)(2). (See note #6.)

26 All categories and subcategories of nonpoint sources in watersheds or other areas designated pursuant to § 311(b)(2)(K) and (L) to undertake BMPs in year five must be utilizing BMPs. § 311(b)(2)(C).

27 If water quality standards are not met in year six, § 311(b)(2)(K), the state must address all nonpoint sources of pollution in 20 percent of the state's watersheds or other areas as part of the second five-year period. §311(b)(2)(K) and (L). Additional

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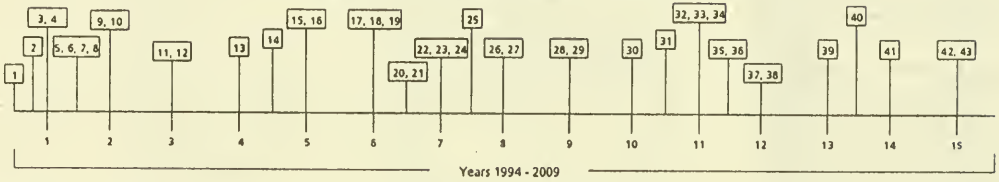
Time Line for Nonpoint Source Pollution Control Provisions of H.R. 3948 Introduced by Rep. Mineta on March 3, 1994



BMPs will have to implemented within three years from this date. § 311(b)(2)(C) and (K).

28 All categories and subcategories of nonpoint sources in watersheds or other areas designated pursuant to § 311(b)(2)(K) and (L) to undertake BMPs in year six must be utilizing BMPs. § 311(b)(2)(C).

29 If water quality standards are not met in year six, § 311(b)(2)(K), the state must address all nonpoint sources of pollution in 20 percent of the state's watersheds or other areas as part of the second five-year period. §311(b)(2)(K) and (L). Additional BMPs will have to implemented within three years from this date. § 311(b)(2)(C) and (K).

30 If water quality standards are not met in year six, § 311(b)(2)(K), the state must address all nonpoint sources of pollution in 20 percent of the state's watersheds or other areas as part of the second five-year period. §311(b)(2)(K) and (L). Additional BMPs will have to implemented within three years from this date. § 311(b)(2)(C) and (K).

31 Administrator shall review and revise final guidance to identify BMPs and measures. § 311(h)(2). (See note #6.)

32 A landowner complying with a qualified program will no longer be exempt from the site-specific management plan requirement. §311(b)(2)(I).

33 State shall review, revise, and submit a state assessment report. § 311(a)(3). (See note #4.)

34 If water quality standards are not met in year six, § 311(b)(2)(K), the state must address all nonpoint sources of pollution in 20 percent of the state's watersheds or other areas as part of the second five-year period. §311(b)(2)(K) and (L). Additional BMPs will have to implemented within three years from this date. § 311(b)(2)(C) and (K).

35 Administrator must approve or disapprove the state assessment report. 33 U.S.C. § 1329(d).

36 State must submit state management program to the Administrator. § 311(b)(3). (See note #7.)

37 Administrator must approve or disapprove the state management program. 33 U.S.C. § 1329(d).

38 If water quality standards are not met in year 11, § 311(b)(2)(K), the state must address all nonpoint sources of pollution in 20 percent of the state's watersheds as part of the third five-year period. § 311(b)(2)(K) and (L). Additional BMPs will have to be implemented within three years from this date. § 311(b)(2)(C) and (K).

39 If water quality standards are not met in year 11, § 311(b)(2)(K), the state must address all nonpoint sources of pollution in 20 percent of the state's watersheds as part of the third five-year period. § 311(b)(2)(K) and (L). Additional BMPs will have to be implemented within three years from this date. § 311(b)(2)(C) and (K).

40 Administrator shall review and revise final guidance to identify BMPs and measures. § 311(h)(2). (See note #6.)

41 If water quality standards are not met in year 11, § 311(b)(2)(K), the state must address all nonpoint sources of pollution in 20 percent of the state's watersheds as part of the third five-year period. § 311(b)(2)(K) and (L). Additional BMPs will have to be implemented within three years from this date. § 311(b)(2)(C) and (K).

42 States with state watershed management programs shall have achieved and maintained water quality standards. § 322(b)(4).

43 If water quality standards are not met in year 11, § 311(b)(2)(K), the state must address all nonpoint sources of pollution in 20 percent of the state's watersheds as part of the third five-year period. § 311(b)(2)(K) and (L). Additional BMPs will have to be implemented within three years from this date. § 311(b)(2)(C) and (K).

TESTIMONY BEFORE THE HOUSE PUBLIC WORKS COMMITTEE
THE CLEAN WATER ACT REAUTHORIZATION
HR 3948
MAY 26, 1994

Mr. Chairman, Members of the Committee, and guests;

My name is William Jeanes, Jr. I come before you today to describe briefly what farmers are currently doing to control and reduce nonpoint source pollution through Best Management Practices and other conservation techniques. I raise corn, soybeans and wheat on 400 rolling but very productive acres in Cecil County, Maryland. I rent over two-thirds of this acreage.

BMP's as they are referred to, are practices utilized to efficiently and economically reduce crop inputs while enhancing the surrounding environment. While some BMP's are quite simple such as a grass buffer strip adjacent to a body of water, others are considerably more complex such as waste management systems for livestock operations. In certain instances, BMP's are necessary to keep land consistently productive, but in all forms they are designed to benefit water quality and substantially limit soil erosion.

Conservation Plans written by the Soil Conservation Service define the types of tillage and cropping rotations a farmer may use and they are designed to minimize soil erosion and protect water quality. While they are required only on land classified as highly erodible, many farmers already have a plan in force. Some practices generally used are conservation tillage, where there is always some crop residue left on the field, cover crops, which entails sowing a winter hardy crop after the initial crop is removed, and contour farming, where the crop is planted along the contour of the field. Crop rotation is widely practiced as well to break the pest cycle thus requiring much less pesticide use. They are popular practices due to their proven agronomic benefits.

These plans also deal with land improvements such as grassed waterways and buffer strips. In Maryland, there is a good deal of tillable land near the Chesapeake Bay and its tributaries. It has been recognized by farmers that buffers along the water's edge helps stabilize the shore and filter out some sediment and nutrients. Grassed waterways also decrease the flow of sediment to the Bay. These improvements are cost-effective while enabling the land to be stabilized.

One of the most important goals of Maryland's Tributary Strategy Program, of which I will talk about later, is the reduction of nitrogen into the Chesapeake Bay. The Nutrient Management Plan defining recommendations on fertilizer placement, quantity and timing of application for each crop are of great importance to all farmers. It is here where the possible reduction of costly fertilizer may be achieved. Through soil testing and subsequent nitrogen testing, it can be determined exactly how much fertilizer needs to be applied and whether or not a particular field will need further applications later on during the growing season. The savings from these tests can have a great impact on a grower's net profit and, indeed, more and more farmers are getting Plans written.

Another important and cost saving practice is Integrated Pest Management. Here, specialists scout the farmer's fields and make specific recommendations on the types and quantities of pesticides needed. This sounds rather simple but it can provide enormous benefit to the grower and can reduce drastically the amount of pesticide applied to a farm. The specialist can determine what pests are present in a field and can advise whether the economic threshold has been reached. This means that if there are not enough of a particular pest in the field, the grower would not use any pesticide. This has obvious benefits to both the farmer and the environment. The program pays for itself.

I would like to talk briefly about Maryland's Tributary Strategy Program and its application to my discussion. It is a program of different options for the reduction of nutrients entering our waterways. The strategy is to develop a grading system for various practices designed to make the overall goal of a 40% nutrient reduction attainable. (The estimates are for the Upper Eastern Shore Tributary system and are shown in Table 2 of the appendix.) Of all the 30 or so options proposed, the top three practices for the maximum amount of nitrogen reduction are: Nutrient Management Planning, conservation tillage, and cover cropping. If implemented, these three practices could make-up more than half the goal of the Upper Eastern Shore Tributary system.That is only one area of Maryland but it is representative of other agricultural areas with similar nutrient problems.

I would like to emphasize that these options are meant to be voluntary. Their adoption depends upon the successful implementation of the practices and any incentives that may be funded to encourage further participation. Currently, the A.S.C.S. is offering incentive payments through the Water Quality Incentive Program to farmers

who agree to sign a Long Term Agreement for three years. (The schedule of the incentive rates is included in the appendix.) This is an excellent program to encourage farmers to begin the practices which will reduce nonpoint source pollution. As with any new program, farmers must be assurred that it will benefit their already thin profit margin. It must also be an ongoing effort, not something that may be terminated after a few years. Farmers are willing to do their part in this effort and will work towards water quality enhancement.

Respectfully Submitted,

William W. Jeanes, Jr.

SRBC Reports On Groundwater Nutrients

(Continued from Page A32)

discharge from the wetland, we were dissatisfied with the results. Review of the data suggested that the concentration of phosphorus in the spring and field drain might be inadequate to promote root growth.

"In June of 1993, a phosphorus fertilizer was added to the wetland. Within three weeks, the nitrate concentration in the wetland discharge dropped from 24 milligrams per liter (mg/l) as N to 9.24 mg/l as N.

"Also the dissolved oxygen fell from 2 mg/l to essentially zero."

What that means is that the lack of phosphorus in the groundwater limited the ability of bacteria, microbes and plants to grow and thus use the nitrates as energy.

That has implications that more research is needed on the construction and maintenance of artificial wetlands, among other things.

However, the technique of recovery of groundwater for treatment is similar to the systems used at landfills to collect leachate.

This year, the SRBC plans to expand its study by developing a similar research plot on a Lancaster County farm, according to Larry Taylor, a hydrogeologist with the SRBC.

Taylor is one of three authors of the study sponsored by the SRBC, "Water Quality and Hydrogeology of Two Small Agricultural Basins in Central Pennsylvania."

The other two authors are Robert Edwards, environmental specialist, and Charles Takita, sanitary engineer.

On Tuesday, Taylor and John Graham, an SRBC civil engineer, were at the site to explain its development, the design of the study, the findings and limitations of any information derived.

The SRBC is a single, federal-interstate agency that was formed by a compact between Maryland, New York, Pennsylvania and the federal government during the 1970s.

Its goal is to serve as the single water resources agency with authority throughout the entire Susquehanna River Basin to effect coordinated control of the use of water resources by governmental and private interests

The continuation of the existing study areas, and the creation of a third hinges on adequate funding. The SRBC receives funds from the states involved and the federal government.

Under the Reagan-Bush administrations, according to researchers, funding for such projects was reduced and there is uncertainty about public policy to fund continued efforts to seek better knowledge in the flow of groundwater and nutrients.

This particular study was done for the purpose of furthering more specific and reliable information on the nature of groundwater under two specific farm sites.

Study May Help Nutrient Management

But, according to researchers, the data suggests that it may be possible to use the information to better design a nutrient containment and/or treatment system for use on-farm.

According to Taylor, though it is too soon to advise the use of such a system, this research, particularly that done at the study site near Halifax, may one day serve as the basis of a Best Management Practice (BMP) for nutrient management in some farming situations.

Based on their conclusions, the authors state in their recommendations that, "Concepts developed from the existing projects should be utilized in a study of the entire Armstrong Creek basin. From this, estimates could be made of the potential nutrient reduction that could be obtained by collecting and treating localized groundwater discharges using field drains and constructed wetlands."

It should be understood that the goal of nutrient management is not to reduce the proper use of nutrients.

The goal of nutrient management is to prevent uncontrolled amounts of nutrients, primarily nitrogen, from creating an overabundance of nutrients in aquatic systems.

The difficulty in doing so is that, while a visual inspection of a particular operation in a sub-basin may not appear to be significant in contaminating water sources, it may very well be a significant factor in local or distant nutrient pollution.

The goal of the law is to reduce excessive levels of nutrients from getting into surface and groundwaters, particularly by requiring high risk operations to develop and use plans for the containment and control of nutrients.

Manure is seen as a major sources of nutrients, although feed, carcasses, and other organic matter that could decompose into basic nutrients are also to be considered.

A definition of high risk operations, though still legally incomplete, would include high-density livestock operators.

Other high risk operations could be defined as those in which the level of competancy or concern of its operator to implement reasonable nutrient controls is apparently low.

Study Isolates Flows

In general, the report showed that nutrients being applied to the land can be contained in "shallow groundwater" if the shallow groundwater can be captured through the use of drainage pipes and directed to a single collectin site.

According to the research, th field drain collected about 43 per cent of the water, while about 4 percent was attributed to los through evapotranspiration. Abou 4 percent of the rainfall actuall was surface runoff and another percent of the total was attribute to loss as getting past the collectio system.

The study notes that while mea sures to control soil erosion hav been successful in containing sur face water, they also aid in direct ing water to filter through th ground, carrying nutrients.

A combination of drains an erosion control devices may even tually be prescribed as a technique for farming in certain situations

Clugston said he raises primari ly corn and alfalfa, and double crops with rye. For the last si years he's also been trying to rais Sudex as an alternative ensilin crop, which he said is a "chal lenge" to use.

The farm soils are primarily sec ond and third class, he said.

Clugston said he enjoys work ing with different types of researcl because he also learns. He said he didn't have the educational opportunities growing up, but he does have educational desire.

"Maybe that's why these types of projects fascinate me," he said.

TOTAL P.09

What researchers have been working with is a 10.9-acre self-contained watershed valley on Clugston's farm that has a natural small spring.

The center of the valley had originally been a wet, soggy, tree-line area until Clugston installed field drains according to his conservation plan created by the USDA's Soil Conservation District. The area had been considered highly erodible land.

Those field drains, according to researchers, were dug deep enough that researchers said they think the drains have been collecting all the shallow ground water from the field.

To treat the collected water, two 20-foot, by 50-foot, by 3-foot-deep rectangular artificial wetlands were constructed.

The first wetland was made five years ago, but it was put in during a dry period. Last year, a second biological filter was installed, after researchers experienced two years of more normal rainfall and discovered that the first wetland couldn't handle the flow.

The research data shows that high nitrate levels in the shallow groundwater, attributable to the use of manure fertilizer on the watershed, seemed to be contained in that layer of groundwater; and that the wetlands plants and microbes consumed the energy from the nitrates, converting it to N2

tutes 78 percent of the earth's atmosphere and is considered a reservior of nitrogen that is not immediately available for use by plants and animals as a nutrient.

The report lists four conclusions reached by its authors:

- "Nitrification is an important process influencing the quality of recharge to the ground water system at both farm sites.
- "The nitrate concentration in ground water decreases with increasing depth below the water table. Thus, the depth to the shallowest water-bearing zone is an important factor in determining the degree that the quality of groundwater produced by a well will be influenced by agricultural activities
- "In the rolling topography, as characterized by areas underlain by the Catskill Formation, field drains can be designed to capture a significant portion of the recharge to the ground water system; perhaps limiting the spread of nutrient contaminated ground water. The nutrient rich water can be treated using small, artificial wetlands.
- "Application timing and rates, and types of fertilizer may be important factors in the quality of recharge water, however, soil conditions, depth of water table, depth of water bearing zones, and natural chemical character of the ground water (either oxic or anoxic) are important considerations with respect to the degree the ground water will be contaminated."

What it means is that researchers are saying that it is possible to protect the movement of nutrients into deep groundwater by using a drainage system to collect rainwater filtering down through the earth and then treating or using that water.

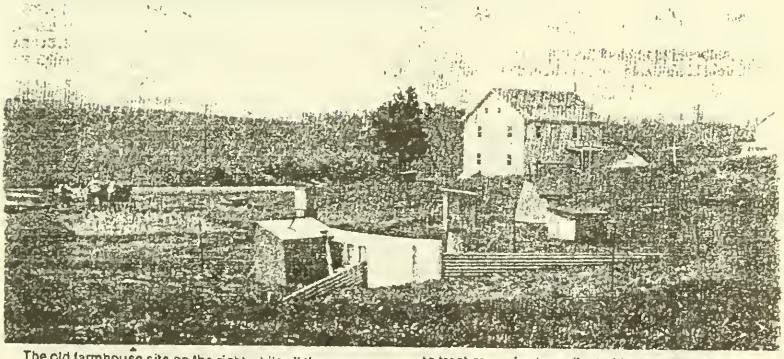
While the researchers used "artificial wetlands" to use up nitrates in the collected groundwater, they said it is theoretically possible to use those nutrients in that water to operate a hydroponics facility.

They said they did have a problem getting enough phosphorus as a nutrient from the groundwater, despite the fact that Clugston uses almost all cow and poultry manure to fertilize.

In the report's comments on the effectiveness of the constructed artificial wetlands, which were designed using the same principles that would be used to construct a biological filter for waste water treatment, the researchers said that the lack of adequate phosphorus in the groundwater limited the ability of the wetlands to use up nitrates.

"Although there had been a small reduction in the nitrate in the

(Turn to Page A34)



The old farmhouse sits on the right while all the measuring devices are in the foreground and researchers and others stand on the far side of an artificial wetland created to treat groundwater collected from a 10-acre watershed is all part of a research program designed to monitor th flow of water and nutrients in a real farming situatio

SRBC Reports Tests On Flow Of Nutrients In Groundwater

VERNON ACHENBACH JR.
Lancaster Farming Staff

HALIFAX (Dauphin Co.) — The Susquehanna River Basin Commission this week published what appears to be a seminal study into the control of flow of nitrogen into groundwater, based on more than five years' worth of data from two small areas of study in Dauphin County.

The report was released Tuesday to *Lancaster Farming* during an onsite tour of one of the farms

(Turn to Page A32)

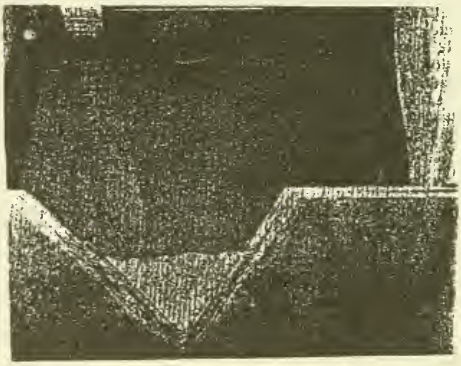
The study was jointly financed by the SRBC and the federal Environmental Protection Agency.

The farm toured Tuesday was the 219-tillable-acre dairy and poultry farm of Paul Clugston, located near Halifax. He milks 103 Holsteins in a commercial herd and raises approximately 92 replacement heifers and calves. He also has 65,000 broilers under contract to Pennfield Corp.

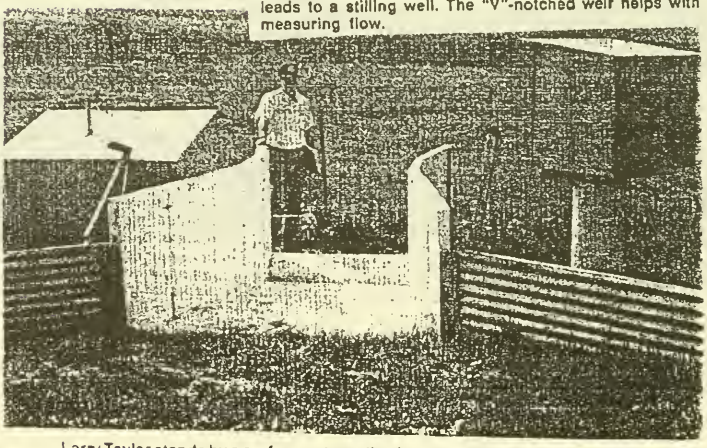
Clugston has been cooperating with nutrient studies for years, and has been involved with several different agencies interested in work versity looked into nutrient cycle at the site. Their work involve measuring amounts of nutrient put on the soil and amount removed.

The SRBC studies were diffe rent in that they focused on mea suring water flows, the nutrien levels in water flows, and also th effectiveness of artificial wetland in removing nitrates from th water.

Because of problems with th design of the second study area at farm near Enterline, much of th monitoring there wa discontinued.



The pipe at the top of the photograph is a drainage pipe that was installed as part of an USDA SCS erosion control plan. The pipe was sectioned and this measurement box installed by researchers in order to measure the rate of flow and also to take water samples. The small pipe on the right leads to a stilling well. The "V"-notched weir helps with measuring flow.



Larry Taylor stands by a surface water collection flume. Water flow is automatically recorded and samples of surface water are automatically taken by the equipment housed in boxes.

WATER QUALITY INCENTIVE PROJECT

WQIP is designed to achieve source reduction of nonpoint source agricultural pollutants in an environmentally and economically sound manner.

Incentive payments will be made for management practices, not structural practices.

The current management system must be impacting or have the potential to impact a water source, to be eligible.

The land must be located within the project area.

Exception:

If two-thirds of a field is within the project area, the entire field is eligible.

PAYMENT LIMITATION

Incentive payments are limited to $25 per acre per year.

Incentive payments are considered towards the $3500 per FY ACP limitation.

Producers must have a Conservation Farm Plan on all farms they own or operate.

WQIP COMPONENTS AVAILABLE

	CODE	LIFE SPAN	PAYMENT
Conservation Cover	327	3	$15 Not to Exceed
Conservation Cropping Sequence	328	3	5/acre
Conservation Tillage	329	1	12/acre
Contour Farming	330	3	12/acre
Cover and Green Manure Crop	340	1	12/acre
Critical Area Planting	342	5	35/acre
Crop Residue Use	344	1	5/acre
Grass and Legumes in Rotation	411	3	15/acre
Integrated Crop Management System	590	1	7/acre row crops
	595		14/acre specialty
	633		
	327		
Livestock Exclusion	472	1	7/acre
Pasture and Hayland Management	510	1	7/acre
Pasture and Hayland Planting	512	3	15/acre
Planned Grazing System	556	3	2/acre
Proper Grazing Use	528	1	3/acre
Record Keeping	991	1	.25/acre
Regulating Water in Drainage System	554	1	10/acre
Row Arrangement	557	1	12/acre
Strip Cropping			
Contour	585	3	7/acre
Field	586	3	7/acre
Waste Management System	312	3	.01/per cubic ft
Waste Utilization	633	1	.03/per cubic ft (on farm)
			.05/per cubic ft (off farm)
Well Testing	990	1	90/per WQRMP
Wildlife Upland Habitat Management	645	1	10/acre
Wildlife Wetland Habitat Management	644	1	10/acre

** TOTAL PAGE.883 **

Table 2: Draft 40% Nutrient Reduction Strategy

Upper Eastern Tributary See strategy documentation for explanation of options, additional benefits and draft strategy selection process

Option	Unit	Accomplishments by 2000 with Existing Resources	Accomplishments by 2000 with Maximum Feasible Resources	Draft 40% Strategy Coverage	N Load Reduction w/ 40% Strategy Coverage (lbs/yr)	P Load Reduction w/ 40% Strategy Coverage (lbs/yr)
Biological Nutrient Removal**	# of plants	4	6	6	124,800	2,200
Erosion and Sediment Control	acres	1,047	1,047	1,047	7,135	2,512
Enhanced Stormwater Management	acres	7,328	7,328	7,328	16,632	1,776
Stormwater Management Retrofits	acres	295	737	295	672	71
Stormwater Management Conversio	acres	76	161	76	172	18
Septic pumping	systems	?	1,594	169	402	0
Septic Denitrification	systems	?	77			
Septic Connection to Sewer	systems	?	60			
Urban Nutrient Management	acres	?	4,800	480	480	48
Domestic Animal Waste Man.	acres	?	1,960	195	390	137
Clustering of New Development	acres	?	660			
Soil Cons./Water Qual Plan Impl.	acres	36,808	85,884	36,808	47,850	7,367
Conservation Tillage	acres	48,078	67,309	48,078	127,889	19,231
Treatment of Highly Erodible Land	acres	3,126	3,125	3,126	6,250	1,563
Retirement of Highly Erodible Land	acres	3	?			
Animal Waste Management System	acres	176	198	176	114,048	22,800
Runoff Control (lbs./unit)	acres	150	159	150	13,050	2,700
Stream Protection with Fencing	acres	16	81	16	43	2
Stream Protection without Fencing	acres	32	162	32	46	3
Nutrient Management Planning	acres	210,236	226,761	210,236	632,864	21,024
Cover Crops	acres	19,182	31,970	19,182	149,620	3,836
Buffers						
Forest (overall)	acres	1,410	2,020	1,410	75,737	3,187
Forest (on ag land)	acres	?	?			
Forest (on developed land)	acres	?	?			
Grassed (on ag land)	acres	1,521	2,535	1,521	27,378	3,042
Structural Shore Erosion Control	linear feet	4,620	61,250	4,620	13,398	0,778
Nonstructural Shore Erosion Control	linear feet	8,940	87,650	8,940	17,516	8,046
Forest Conservation	acres	1,466	1,466	1,466	16,356	1,411
Tree Planting	acres	1,110	2,250	1,110	3,785	511
Forest Harvesting Practices	acres	885	1,576	1,576	1,734	1,135
Marine Pumpouts (installation)	marinas	25	53	25	22,500	4,950
Pumpout Education	boaters	1,460	5,255	3,153	*	*
					1.4	0.12

** Assumes plant designed for seasonal BNR will be operated year-round, point source strategy includes chemical phosphorus removal to 1.5 mg/l

? This information is not currently available

* Loads are not computed for these options because loading reduction rates have not been quantified

< Sum of Reductions (million lbs/yr)

(sum has been rounded to the nearest 100,000 lbs for N and nearest 10,000 lbs for P)

Nitrogen (million lbs/yr)	Phosphorus (million lbs/yr)	
5.6	0.44	< 1985 Base Load (from Table 1)
4.2	0.29	< Loading Cap (from Table 1)
5.6	0.36	< Projected total load in 2000 with current reductions
-1.4	-0.12	< Subtract the sum of reductions (million lbs/yr) from the projected 2000 Total Load
---	---	
4.1	0.25	< 2000 Total Load with 40% Strategy (projected 2000 load - sum of reductions)
-1%	-15%	< % over (+) or under (-) the Loading Cap

Most options have benefits in addition to nutrient reduction, for example, forest buffers provide wildlife habitat, stormwater management prevents erosion, etc

TESTIMONY BEFORE

THE WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE OF THE HOUSE

PUBLIC WORKS AND TRANSPORTATION COMMITTEE OF THE

UNITED STATES HOUSE OF REPRESENTATIVES

BY

THOMAS C. JORLING,

VICE PRESIDENT, ENVIRONMENTAL AFFAIRS

INTERNATIONAL PAPER

May 26, 1994

Mr. Chairman, I'm Thomas C. Jorling, Vice President, Environmental Affairs for International Paper. As you know, I have appeared before this committee before during my tenure as Commissioner of the New York State Department of Environmental Conservation. Thank you for the opportunity to appear today on behalf of International Paper and to present our company's views on several key aspects of the ongoing Clean Water Act re-authorization debate.

International Paper is the world's largest forest products and paper company and employs 75,000 people worldwide with 50,000 in the United States alone. The company is the nation's 31st largest industrial corporation. We have manufacturing and converting operations in 27 countries and export products to more than 130 nations. We have 237 manufacturing facilities throughout the country, whose operations are affected by point source provisions of the existing Clean Water Act, and whose financial viability will be adversely impacted by some of the proposals under consideration during the re-authorization process. Additionally, the company owns over 6 million acres of forest land in the Southeast, Northeast, and Northwest. International Paper has owned and managed forest land since its founding in 1898. Throughout our history, we have demonstrated repeatedly our ability to conduct on-going forestry on our lands without significant threat to water quality. Some of the nonpoint source proposals under consideration at present have the potential to adversely impact our ability to continue to profitably manage these lands.

International Paper is committed to making environmental considerations a priority in our daily operations. Our facility managers must, and I repeat must, comply with all environment, health and safety laws and regulations. Facility production is reduced or shut down entirely when the potential for violation of a law or regulation exists. The protection and viability of the nation's waters are critical

societal needs. We believe that these needs are being met effectively with the current Clean Water Act, as evidenced by the significant improvement in the nation's water quality over the past 20 years. Clearly, significant and sufficient attention has been paid to point sources over the years. We have yet to see the full impact of some point source requirements of the existing Act because some of the 1987 provisions are not yet implemented. An excellent case in point is the effluent guidelines being proposed under the Cluster Rulemaking.

International Paper believes that the existing Clean Water Act provides the EPA with the authority to maintain, protect and continue to improve the nation's waters. Full implementation of the 1987 Clean Water Act amendments would provide EPA with the environmental benefits sought under many of the re-authorization proposals before Congress. Passage of these bills will restrict the ability of states and industry to develop innovative approaches to achieve compliance with the goals of the Clean Water Act. We strongly believe that the result would be dramatically increased compliance costs without providing national environmental benefit.

I'd like to discuss some specific aspects of the proposed re-authorization with you today and do so from the essential starting points for any consideration of amendments to the Clean Water Act:

First, a review of what has worked - and a great deal has worked because the waters are much cleaner and safer than in the late 1960's when the federal efforts began in earnest;

Second, a careful review of what water quality problems remain, and there are some, as the section 305(b) report documents;

Third, careful evaluation of the allocation and best and most cost effective use of very scarce public and private resources.

1. What works: The regulation of industrial point sources, under section 301 and 402, including toxics, has been a remarkable success story. Review of the 305(b) report reveals few waters not meeting water quality standards for toxics or other parameters as a result of current industrial discharges. The authorized program for control for municipal POTW discharges, including pretreatment, has also proven its efficacy. Where performance has fallen short, it hasn't been because of authority, it has been because of resource shortages, which will be addressed by the proposed amendments to the SRF, or a lack of political accountability, as is the case in Boston.

There are still difficult issues, such as contaminated sediment, and the employment of cost effective bioassays. But there are not gaps in statutory authority. Steadfast implementation is the key here.

2. What water quality problems remain: The report prepared by the states and EPA under section 305(b) instructs all of us, especially Congress, where the most serious water quality problems are and the major contributing factors to them. In addition to confirming that the remaining problems are not caused by industrial point sources, this report confirms the problems are nonpoint source and airborne source related with some significant municipal source point, especially including CSOs.

Several amendments have been proposed to address those areas, that if crafted properly, will address these serious problems: watershed planning and management, nonpoint source controls, the SRF, and wetlands.

Watershed Planning and Management

Substantial institutional barriers will make implementation of a comprehensive watershed planning and management program extremely difficult. Since no single institution oversees all watershed activities, the decision making process will be complex. Clearly, a federally mandated, one-size-fits-all approach to watershed management will be unworkable. This does not mean that watershed planning should be discarded as a potential tool for addressing water quality issues, however. Congressional direction and support, financially and technically, as a flexible instrument is most appropriate.

International Paper therefore supports watershed planning as a means to target scarce public and private resources. We clearly do not have all the money and other resources needed to fully address the nation's concerns, including those of water quality. By effectively using a watershed approach, we can allocate our resources to those activities which offer the greatest potential benefit. By documenting and analyzing the total pollutant load in a watershed, one can determine where the greatest return can be achieved for the investment of limited dollars. For example, one might find that it is most cost effective to install settling ponds at a key agricultural source before requiring any further point source curtail throughout the watershed. Given the unique character of individual watershed, it is critical that the states be allowed to approach watershed planning in ways best suited to their individual circumstances.

New authority should be carefully crafted to build on existing programs and to accommodate the great variety of circumstances that exist across the country. I can speak to this point from my personal experience in New York state. At present, New York is developing a watershed plan for the New York City Catskill-Delaware-Croton Watershed, after determining that the watershed approach is more

economically viable and environmentally sound than building a filtration system for the water supply of New York City. This activity is being pursued under state law and should be incorporated, not overridden by a new federal program. And just as clearly, watershed planning will not work unless the process and the resultant plans are specifically tailored to local watershed conditions and state capabilities to implement them.

Nonpoint Source Pollution

International Paper believes that additional steps need to be taken to address nonpoint source pollution in the country. Interestingly, during the re-authorization debate, substantial attention is being targeted at forestry which is a minor part of the nonpoint source problem. According to the U.S. Environmental Protection Agency's "National Water Quality Inventory: 1990 Report to Congress," silviculture as a source for water pollution is negligible, especially when compared to other sources such as urban development and agriculture. Again, we are concerned that the nation's limited resources be targeted at major sources of nonpoint source pollution so that the greatest benefit can be achieved from our investment.

Additionally, it is key that provisions not be enacted that will decrease the financial viability of owning and managing forest lands. Without question, forestry is the land use that is most compatible with maintaining water quality. Ongoing forestry, as practiced by International Paper, clearly protects water quality better than is possible under other land uses. International Paper establishes streamside management zones along major streams and water bodies to protect water quality while at the same time providing travel corridors and habitat diversity for wildlife. In fact, our company leads the industry in integrating forest management with wildlife habitat protection. For over three decades, our internal forestry research

program has continually sought ways to improve our ability to obtain acceptable economic returns from our forests while protecting environmental quality for the long-term. Since well managed silvicultural activities contribute minimally to nonpoint source pollution, regulatory requirements should not discourage ongoing forestry activities. Any provisions that make it more expensive to practice forestry serve as incentives to remove land from forestry, thereby putting the nation's water quality at increased risk. This is not restricted to companies such as International Paper, but is also the case for smaller nonindustrial private landowners who rely on economic return from management of their forests. We need to work to assure that disincentives to forest land ownership and management do not result in conversion of forests to other uses.

Existing state nonpoint source pollution control programs, where adequately funded and implemented, effectively protect water quality. The key is to provide adequate funding under Section 319 so that the degree to which these programs can be implemented can be substantially increased. Finding all existing state nonpoint programs insufficient to protect water quality and imposing an inflexible, federally mandated program in their place is ill-advised.

Nonpoint source pollution control is best accomplished through state programs that can be tailored to the land uses and site conditions present within the state. The manner in which states have adopted best management practices for forestry operations can serve as an effective model for expanded efforts to address other sources of nonpoint source pollution, such as urban development and agriculture.

All 38 major timber-producing states have adopted voluntary best management practices for forestry or have enacted forest practices acts. Where sufficient funding has been available to develop comprehensive BMPs and to educate

landowners about their value, implementation of voluntary BMPs has been widespread and highly effective in protecting water quality. States with good BMP programs include North Carolina, South Carolina, Virginia, and New York. In our case, International Paper has had written forest management guidelines for over a decade. At present, we have strict internal Forest Environmental Quality Guidelines for forestry operations and compliance to these guidelines is mandatory on company land. In some states in which we operate, our mandatory guidelines exceed voluntary state BMPs.

We at International Paper have concluded that enforceable BMP programs related to water quality are warranted in states that a voluntary program has not gained the desired results. However, -- and I can't emphasize this strongly enough -- we do not support an inflexible, federal program of mandatory BMPs that would be arbitrarily forced on the states. Without doubt, nonpoint source pollution control is best accomplished through state programs. Enforceable BMP programs should be developed by the states so that programs will be best suited to each state's individual circumstances. Additionally, such programs should cover all sources of nonpoint source pollution, should be targeted at bad actors, and most importantly should be tied directly to meeting water quality standards rather than mandating specific management practices or administrative procedures. We must continue to focus our limited fiscal resources on the biggest problems in a way that will allow us to achieve the greatest benefit.

Mr. Chairman, since early last year, the forest products industry has been working to develop sustainable forestry principles and implementation guidelines. In these principles, the industry will pledge to practice sustainable forestry on its lands and will work to see that it is practiced on all forest lands. The industry under the plan will practice a forest stewardship ethic which integrates the growing,

nurturing, and harvesting of trees for useful products with the conservation of soil, air, water, wildlife, and fish habitats. The industry supports and will promote on its forestland sustainable forestry practices which integrate the production of wood and paper products with other environmental benefits. Hopefully, these principles will be approved in July and implemented shortly thereafter.

Wetlands

On-going forestry in jurisdictional wetlands is exempted from some of the permitting provisions of the Clean Water Act in what is commonly referred to as the silvicultural exemption. Regulatory agencies have been attempting to substantially narrow the scope of the exemption in spite of Congressional intent to the contrary. The re-authorized Clean Water Act should maintain the silvicultural exemption without any narrowing of its scope. Any restriction of the existing exemption would have an adverse impact on silvicultural activities resulting in increased operating costs for no measurable environmental benefit. Increased costs will make it less economically viable for landowners to maintain land in forest cover, and ironically, if the forest management purpose is lost, surely the wetlands will be jeopardized.

In conclusion, let me re-emphasize several key conclusions that International Paper has reached in its analysis of the ongoing Clean Water Act re-authorization process:

- International Paper believes that the existing point source and toxic control authority of the Clean Water Act is sufficient to maintain, protect and continue to improve the nation's water quality.
- We strongly oppose any provisions in a re-authorized Clean Water Act that will dramatically increase compliance costs without providing benefits through increased quality of the nation's waters.

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- International Paper believes that the concept of watershed planning and management is the proven vehicle to direct cost effective strategies to bring degraded waters up to the quality established by the water quality standards. When properly implemented, such an approach can assure that limited fiscal resources are targeted at the most significant water quality problems. To be successful, watershed planning must be conducted at the state level, tailored to specific characteristics of individual watersheds, and integrated where appropriate with ongoing watershed planning programs. A one-size-fits-all federally mandated approach is doomed to failure.
- International Paper believes that additional steps need to be taken to address nonpoint source pollution in the country and that such steps should be directed at the major nonpoint source problems. Nonpoint source pollution control is best addressed through state programs tailored to local conditions. Forestry best management practices programs in place at the state level provide an excellent model for other nonpoint sources.
- International Paper supports enforceable BMP programs, but only if they are developed at the state level, cover all nonpoint sources, are targeted at bad actors, and are tied directly to meeting water quality standards rather than mandating specific management practices or administrative procedures. We strongly oppose an inflexible, federal program of mandatory BMPs that would be arbitrarily imposed on the states.
- We strongly support maintaining the wetlands silvicultural exemption without any narrowing of its scope.

Thank you, Mr. Chairman. I'd be pleased to answer any questions that you or other members of the committee have.

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Statement of the

NATIONAL PORK PRODUCERS COUNCIL

Before the

Subcommittee on Water Resources and Environment

of the

Committee on Public Works and Transportation

U.S. House of Representatives

on H.R. 3948, the "Water Quality Act 1994"

May 26, 1994

Presented by:
Jerry King
Chairman, Environmental Committee
National Pork Producers Council
Victoria, Illinois

Dear Mr. Chairman and Members of the Committee:

My name is Jerry King and I am a pork producer from Victoria, Illinois. I'm presenting this testimony today on behalf of the National Pork Producers Council (NPPC). NPPC is a trade association that represents over 85,000 pork producers around the country through 45 state affiliates.

We certainly appreciate this opportunity to testify on the Clean Water Act. This legislation has resulted in a dramatic improvement in our nation's waters over the last two decades. However, despite remarkable progress in reducing water pollution, we recognize that difficult water quality problems remain.

Environmental Education and Demonstration

While regulation will always be the principal means of enforcing environmental quality, the Environmental Protection Agency and industry recognize that there are non-regulatory alternatives for ensuring our nation's environmental goals. Specifically, the pork industry has developed a national environmental education program that relies on the expertise of federal and regional EPA staff as well as state quality agency personnel.

In my home state of Illinois for instance, pork producers organized a series of educational workshops aimed at helping livestock producers understand current state regulations. The workshops, which included participation by the U.S. Department of Agriculture's Soil Conservation Service, the Illinois EPA, and private industry, also provided producers information on how to improve their environmental management program.

Nationally, pork producers have conducted workshops in 13 states reaching nearly 5,000 producers. These programs would not have been possible without the support of the EPA and individual state water quality agencies.

Funding for Section 319 of the 1987 Clean Water Act

We believe the EPA and states are making tremendous progress in addressing water pollution through the state-by-state implementation of the Section 319 Program authorized in the 1987 Clean Water Act, even though significant funding was not made available until 1990.

This Committee well knows that Section 319 called for states to develop plans and implement voluntary programs to begin addressing critical nonpoint source water quality issues. Section 319 sets forth a watershed-based approach that concentrates efforts on the site-specific problems affecting critical watersheds.

As the Committee works to reauthorize the Clean Water Act, nonpoint source pollution is a focus of the debate, with many calling for mandatory instead of voluntary programs. I would argue, however, that we have not given the Section 319 program enough time or opportunity to work.

It is unfortunate that the Section 319 program has not been fully funded by Congress. The voluntary nature of this program makes it ideal for addressing environmental issues with a least cost approach that avoids the heavy cost, and the heavy hand, of regulation. In spite of these advantages, Congress has only appropriated about $270 million for the Section 319 program since it was established seven years ago.

Last year's increase in Section 319 funding to $80 million has been a critical step in supporting state nonpoint source pollution programs. If, however, nonpoint source pollution is going to be a priority for Congress and the EPA, then funding for the nonpoint source programs should mirror that priority.

Section 319 and the Livestock Industry

There are hundreds of examples across the country where Section 319 projects are having a positive impact on environmental management within the livestock industry. For example, in Iowa, Section 319 funding has helped develop a concentrated animal feeding operations booklet which clearly defines what producers must do to comply with the federal Clean Water Act and state water quality laws. Iowa has also developed a ground water monitoring project and an intensive county-wide, livestock manure management project.

In Missouri, the state Department of Natural Resources is setting up local watershed alliances which will bring interested and affected parties to the table to develop watershed-based solutions. The state of Ohio has used Section 319 funding to develop new best management practices that reduce over-fertilization and encourage the proper use of animal manures in a cropping system. And finally, in my own state of Illinois, the Illinois EPA is conducting education programs, like the workshops I mentioned earlier, and has set up a Watershed Tracking System that monitors the application of best management practices and the resulting water quality benefits.

These are just a few examples of how the 319 Program can work, but its success remains linked to the amount of funding that is made available by Congress. The 1987 Clean Water Act directed states to develop and implement nonpoint source pollution programs, and even though Congress has not responded with the necessary funds, states have struggled hard to follow the mandates of the law. In order to fully address nonpoint source pollution, Congress must come forward with sufficient funding for EPA and

the states through the 319 Program.

Agriculture Programs Complement Section 319

In addition to Section 319, we have other programs at the federal, state and local level that must be fully funded and coordinated with the Clean Water Act. These programs include the soil conservation and water quality provisions in the 1985 and 1990 Farm Bills, and the state ground water surface water protection programs of The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The point is that the Clean Water Act does not stand alone in protecting our nation's waters from nonpoint source pollution.

Where do we go from here?

In briefly discussing the programs outside the Clean Water Act and the need for fully funding the existing 319 Program, we are not suggesting that we are opposed to any changes in the current Clean Water Act. We think the reauthorization process provides a great opportunity to refocus our efforts and resources to those areas where we can make the most significant impact on improving the quality of our waters.

Recognizing the 20-year, multi-billion dollar commitment Congress has made to eliminate point source pollution, success in reducing the more complex and diverse nonpoint source pollution (NPS) will require similar time and a strong positive commitment from the private sector because the federal government simply does not have $20 billion dollars to spend on the NPS issue. To be effective in tackling this problem, we will need an entirely different approach than that of point source elimination. Unlike point source pollution, NPS is primarily a weather-related phenomenon that can be managed, but not feasibly eliminated.

The central focus of NPS management solutions should be a reasonable and voluntary approach based on incentives, education and technical assistance as the primary means of managing NPS pollution. The National Pork Producers Council has had great success with such an approach, through our Pork Quality Assurance Program, which is designed to ensure that producers properly handle and administer animal health products.

NPPC continues to search for creative solutions to address water quality issues. In addition to being the first agricultural commodity organization to develop an environmental guide for our producers, we are now exploring the initiation of an "Environmental Assurance Program" for pork producers.

Under an amended Clean Water Act livestock producers should be allowed to use a combination of existing voluntary programs, new technologies, and

innovative approaches to protect water quality. Such a comprehensive program should minimize excessive capital investment and the regulatory burden associated with environmental management.

New and existing water quality programs can be integrated to make them truly effective for livestock producers. These programs must also be designed to address local water quality conditions and be implemented on a watershed level. Additional incentives, such as those found in USDA water quality programs, together with access to new options will assist producers in developing and implementing their own individual comprehensive water quality protection plans.

We also strongly believe that the watershed management efforts of Section 319 should be directed to priority areas based on scientific assessments that identify water bodies with impaired or threatened uses. States should have primacy in determining priority of watersheds for management measures and flexibility in developing strategies for addressing water quality concerns.

H.R. 3948 and the Livestock Industry

Given the aforementioned backdrop to the current debate on the Clean Water Act, we welcome this forum to comment on H.R. 3948, the "Water Quality Act of 1994."

Mr. Chairman, we commend you for your leadership on this extremely complex and delicate piece of legislation that has great implications for the long-term viability of livestock production in this country. As we continue to face heavily subsidized foreign competition in the international marketplace, we simply cannot afford to comply with untested measures that are inflexible, prescriptive in nature, and require unnecessary capital investments.

In this vein, we offer the following comments and recommendations as constructive information on the various provisions of H.R. 3948.

Antidegradation -- Section 303 of the bill requires each state to develop a statewide antidegradation policy within two years of enactment of the legislation. If the quality of water is better than "fishable and swimmable," then that level must be maintained even if it's cleaner than needed to maintain the existing designated use. We believe that the antidegradation provisions in current law are more than sufficient to protect water quality.

"Outstanding National Resource Waters" (ONRW)-- These waters are especially protected, including all waters within national parks and wilderness areas, any waters of exceptional recreational or ecological significance, and any other high quality waters the state designates.

These provisions have the potential to significantly limit the growth of livestock production, especially in those watersheds upstream of ONRW areas. In many instances, development in these areas will be prevented or will be required to implement more stringent controls than elsewhere.

Livestock producers seeking to expand their existing operation or seeking to construct new operations in a state, could also run into problems with the antidegradation provisions. The simple expansion of existing livestock operations may necessitate an extensive waiver process, whereby livestock producers and the state will be required to provide substantial information to EPA to justify waivers of the antidegradation policy. This means that normal expansion and growth in the livestock industry in a particular state could be severely disrupted if the state in question is without adequate resources to comply with this new procedure.

Enforcement -- The enforcement provisions of H.R. 3948 significantly expand EPA authority and focus on punitive measures rather than encouraging compliance. These primarily affect point sources with a provision allowing for citizen suits to be filed within six months of the wholly past violation that may have already been corrected.

The bill would require minimum civil penalties against polluters equal to any economic benefits derived from the violative discharge. The problem with this provision is that there may be situations where the "violator" did not knowingly or wilfully pollute. If there is an excessive storm event that leads to runoff beyond the control of the producer, shouldn't this be a mitigating circumstance calling for a reduced penalty from sanctions in the amount of full economic benefit? Last summer's excessive chronic rains that caused devastating floods in the Midwest, clearly demonstrates that there are certain events that are well beyond anyone's control.

We are also extremely concerned about the "bounty hunter" provision of Section 310(h) of the bill. Bounty hunters could receive up to $50,000 for bringing in violators. This bounty provision is clearly ripe for abuse. One could envision a person signing up as a volunteer for the citizen monitoring program and gathering information for sale to bounty hunters.

The net result is likely to be a major increase in administrative penalties, with lawsuits of both a civil and criminal nature filed against individual livestock producers, and even environmental enforcement authorities.

We believe that we should focus the limited resources we have on water quality improvement and not on defending ourselves against lawsuits. Rather than hiring environmental lawyers, we should be working with technical experts on improvements in our operations. In that regard, we would recommend that the Committee exempt nonpoint agricultural sources of pollution from lawsuits filed under the Clean Water Act. We

should avoid effectively setting up a new "revolving fund" for environmental lawyers that will result from expanded opportunities for litigation.

Citizen Monitoring -- We believe it would be a mistake for Congress to mandate a new citizen monitoring program as outlined in Section 307 of the bill. While some citizen's groups genuinely believe there monitoring efforts are filling a void left by inadequate government monitoring capabilities, we need to be especially diligent that the actual data collected is not used for inappropriate purposes. Rather than subsidizing citizen monitoring, Congress should make sure the government agencies assigned with enforcing environmental laws have the resources to perform their task thoroughly.

All Agricultural Producers Face Mandates -- The bill appears to subject all nonpoint sources to mandatory controls, without consideration for whether they are located in areas with impaired waters. We believe that scarce resources should be directed to the minority of waters deemed to be impaired.

Recognition of Background Levels -- H.R. 3948 fails to recognize background levels of pollution that exceed water quality standards. Many pollutants are either naturally occurring or have resulted from an accumulation of man-made activities over a several year period prior to ownership by the current landowner. Livestock producers should not be held accountable for and exposed to liability for background levels of pollution caused by circumstances that predate their farm operation activities.

Unfunded Mandates -- The bill does not address the issue of funding shortfalls. The bill should provide that deadlines for states and agricultural producers be adjusted in the event of insufficient federal appropriations to carry out the new mandates. The federal government cannot continue to develop laws and regulations without fully recognizing that the additional costs of implementation will be passed on to someone down the line.

Positive Features of H.R. 3948

We are particularly encouraged by the authorized levels of funding for the Section 319 program and the State Revolving Fund. Recognition of site-specific planning together with acknowlegement of a number of existing U.S Department of Agriculture programs and state programs are all positive provisions that will assist agricultural producers in meeting new water quality challenges. New provisions for construction grants and other provisions that offer incentives and stimulate innovative approaches are certainly welcome.

Bipartisan Alternative

This proposal offers more flexibility to meet the objective of improving water quality, while minimizing the costs of reaching this important goal. We specifically agree with the approach that encourages positive state participation in managing nonpoint source pollution.

While not analyzing the proposal in detail, we are particularly supportive of the provision that addresses the significant problem of funding shortfalls. The bipartisan proposal amends Section 319 to allow nonpoint source deadlines to be postponed for one year whenever actual amounts appropriated by Congress fall short of nonpoint source program authorization levels. This provision is critical to Congressional credibility, because it demonstrates that the federal government is financially committed to its role and responsibility in improving our nation's water quality.

Conclusion

U.S. pork producers recognize the important role we must play in protecting the environment. We are ready to work with this Committee to support the voluntary programs that are having a positive effect on both our industry and the environment.

Since American pork production is not directly subsidized by the government, our producers traditionally eschew government involvement. We are opposed to "command-and-control" style regulation and expanded bureaucracies within the government. There is a critical coordinating role government must play, however, in helping producers meet society's demands for a cleaner environment. That is why the Section 319 Program is so important to our industry.

We also recognize the difficult task the Committee faces in working to improve the 319 Program. We hope our comments will be of use as the Committee continues its deliberations.

Testimony by Larkin Martin
of Courtland, AL
on behalf of
National Cotton Council of America
before
Subcommittee on Water Resources and Environment
May 26, 1994

Mr. Chairman, my name is Larkin Martin and I farm 5,200 acres of cotton, 750 acres of corn, 650 acres of soybeans and 200 acres of wheat on our family farm in Courtland Alabama. I am also on the board of Trust for the Nature Conservancy for the State of Alabama. Today, I am representing the National Cotton Council of America, the central organization of the United States cotton industry. Our members include producers, ginners, oilseed crushers, merchants, cooperative, warehousemen, and textile manufactures. While a majority of the industry is concentrated in 17 cotton producing states, stretching from the Carolinas to California, the downstream manufacturers of cotton apparel and home furnishings are located in virtually every state.

The past 10 years have brought a tremendous change in farming methods and practices across the cotton belt. All of the emphasis today is to find ways to till the soil less, to decrease erosion, to decrease chemical use and to decrease the cost of production. Every farm publication I read has at least one article on minimum tillage or no-till farming methods. Controlling soil erosion economically is the major focus of most farmers in my area. And, the judicious use of inputs is the number one cost-cutting step we can take in our operations.

Mr. Chairman, despite this shift in emphasis, I still must maintain high yields per acre in order to turn a profit. If I cannot farm efficiently and productively, I will not be farming long. Furthermore, the clean water legislation this Committee is considering will have long-term effects on my ability to continue farming.

Our industry is active in many programs which are tailored toward preserving and conserving natural resources, including water. Modern cotton production makes excellent use of available resources such as water supplies, and otherwise non-productive saline soils and water. In addition, we are making strides in minimizing soil erosion, nutrient loss, groundwater contamination and the use of crop protection chemicals. Supplying nutrients as the crop demands has replaced traditional methods, as soil and tissue testing are being used by more and more producers.

A fair and reasonable approach is essential in developing any farming practice as well legislation which may require costly changes in farming operations. Programs work best when they are based on cooperative voluntary approaches coupled with sufficient technical assistance, education and funding. Producers will change their operations if: (1) they are

convinced there is a need to do so, (2) they can maintain profitability, and (3) they are given the flexibility to achieve a stated goal in a manner that best suits their farm.

With respect to clean water legislation, in general, it is the position of the National Cotton Council that Congress should find ways to adequately fund voluntary programs designed to reduce nonpoint source pollution and should develop a more precise and thorough database of information. We need to have a better handle on the condition of the waters and the degree that nonpoint sources are contributing to pollution before resorting to mandatory programs.

With adequate funding and adequate information, states can begin to implement programs that would target the most severe water quality problems and take steps to correct them. With adequate time and a flexible approach, the affected farmers can alter their cultivation methods and adapt their operations.

Our major concerns with the primary bill before this Committee are as follows:

1. The bill appears to subject all nonpoint sources to mandatory controls by either the State or the Federal government, whether or not there is an impaired water.

2. The bill is on too short a time table. The bill should ensure that the necessary combination of assistance and time are available for agricultural producers to implement solutions, and that adequate time be allotted for the benefits of measures and practices undertaken to be reflected in enhanced water quality.

3. It is highly unlikely that sufficient funds will be available from the federal government in the quantity or all of the forms needed for states and individuals to comply with the new mandates. The bill should contain a formula which delays compliance deadlines whenever actual funding levels are below a certain percentage of those funds which are authorized to be appropriated, using some equivalent basis to determine the length of the delay.

4. The bill defines best management practices without a clear enough reference to whether the burden of the practice will render the financial operation unprofitable. The bill should clarify that management measures required of farmers and ranchers should take into account the reasonableness of the relationship between the cost of the management measure and the benefits derived.

5. We are troubled with the inclusion of rigid anti-degradation requirements in this legislation. We believe this provision has the potential to choke off economic activity and throttle small, growing communities and the small companies on which they depend.

6. The authority of each state to allocate quantities of water within its jurisdiction should not be superseded, abrogated, or otherwise impaired by this bill. The bill should contain provisions to make this clear.

7. For wetland policy, we support the provisions in H.R. 1330, the Comprehensive Wetlands & Management Act of 1993, authored by Congressman Hayes.

8. The Soil Conservation Service should be designated as the primary contact for farmers with respect to all aspects of this legislation.

9. Although we are very much against mandated solutions at this time, we are encouraged by the provisions in the bill concerning watershed management units. We agree with the desire to have states approach water quality implementation on a watershed management unit basis, thereby considering all pollution sources within a particular watershed unit and developing an overall plan to assure the maintenance of the quality of the water within that watershed. This approach appears to be more flexible, with an emphasis on long-term water quality results as opposed to individualized short-term reductions in discharge levels.

   It could be the case that with the proper massaging and a focus on impairment, this approach would solve the problems inherent between treating nonpoint sources that are significant contributors of pollution within a watershed the same as those who are not significant contributors. It also may increase the likelihood that area-wide pest control projects which rely on coordination over a wide area to reduce significantly pest populations today in order to reduce pesticide applications tomorrow, could be an acceptable part of a watershed management unit plan.

We have reviewed an alternative proposal the Committee is also considering. That bill, we believe, offers more flexibility to producers and would be less financially detrimental, overall, than the primary bill before the Committee. It is a step in the right direction.

I would like to stress that farmers are environmentalists and conservationists. We work hard to preserve the soil and keep our water clean. We are proud of our accomplishments and believe that a cooperative involvement in environmental issues is essential. We want to continue our positive role in taking care of our natural resources -- and we want to continue to be productive.

Thank you for the opportunity to present this testimony in behalf of the National Cotton Council of America and I would be happy to answer any questions.

PRESENTED BY CHARLES LOVELESS

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TESTIMONY

OF

GERALD W. McENTEE
INTERNATIONAL PRESIDENT

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES
(AFL-CIO)

BEFORE

WATER RESOURCES AND ENVIRONMENT SUBCOMMITTEE
PUBLIC WORKS AND TRANSPORTATION COMMITTEE

UNITED STATES HOUSE of REPRESENTATIVES

ON

CLEAN WATER REAUTHORIZATION ACT

and

UNFUNDED MANDATES LEGISLATION

MAY 26, 1994

in the public service

Mr. Chairman and distinguished members of the Committee, I am Gerald W. McEntee, International President of the 1.3 million member American Federation of State, County and Municipal Employees (AFSCME), representing state and local government workers across the nation. I am pleased to present AFSCME's views, and as Vice President of the AFL-CIO, the views of the AFL-CIO, on the reauthorization of the Clean Water Act and some of the issues that have been raised relative to it.

Water pollution is one of the most important issues in American life. It determines a large part of our quality of life, our health and well-being, our supply of drinking water, the kinds of recreational opportunities we have, a significant part of our food supply, where we can locate new business, whether we can accommodate growth, and what kind of a world our children will inherit from us.

The task of sustaining more and more of us, and at a higher and higher standard of living, on an unchanged amount of fresh water, is an increasing challenge, and requires increased effort on our part. There are more of us, creating more pollution at the same time we need more unpolluted water than ever before. And there is no substitute for water; there is no alternative to water.

This is a challenge which is central to our lives and to the lives of our children. In our nation, our attempt to meet this challenge has centered on the Clean Water Act, which regulates the pollution of our nation's waters so that we can all continue to be sustained by the water available to us. The Act has been in place for over 20 years, and it has accomplished a great deal.

It is the responsibility of this Subcommittee and the full Committee on Public Works and Transportation to report legislation that reauthorizes the historic federal water pollution control act amendments of 1972 -- known as the Clean Water Act. On behalf of the labor movement, we urge the Committee to promptly join the issue and begin the process of reauthorizing this crucial law. It is the responsibility of us all to insure that Congress does not end this year having failed to reauthorize the Clean Water Act.

We are prepared to work tirelessly to secure passage of the reauthorization. The Chairman's mark is before the Committee and EPA and the Administration have given their views -- it is time to craft a balanced, progressive reauthorization that meets today's needs -- one which is not burdened with harmful amendments that would effectively de-rail the historic purpose of the Clean Water Act.

In particular, the entire labor movement is concerned with the direction the "regulatory relief" agenda that has been discussed on Capitol Hill has taken. Of these regulatory issues -- mandates, takings and risk assessment, any of which could be added to Clean Water or any other authorizing legislation, I want to concentrate on the so-called "unfunded mandates" issue.

There are few subjects as important as shedding light and furthering debate on the subject of under-funding of needed public services and the financial condition of state and local governments. Such local services as construction and maintenance of our public infrastructure, ensuring public safety and educating our nation's school children, caring for the sick and elderly, maintaining a clean environment and so much more have

been severely strained throughout the 80's and early 90's. Federal budget cutting has caused irreparable harm to the fiscal stability of state and local governments. All this has happened at a time when demand for these and other services has been at an all time high, resulting from generally poor economic conditions throughout the country.

According to our analysis, federal aid has fallen as a percentage of total state and local spending. For example, in 1980, total federal grants in aid accounted for 25.8 percent of total state and local outlays, but that gradually fell over the Reagan years to 17.7 percent and only climbed to 22 percent by the time President Clinton took office. So, in our opinion, federal aid is not keeping pace with the increased responsibilities state and local governments have had to assume. The recent increase in federal aid has been to programs which benefit individuals, not state and local governments. The Advisory Council on Intergovernmental Relations (ACIR) reports that grant payments to individuals accounted for only 35 percent of all federal grants in 1980, but have now almost doubled to 62 percent in 1993.

We all know much of this increase has been for Medicaid costs. Federal health care aid has jumped from 17 percent of all federal grants-in-aid in 1980 to 41 percent in 1993. In contrast, community development grants have been cut in half, falling from seven percent of all grants in 1980 to three percent in 1993. Federal grants for natural resources and the environment have taken a particularly hard hit, falling from almost six percent of all federal grants in 1980 to only two percent in 1993.

So while we believe that Congress needs to focus on the issue of adequate funding for the delivery of vital community services, we cannot endorse any of the mandate relief bills that have been introduced in Congress. In particular, AFSCME believes that H.R. 140, the legislation introduced by Representative Gary Condit (D-CA), and other pieces of legislation like it, are not only overly broad but miss the mark. They do not address what we believe is the real issue which is lack of federal funding for local services and programs. Instead, we are concerned that they would provide what would amount to a convenient excuse to curtail or eliminate enforcement and coverage of important federal laws and protections for working Americans and their families.

By its very provisions, the Condit bill and its Senate companion, S. 993, sponsored by Senator Dirk Kempthorne (R-ID), would exempt state and local governments from compliance with new laws, as well as new and revised regulations, that do not provide full federal funding to pay for them. Had the Condit/Kempthorne bill already been enacted, it would have undone the passage of recent laws such as the National Voter Registration Act, the National Child Protection Act, the Brady bill, the Americans with Disability Act, and the Family and Medical Leave Act, just to name a few of the major recent new domestic policy initiatives.

As I am sure you know, proponents of this legislation have already attacked these and many more areas of law. In fact, I would urge members of the Committee to read the list of so-called unfunded mandates listed in the Mandate Catalog, prepared by the National Conference of State Legislatures. The list of what the NCSL calls unfunded mandates includes major areas of established law and regulation from literally A to V ... Agriculture to Veterans and practically everything in between.

Mr. Chairman, everything cannot be a mandate. Yet, if one looks in the Mandate Catalog and at the definition of mandate set forth in the Kempthorne bill, virtually every proposed federal law or regulation could be termed as such and thus would not have to be enforced if full funding isn't provided.

Let me state just one current example. The House and the Senate are actively considering legislation to reauthorize the Occupational Safety and Health Act (OSHA), which would extend coverage to public employees for the first time. When this bill was marked-up by the House Education and Labor Committee last month, public employee OSHA coverage was attacked as an unfunded mandate and an amendment was offered making such coverage conditional on funding. The amendment was subsequently defeated, but we would assert that OSHA coverage should not be termed an unfunded mandate. It is a government policy stating that it is the responsibility of employers to provide safe, hazard-free working conditions. The private sector already complies with this basic labor standard and 23 states already acknowledge that it is worthwhile to have federally approved public employee OSHA programs. Furthermore, we have studies to show that it more cost effective and certainly more humane to have OSHA protection in place. It saves lives and it saves health care costs and workers compensation costs.

If the Condit/Kempthorne bill is passed, I doubt that the Congress could pass most of the current major domestic policy initiatives pending in Congress, including OSHA reform, health care reform, or welfare reform, with any confidence that the states would follow them. What would result is an unequal system of local enforcement and protection of important national policies directed at civil rights, environmental protection, labor law protection and even the education of disabled children.

By requiring funding of federal requirements at a time of budgetary restrictions would mean that overall impact of important congressionally approved national policies would be reduced. It is simply unfair to exempt states and localities from compliance with federal policies when the private sector is forced to comply and when citizens depend on governmental protection as well. While adequate funding is a very real issue, we do not believe states and localities must be reimbursed as a condition for complying with federal laws and regulations.

We also must raise significant questions about the workability of such unfunded mandate proposals. What exactly is an unfunded mandate? Just exactly how would reimbursement be determined? Who decides what constitutes "full funding?" If only partial funding is provided, do states have to comply with only certain requirements of a particular law? Suppose requirements are attached to grants in aid, do you lose the grant money if you don't comply fully?

There may be other adverse consequences associated with the legislation. In particular, the question of whether state and local governments would have to comply with various federal regulations and laws inevitably would give rise to numerous lawsuits.

The growing drumbeat for eliminating unfunded mandates may sound like a catchy and worthwhile idea, but behind it lurks an outright assault on fundamental federal protections which benefit all Americans. While we know that many of the

proponents of this legislation are well-intended, we are fearful that it is a thinly disguised effort to undermine laws and regulations designed to protect the health, safety and rights of all Americans. Furthermore, we believe it is a far-reaching and not carefully considered attempt to redefine the role and responsibilities of state and local governments and their relationship to the federal government.

For these reasons, AFSCME opposes the Condit/Kempthorne legislation and other similar proposals. We believe that any effort to include an unfunded mandate amendment on reauthorization of the Clean Water Act should be rejected. Instead we would urge all concerned officials to join with us in fighting for full funding and adequate reimbursement of state and local government services, as well as reduced federal requirements on a case-by-case basis when it is warranted.

Thank you Mr. Chairman. We would be pleased to answer any questions you may have at this time.

GWMcE:ejb

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POSITION STATEMENT

Testimony of
James R. Moseley, Director
Agriculture Services and Regulations, Purdue University
on behalf of the
National Association of State Departments of Agriculture
before the
House Public Works and Transportation Subcommittee on
Water Resources and Environment
U.S. House of Representatives
May 26, 1994

re: Reauthorization of the Clean Water Act

Good morning Mr. Chairman, members of the Subcommittee. I am Jim Moseley, Director of Agriculture Services and Regulations at Purdue University. I am also a corn, soybean and hog farmer, and former United States Department of Agriculture (USDA) Assistant Secretary for Natural Resources and the Environment where I was responsible for the oversight and management of the Soil Conservation Service (SCS) and the majority of USDA's environmental and conservation programs. I appear before you today on behalf of the National Association of State Departments of Agriculture (NASDA). NASDA is the nonprofit association of public officials representing the Commissioners, Secretaries and Directors of Agriculture in the fifty states and the territories of American Samoa, Guam, Puerto Rico, and the Virgin Islands. As the chief state agriculture officials, NASDA's members are keenly aware of the importance of balancing agricultural production and natural resource conservation on their state's and the nation's economy. The state departments of agriculture will be directly responsible — just as they are in the development of the Coastal Zone Management Act nonpoint source plans — for assisting in the development of the agricultural portion of the state nonpoint source strategies and helping farmers implement those plans.

As we look at the issue of natural resource protection and specifically water quality improvement, there are three objectives we can all agree upon: 1) We want to protect and enhance our natural resources; 2) We want to ensure that we have a safe, adequate, and affordable food and fiber supply; and 3) We want to achieve these first two goals in a manner that services our economic needs. So the critical question we are compelled to address is not what we want to achieve, but rather how we go about doing it. Farmers and ranchers across this country want to solve the problems with water quality directly attributable to agricultural sources. It is our responsibility as policymakers to provide them with programs, education and training, and financial assistance to accomplish that objective.

We only need to look at the volumes of information featured in every farm and ranch publication during the past few years to recognize that an information explosion on the environment — and specifically on water quality — is taking place out in the country. These environmental articles are not about whether farmers and ranchers should participate in the solution, but rather how they can incorporate conservation practices on their farms that protect water and soil resources.

In 1986 the *Farm Journal* magazine, a major farm publication with a circulation of over three-quarters of a million, printed ten feature articles dealing with agricultural environmental issues. In 1990, the number of environmental feature articles had grown to 65, a 550 percent increase. And that trend is continuing. The significant point here is that they don't write articles unless there is a demand by their readership. Readership surveys indicate farmers and ranchers want more and more information on conservation and environmental issues. It seems apparent from this increase in demand for information that we have begun the first steps in the education process, a process which leads to attitudinal change and ultimately to behavioral change. This demand also points out that farmers and ranchers recognize the principle questions we must all address: What are the best, most effective methods we can use to conserve and improve our nation's water resources?

Below are some guiding principles which should be used to develop programs and policies as we look for solutions to the questions production agriculture faces.

- Natural resources management policy decisions should be driven, not by assertion, but by scientific fact. Science should be used as the foundation of all water quality decisions.

- Farmers and ranchers will respond if they know there is a problem and if they are given reasonable alternatives on how to fix them. The key to the adoption of these new practices is getting the information into the producers' hands; assuring them through research that they will work; and showing that adoption will be cost-effective.

- Improving water quality is a process which takes time for results.

- Solutions that come from the bottom up, rather than the top down, are most effective. Education and technical programs should focus on identifying local solutions.

- Regardless of what programs there are in place, nothing happens until the management practices are applied to the land. Below are a few examples of activities which are happening on the landscape as people respond to the nonpoint source question.

We're making significant progress on getting conservation tillage on the ground; some because of conservation compliance and the rest because farmers are learning that it makes good sense. This can have as much impact as anything we can do to improve water quality in our streams and lakes. The concept is simple, keep the water on the land and you reduce the opportunity to move soil and nutrients to the drainage system.

About 92 percent of the conservation compliance plans for America's most highly erodible cropland are being implemented on schedule according to a review conducted by SCS. Of these plans, 50 percent have already been fully implemented. The 1993 status review provides a statistically reliable sample of conservation plans on highly erodible cropland. These on-site reviews by SCS covered 53,000 conservation plans on 8 million acres.

From the reviews, SCS estimates that plans are on schedule on 92 percent of the cultivated cropland covered. These estimates indicate that erosion on our most highly erodible lands will be reduced by about 66 percent going from an estimated national average of 17.5 tons per acre in 1985 to 6 tons per acre annually when plans are fully implemented by the December 31, 1994 deadline.

We've begun to understand that animal waste is really not waste, but rather a valuable resource that can be managed and used to improve farm profitability. Precise measurements of nutrient content and prescription application is becoming standard operating procedure on farms all across the country.

And with regard to general fertilizer management, we are learning to become very specific in our testing and application — farmers and ranchers are attempting to apply only what is required of a crop for growth in that crop year, and no more. This is especially important with nitrogen, because excess free nitrogen unused by the crop has the potential of moving offsite. Farmers are becoming very sensitive to this issue and recalibrating nitrogen rates accordingly.

NASDA Position on Reauthorization of the Clean Water Act

Reauthorization of the Federal Water Pollution Control Act (commonly known as the Clean Water Act) is an opportunity to review the quality of our nation's water resources, assess our efforts to clean-up impaired waters and prevent potential pollution, and set a course to protect this vital resource. Let me concentrate on the area of nonpoint source (NPS) pollution and agriculture's efforts to prevent such pollution. NASDA recognizes the need to address agricultural nonpoint source pollution which may have adverse effects on the environment and human health. Agricultural operations, along with urban, construction, septic and natural sources, require a comprehensive and coordinated management strategy, much of which is already in place, but in many cases inadequately funded.

In order to reduce complex and diverse NPS pollution, a commitment of time and resources is necessary similar to the 20-year commitment our country has made to eliminating point source pollution. However, management of this problem will require a different approach than that of point source pollution because, unlike point source pollution, NPS pollution is primarily a weather-related phenomenon that can be managed, but not feasibly eliminated. NPS pollution is caused by the inadvertent discharge of pollutants from a wide variety of society's most essential activities.

The Clean Water Act (CWA) is not alone in protecting America's waters from NPS pollution. Other ongoing programs at the federal, state and local levels must be funded fully, and coordinated with, not superseded by, the CWA. In particular, this includes the soil conservation and water quality provisions of the 1985 and 1990 farm bills and the state groundwater and surface water protection programs of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The CWA reauthorization should not directly or indirectly create a federal water quality law or program which supersedes, abrogates or impairs state water allocation systems and water rights.

Principles of the Clean Water Act

The reauthorized CWA's central focus for NPS management solutions should be reasonable, voluntary, and based on incentives, education and technical assistance. NPS pollution management programs should emphasize the protection of water resources and state-designated water uses, including state-designated agricultural uses, recognizing the importance and needs of individual agricultural producers and other landowners affected by the CWA. This approach emphasizes the use of locally designed and applied, economically feasible, site-specific best management practices which do not infringe on private property rights.

The CWA contains valuable provisions for NPS management embodied in section 319. Although section 319 has been historically underfunded and has been hampered by bureaucratic roadblocks, all states now have approved section 319 assessments and management programs. Amendments to the CWA should continue to focus on the 319 program as the means for states to identify nonpoint sources in critical areas, and to develop management programs to control discharge. Reauthorization of the CWA should provide increased funding and technical support for state management programs and local implementation. Management efforts funded by section 319 should be directed to priority areas based on scientific assessments that identify water bodies with impaired or threatened uses. Priority, as determined by states, should be based on the magnitude of risk to human health, the protection of designated uses, and likelihood of further significant and unreasonable water quality degradation if no action is taken.

The proper management of NPS pollution lies in state and local efforts. As such, states should continue to identify and resolve their priority NPS water problems through administration of section 319 funds. With state oversight and approval, local entities should continue to carry out these NPS programs. State and local programs should provide for a mix of research, development, education and technical and financial assistance for both planning and implementing actions aimed at achieving state designated uses. Agencies at the federal and state levels should harmonize objectives and coordinate funding for national and regional NPS management programs.

Strategies should be developed on a hydrologic unit, watershed-wide basis using an approach that includes the consideration of both surface and ground water quality. Programs should focus on cost-effective, site specific practices for individual operations with flexibility for implementation. Section 319 management programs on federal lands should be developed and implemented by the specific agency statutorily charged with management of the lands in question, rather than by regulatory authorities independent of that agency.

In order for section 319 to work effectively for agriculture, the U.S. Department of Agriculture must play a lead role in the formulation and communication of technology-based best management practices in agriculture. USDA should assist in coordinating section 319 programs with technology-based conservation measures adopted in the 1985 and 1990 farm acts, FIFRA pesticide regulations, wetlands protection, public lands management, and EPA groundwater policies.

An effective and cost-efficient response to water quality problems requires accurate and reliable information on the source, extent and impact of NPS pollution, as well as the effectiveness, utility and economic feasibility of conservation measures and best management practices. CWA reauthorization should include a strong financial commitment to further research, monitoring and assessment projects. Monitoring should include before and after sampling as well as frequent sampling during storm events and assessment of natural and historic loadings. Scientific research and monitoring projects should follow protocols developed by the U.S. Geological Survey and should be concluded on a watershed basis with local and state input. Representative pilot projects aimed at achieving market based incentives on a watershed or regional level should be encouraged. It is, however, inappropriate to provide the authority for citizen suits against individuals participating in NPS management programs. Moreover, a more prudent use of scarce resources is to provide monetary assistance to states for monitoring activities rather than to voluntary monitoring programs.

PENDING LEGISLATION

Mr. Chairman, your Subcommittee has pending before it H.R. 3948, the Water Quality Act of 1994. After a close review of the bill, we are seriously concerned with the all encompassing "command and control" nature of the nonpoint source provisions. The timelines set out for the initial state water quality

assessment, the implementation of best management practices and plans, and the future determinations of whether the regulations are strict enough, are simply inadequate. The enforcement provisions of H.R. 3948 focus too heavily on punitive damages — that is fines and jail time — rather than engaging in a long-term commitment to a joint, partnership type of approach which will improve water quality.

It is the opinion of the state agriculture officials that the approach the nonpoint source provisions of the CWA should take is one which combines educational and technical assistance, financial help, and a cooperative understanding of the agricultural industry, its potential pollution problems, and its financial and technical capabilities. We strongly believe that the states, working with those concerned at the local level, are in the best position to create this delicate balance. That is why we believe the CWA should place the responsibility on our shoulders; don't send us more unfunded federal mandates that are impossible to achieve.

Give us, the states, the time necessary to evaluate our current and potential water quality problems. Give us the time and opportunity to design programs, plans, and practices that can be implemented efficiently and effectively, keeping agricultural producers in business while providing environmental protection. Let us assess whether those programs are achieving water quality enhancement by providing general benchmarks, not strict time and specific measurements which can never be applied nationwide in a uniform manner.

Mr. Chairman, we are talking about a 15 to 20 year commitment, a timespan similar to the commitment the federal government made in addressing point source pollution. If you give us, the states, that type of timeframe with an opportunity to develop a combination of programs which meet our local needs while reaching certain benchmarks along the way, I am confident we will see an improvement in water quality.

Current Efforts to Prevent NPS

The existence of programs at all levels of government to protect water from potential NPS contaminants necessitates development of an effective coordination strategy to avoid conflicts and duplication of efforts. Failure to recognize this need can lead to squandering of limited resources and may result in conflicting programs that may even increase the potential for pollution of ground water while trying to reduce the potential for pollution of surface water (or vice versa).

Approaches to protect water quality can be categorized as nonregulatory/voluntary, regulatory, liability, or comprehensive protection. Many farmers have voluntarily adopted best management practices and other measures that will help protect water from potential pollution. Continued research, education by public and private entities, technical assistance on developing or implementing water quality protection programs, economic incentives, and product stewardship are necessary to increase water resource protection.

Numerous efforts are underway to protect ground and surface water from potential NPS pollution. Among these are programs and legislation at all levels of government, that vary in type and structure. For the record, allow me to highlight a few of the federal, state and local regulatory and voluntary programs which currently exist.

The Coastal Zone Management Act — The original Coastal Zone Management Act (CZMA) was passed in 1972, amended in 1980, and reauthorized in 1990. The lead agencies for implementation of the latest CZMA programs are the Environmental Protection Agency (EPA) and the National Oceanic and Atmospheric Administration (NOAA).

Section 6217 of the 1990 legislation requires each state with a federally approved CZMA program to develop a "coastal nonpoint pollution control protection program" to implement coastal land use management measures for controlling NPS pollution. The states are able to provide maximum flexibility in establishing the state and local institutional arrangements to accomplish the control of NPS pollution. State programs, however, must be developed and implemented in conformity with national guidelines.

Federal Insecticide, Fungicide, and Rodenticide Act — Under FIFRA, the EPA collects environmental fate data that are used, among other things, to indicate whether a pesticide poses a threat to ground or surface water. Based on such data, the agency may require label directions and precautions to inform the applicator that the pesticide must be used in a manner that prevents water supply contamination.

Also under FIFRA, the EPA may restrict, cancel, or temporarily suspend all or some pesticide uses that pose unreasonable risks to human health or the environment through contamination of water supplies. The agency has proposed a Ground Water Restricted-Use rule that describes the criteria (i.e., a pesticide's tendency to leach) for identifying pesticides for possible restricted-use classification because of ground water concern. After the final rule is promulgated, EPA will initiate reviews to classify up to 30 pesticides as restricted-use chemicals because of their tendencies to leach to ground water. Restrictions may include limiting use to certified applicators.

Safe Drinking Water Act — Under the Safe Drinking Water Act's Public Water Systems Program (PWSP), the EPA regulated six pesticides and nitrate/nitrite in addition to other chemicals and biological contaminants. Under the drinking water regulations announced in January 1991, effective in July 1992, states must adopt new drinking water standards for 33 potential drinking water contaminants including 18 pesticides. The EPA has also developed Health Advisories for about 70 pesticides that are actual or potential ground water contaminants. In addition, EPA implemented new standards of 1 ppm for nitrite and 10 ppm for nitrate/nitrite as nitrogen (N) combined in July 1992.

EPA has established requirements for regular monitoring, public notification of contamination, and specific timeframes for removal of the contamination. Monitoring for the 18 pesticides covered under the new drinking water standards were phased in after July 1992. Such an approach gives states the opportunity to institute watershed and ground water protection measures to keep pesticides out of drinking water. EPA also conducts and enforces drinking water programs in states that do not have primacy or are not enforcing their programs adequately.

Comprehensive Environmental Response, Compensation and Liability Act — Superfund, created in 1980, is an important tool in EPA's response to the nation's hazardous waste problem. Approximately 31,000 hazardous waste sites have been identified. Some of these sites are in rural areas, and sometimes involve contamination of ground and surface water due to improper disposal of septic tank wastes and sludge containing hazardous substances such as PCBs, benzene, and toluene, or wastes from pesticides and fertilizer manufacturers. Estimated costs for cleaning up some of the Superfund sites are very high, running in the millions of dollars.

Toxic Substances Control Act — EPA has broad authority under section 6 of the Toxic Substances Control Act (TSCA) to control manufacturing, processing, distribution in commerce, use or disposal of a chemical substance or mixture if it "presents or will present an unreasonable risk of injury to health or the environment." Under section 4, EPA may require industry to test a chemical substance or mixture if the agency finds it "may present an unreasonable risk of injury to health or the environment." If the EPA decides that it lacks important information about toxicity or exposure, it can specify what information the industry must provide through additional testing if necessary.

Research on Transport and Transformation of Contaminants — In order to predict the movement of contaminants in the subsurface, and thereby predict potential human and ecological exposure, EPA's Office of Research Development (ORD) maintains a research program in transport and transformation of contaminants. Some of this research is done to predict the leaching behavior of agricultural chemicals. This includes advances in integrating process level information into predictive tools such as the pesticide soils leaching model PRZM, the pesticide ground water leaching model RUSTIC, and the development and application of the comprehensive environmental management model CEEPES to agricultural chemicals. In addition, a new effort is underway to support the Office of Water in determining the sorptive properties of soil as a factor in protecting wellheads from contaminant migration.

EPA has joined with the United States Department of Agriculture (USDA) and the U.S. Geological Service (USGS) in the Midwest Initiative on atrazine. Under a coordinated plan of study drafted in 1989, the three agencies selected the mid-continent soybean and corn-growing region to determine the regional factors affecting the distribution of atrazine, a herbicide of long-standing use, through the environment.

Information Systems for Preventing Ground Water Contamination from Pesticides — Tools exist to locate pesticide problem areas, and develop strategies for use of pesticides on a local level. These tools include models that have been developed to predict the leaching of pesticides to ground water, data that have been collected on soil properties and other relevant environmental factors, and geographical information systems for displaying and analyzing spatial information. These types of tools, however, have not been systematically integrated into a workstation framework of state and local risk management. ORD has initiated research to provide such a framework for states upon which they can develop locally meaningful pesticide management plans. The work will also include field evaluation and modeling schemes. The project is coordinated with related research on the effects of agricultural chemicals on water quality at USGS and USDA, in order to ensure integration of information and dissemination of results.

Methods for Assessing Aquifer Sensitivity to Pesticides — To assist states in assessing ground water vulnerability to pesticides as part of their efforts to develop pesticide management plans, EPA's Office of Ground Water and Drinking Water is preparing a technical assistance document on methods for assessing the natural sensitivity of aquifers to pesticide contamination.

President's Water Quality Initiative — The President's Water Quality Initiative (WQI), established during the Bush Administration, called for a vigorous effort to protect ground and surface water from contamination by agricultural chemicals, commercial fertilizers, and wastes, especially pesticides and nutrients. The WQI is using the combined expertise of USDA, USGS, EPA, and NOAA, to promote the use of environmentally and economically sound farm production practices, and to develop improved chemical and biological pest controls.

Under the WQI, USDA has established the USDA Water Quality Program to determine the precise nature of the relationship between agricultural activities and ground water quality; and develop and induce the adoption of agrichemical management and agricultural production strategies that protect ground and surface water quality.

Technical and Financial Assistance Programs — USDA provides a number of technical and financial assistance programs to assist in protecting water resources.

- The *Agricultural Conservation Program (ACP)*, initiated in 1936, provides financial assistance to farmers for implementing approved soil and water conservation and pollution abatement practices.

Cost-share payments may not exceed $3,500 per year for 1-year agreements, or an average of $3,500 for multi-year agreements. Except for Water Quality Special Projects, conservation priorities are set by states and counties based on local soil and water quality problems.

- The *Conservation Technical Assistance (CTA)*, initiated in 1936, provides Soil Conservation Service (SCS) technical assistance through conservation districts to farmers for planning and implementing soil and water conservation and water quality improvement practices.

- The *Rural Clean Water Program*, initiated in 1980 and ending in 1995, is an experimental program implemented in 21 selected projects under the authority of the Clean Water Act. It provides cost-sharing and technical assistance to farmers voluntarily implementing BMPs to improve water quality. Cost-sharing is limited to $50,000 per farm.

- The *Extension Service* provides information and recommendations, in cooperation with SCS and conservation districts, on soil and water quality practices to landowners and operators.

- The *Farmers Home Administration (FmHA)* provides loans to farmers and associations of farmers for soil and water conservation, pollution abatement, and building or improving water systems that serve several farms.

- The *Rural Conservation and Development Program*, initiated in 1962, assists multicounty areas to enhance conservation, water quality, wildlife habitat and recreation, and rural development.

- The *Great Plains Conservation Program*, initiated in 1957, provides technical and financial assistance in Great Plains states to farmers and ranchers who implement total conservation treatment of their entire operation. Cost-sharing assistance is limited to $35,000 per contract.

- The *Small Watershed Program*, initiated in 1954, provides technical and financial assistance to local organizations for flood prevention, watershed protection, and water management.

- The *Water Bank Program*, initiated in 1970, provides annual payments for preserving wetlands in important migratory waterfowl nesting, breeding, or feeding areas.

- The *National Agriculture Library* collects and distributes information on all aspects of U.S. agriculture, and has received special funding to develop a new information program on agriculture and water quality.

USDA Research Programs — One of the objectives of USDA's Research Plan for Water Quality is to improve existing and develop new cost-effective agricultural systems to address water quality problems. USDA's Agricultural Research Service (ARS), Cooperative State Research Service (CSRS), and Economic Research Service (ERS) conducts research on agriculture and water quality. ARS conducts research on new and alternative crops and agricultural technology to reduce the impacts of agricultural production on soil and water. CSRS coordinates soil conservation and water quality research conducted by State Agricultural Experiment Stations and land grant universities. CSRS allocates funds appropriated by Congress for special and competitive grants for water quality research. ERS estimates the economic impacts of existing and alternative policies, programs, and technology for preserving and improving soil and water quality. Along with the National Agricultural Statistics Service, ERS collects data on agrichemical use, agricultural practices, and costs and returns.

Farm Bill Programs — The Food Security Act of 1985 has four major provisions that contribute to meeting water quality protection objectives; the Food, Agriculture, Conservation, and Trade Act of 1990 adds four additional programs.

- *Conservation Reserve Program* — The Conservation Reserve Program (CRP), authorized in the 1985 Farm Bill and expanded in size and scope to cover water quality concerns, allows USDA to make annual rental payments to landowners who voluntarily retire highly erodible cropland and other environmentally critical lands from production for 10 years. It pays up to 50 percent of the cost for establishing a soil-conserving cover crop on the retired lands.

- *Conservation Compliance* — The Conservation Compliance provisions require farmers who produce on highly erodible cropland to develop and implement a conservation compliance plan by January 1, 1995. The requirement affects 40 percent of U.S. farmers, 135 million acres of highly erodible land, and involves 1.3 million plans. Less than 2 percent of highly erodible land will be uncovered once the plans are implemented. A combination of the conservation reserve and conservation compliance program is projected by USDA to reduced erosion by 1.5 billion tons per year, half of all erosion on all cropland.

- *Sodbuster & Swampbuster Provisions* — Sodbuster provisions prevent farmers from new production on highly erodible land unless it is done under an approved conservation plan. Swampbuster provisions prevent farmers who convert wetlands to crop production from collecting farm program benefits, unless USDA determines that conversion would minimally affect wetland hydrology or biology.

- *Wetlands Reserve Program* — The Wetlands Reserve Program (WRP) is a voluntary program offering landowners a chance to receive payments for restoring and protecting wetlands on their property. Authorized by the 1990 Farm Bill, the WRP provides a unique opportunity for farmers to retire marginal cropland and reap the many benefits of having wetlands on their property. WRP obtains 30-year or permanent conservation easements from participating landowners and provides cost share payments for wetland restoration. Currently, 50,000 acres are under easement to restore previously converted wetlands, reducing NPS pollution potential, and enhancing wildlife habitat, flood control, and ground water recharge.

- *Water Quality Incentive Program* — The goal of the Water Quality Incentive Program (WQIP) is to achieve source reduction of agriculture pollutants by implementing management practices (BMPs) in an environmentally and economically sound manner on 10 million acres of farmland by thee end of 1995. USDA provides agricultural producers with the necessary financial, educational, and technical assistance required to make changes in management systems to:
  1) restore or enhance the impaired water resources where agricultural NPS pollution has a detrimental effect; and
  2) prevent future impairments.

  Producers must submit applications for enrollment, and a long-term agreement is developed, generally for three years. The WQIP incentive payment limitation is $3,500 per person per year for up to 5 years. Eligible acres for WQIP has expanded to include areas identified in state NPS management plans (section 319), areas with shallow karst topography, and other environmentally sensitive areas.

- *Conservation Environmental Easement Program* — The Conservation Environmental Easement Program provides for permanent easements on lands that pose a significant environmental threat. The exact eligibility for these lands is yet to be determined, and funding is not yet available.

- *Integrated Farm Management Program Option* — The Integrated Farm Management Program Option adds planting flexibility to federal farm programs, and encourages farmers to adopt resource conserving crop rotations to help prevent soil erosion and protect water quality on 5 million acres. The program requires farmers to carry out an approved farm management plan to promote the use of soil conserving crops and rotations on at least 20 percent of their crop base qualified for federal programs.

National Water Quality Assessment Program — The National Water Quality Assessment Program is a major national assessment designed to describe the status and trends of U.S. waters and identify the factors that affect water quality. In the pilot phase of the project, the USGS is investigating the extent and location of ground water pollution by agrichemicals in several regions of the U.S.

Mid-Continent Herbicide Initiative — In cooperation with USDA's Midwest Initiative, USGS is conducting the Mid-Continent Herbicide Initiative, a five- to ten-year research program on the impact of the agricultural herbicide atrazine on ground and surface water.

USGS Federal-State Cooperative Program — This program is a partnership for water-resources investigations involving 50-50 cost sharing between the USGS and more than 1,000 cooperating state or local government agencies. The USGS performs most of the work on behalf of the cooperators. A variety of hydrologic data collection activities and water-resources investigations are included in the program. Examples include providing support for mapping aquifers, for monitoring pesticide contamination, and assisting in developing wellhead protection programs.

State Water Resources Research Institutes Program — Under this program, USGS provides grants to 54 state and U.S. territory Water Research Institutes at land-grant colleges or universities. The grants support research, information dissemination, and training for students in water resources fields.

USGS Information Dissemination Programs — Through its annual National Water Summary report, USGS provides water quantity and quality information on a state-by-state and national basis to aid policymakers in the analysis and development of water policies, legislation and management actions. The report also includes case studies of NPS contamination and summaries of studies on managing and coordinating federal and state water protection efforts.

USGS' Hydrologic Data Collection Program provides information on the quantity, quality, location, and use of the nation's surface and ground water. Data collection stations are maintained at selected locations to provide records on streamflow, reservoir and lake storage, ground water levels, and the quality of surface and ground water. These data form an information base that support national and regional water-resource assessments.

Maine's Pesticide Control Regulations — The Maine Pesticide Control Act of 1975 is the primary legislative authority to regulate the labeling, distribution, storage, transportation, use, and disposal of pesticides in Maine. Under this Act the state may cancel the registration of a pesticide, restrict its use, or suspend its use if it poses an imminent hazard. Part of the state's pesticide registration fee is deposited into a fund to cover the costs of Maine's Integrated Pest Management (IPM) program. The state is adding training in ground water protection to its restricted-use pesticide certification program. The state's

Pesticide Control Board has the authority to designate critical areas where pesticide use would present an unreasonable threat to water quality.

Iowa's Restrictions on Atrazine — Prior to EPA's classification of atrazine as a restricted-use pesticide in 1991, Iowa classified atrazine as a restricted-use pesticide, limiting its use to certified applicators. Iowa reduced the maximum allowable application from 4 to 3 lb/acre/year, and restricted maximum application to 1.5 lb/acre/year in contaminated or vulnerable ground water areas. Additionally, Iowa now prohibits atrazine application within 50 feet of a sinkhole, well, cistern, lake, or surface water impoundment, and mixing, loading and repackaging within 100 feet of the same.

California's Pesticide Control Measures — Proposition 65 prohibits a person in business with 10 or more employees from knowingly discharging a chemical known to cause cancer or reproductive toxicity into water or onto or into land where the chemical may pass into a source or potential source of drinking water. The Pesticide Contamination Prevention Act was passed specifically to try to prevent or minimize future ground water contamination by pesticides.

Nebraska's Restrictions on Fertilizer Use — The Central Platte Natural Resource District (a multi-county regional political subdivision) has established restrictions on nitrogen fertilizer use in a designated Groundwater Management Area. The program has three phases depending on the concentration of nitrates found in wells. All phases include requirements for education, collection of soil and water samples, and efficient fertilizer use. The most severe phase totally bans applications.

Fillmore County, Minnesota's Erosion Control Ordinance — Fillmore County is located in a karst area of Minnesota and has identified agricultural runoff and erosion as sources of both surface and ground water contamination. The County's Erosion Control Ordinance considers any occupiers of farmland to be in compliance if: (1) they are using soil conservation practices approved by the County Soil and Water Conservation District Board; (2) they do not have rills, gullies, or sediment deposits in their fields; and (3) their farming methods do not create sediment problems on adjoining properties. Violators of the ordinance have 30 days to work with the County Soil and Water Conservation District to develop a plan that must include: (1) specific practices to stop the sedimentation; and (2) a timetable for completing the practices.

Maryland Critical Area Program — The goal of the program is to improve the water quality of the Chesapeake Bay. The Maryland Conservation Reserve Program will pay farmers $20 per acre annually to enroll cropland within critical areas and along stream boarders in the federal CRP.

Chesapeake Bay Nutrient Reduction Program — The Chesapeake Bay Agreement of 1987 calls for a 40 percent reduction of nitrogen and phosphorus entering the mainstream of the bay by the year 2000. Maryland, Pennsylvania, and Virginia have initiated nutrient management programs to assist in reducing agricultural NPS pollution to the Bay. After over five years of significant cooperation on the part of the landowners, experts now believe that agriculture may not be the source of nutrient loadings to the Chesapeake Bay. In fact, the Environmental Defense Fund released a 1988 report which considers septic systems, high density development, sewage treatment plants, and atmospheric deposition as the dominant sources of nitrogen in the Bay.

- Maryland's Cooperative Extension Service assists farmers in the development of nutrient management plans under *Maryland's Nutrient Management Program*. Since 1989, farmers have prepared 748 plans, covering 49,966 acres of cropland. Nutrient management plans include manure tests for nutrient content, soil tests, documentation of crop histories and manure

management, documentation for a statewide nutrient management data base, and personalized service from consultants. First priority for preparation of the plans is given to farmers applying for state cost-share funds for all animal waste storage BMPs.

- *Pennsylvania's Nutrient Management* cost share program is funded in part by the Chesapeake Bay Program. Cost sharing for installation of BMPs is available to farmers within priority watersheds where they must adopt nutrient management plans. Such plans include manure tests, soil tests, summaries of recommended nutrient applications, and provisions for verifying nutrient and pollution reduction. Conservation districts provide technical assistance in developing the plans, and a mobile nutrient laboratory assists with rapid analyses of soils, water, and manure.

- *Virginia's Chesapeake Bay Preservation Act* requires farmers in the 13 coastal counties to develop water quality management plans that include integrated pest management plans, soil conservation plans, and nutrient management plans. Since 1989, the state has required farmers statewide to develop nutrient management plans to receive cost share funds for animal waste BMPs. A new law allows tax credits for purchases of manure and pesticide spreaders for farmers with nutrient management plans approved by their local conservation district.

Kansas' Cost-Share Efforts under the State Water Plan — In 1989, Kansas established the State Water Plan Fund to serve as a dedicated source of funding for state water planning activities. The economic incentives are available both for practices to treat highly erodible land and practices to protect water quality by limiting run-off of agricultural contaminants.

North Carolina's Cost-Sharing to Reduce Nutrients — The voluntary North Carolina Agricultural Cost-Share Program was established to protect surface water from contamination by sediments, nutrients, animal wastes, and pesticides. The program pays farmers 75 percent of the average cost to implement appropriate BMPs.

Jefferson County, Washington's Water Quality Improvement Fund — Washington state provides $200,000 to Jefferson County for loan to county residents in a low-interest loan program — the Jefferson County Water Quality Improvement Program — which finances major NPS pollution control projects. The funds for the state loan are from the state's Revolving Loan Fund, capitalized by an EPA grant and a 20 percent state matching grant. The Fund is designed to encourage and assist county residents in repairing or upgrading existing septic systems under the direction of the County Health Department and in designing and implementing farm plans and agricultural BMPs under the direction of the County Conservation District.

Iowa's Education and Technical Assistance Efforts — Iowa's 1987 Groundwater Protection Act establishes a program for research education, and demonstration projects to address ground water problems caused by agricultural contaminants and other sources. The law requires the state Department of Agriculture and Land Stewardship (DALS) to promote the adoption of BMPs for soil conservation and for reducing ground water contamination from agricultural chemicals. As part of this effort, DALS is helping finance the Private Pesticide Applicator Training Program conducted by Iowa State University Cooperative Extension Service, which is educating over 60,000 farmers on environmental and personal safety when applying fertilizers and restricted-use pesticides. The program also covers nonchemical methods to control weeds and pests.

Wisconsin's and Minnesota's Farmstead Assessment Worksheets — Wisconsin and Minnesota have prepared pilot versions of worksheets to assist farmers in assessing the effectiveness of farmstead practices

in protecting drinking water. Practices for assessment include well condition, pesticide storage and handling, fertilizer storage and handling, household wastewater treatment, and livestock waste storage. Accompanying each worksheet is a separate publication with recommendations on modifying practices to minimize pollution risks, and suggested sources for additional information.

Maine's BMP Manual — Maine collaborated with SCS, the Extension Service, and farmers to produce a BMP manual that educates farmers on the characteristics of agricultural chemicals and offers practical tips on protecting water from contamination.

Virginia's Outreach Efforts — The Virginia Water Resources Center has developed instructional materials, exhibits, and publications on water quality protection. The Virginia Extension Service conducts water quality related outreach activities for the agricultural community as well as local citizens, local government staff, and students.

State Research and Data Management — Basic and applied research that supports water quality protection efforts is being carried out by the states, mostly at state Agricultural Experiment Stations, land-grant universities, and Water Resources Research Institutes. Much of this research is at least partially funded by federal grants. States are also developing data management systems to store and maintain the information they need to implement their water quality protection efforts.

- *Connecticut* — The College of Natural Resources of the University of Connecticut conducts research on pesticide usage issues and on IPM, while the state Agricultural Experiment Stations study the fate of pesticides in the environment. Connecticut has an extensive data base on the hydrogeological conditions of the state. In cooperation with USGS, the state Department of Environmental Protection has collected information on all watersheds, the properties and distribution of aquifers, depth to water tables, water quality in vulnerable or sensitive areas, locations of public water supply wells, locations of pollution sources, etc.

- *New York* — The state Water Resources Research Institute at Cornell University conducts research on the water quality effects of agricultural chemicals. Researchers are evaluating the relationship between pesticide application practices, crop production, and ground water quality for potato crops. In addition, the Institute is interested in studying the effects of soil organisms on chemical transport, microbiological degradation of chemicals, transport of microbes within the soil, and the toxic effects of ground water contamination on ecological systems. Faculty at Cornell, Oregon State University, Michigan State University, and the University of California at Davis have been developing a toxicological information system called EXTOXNET. The system will be used by Extension agents to answer questions about current or potential contamination by agricultural contaminants.

- *Pennsylvania* — Pennsylvania State University is involved in several research efforts. First, Penn State and three other U.S. universities are studying the environmental fate of pesticides under minimum and conventional tillage. Second, Penn State is involved in a cooperative venture to reduce NPS pollution in the Chesapeake Bay watershed. Third, the university participates in a well-funded program to develop expert systems for pest management on all crops. Fourth, Penn State is interested in developing insect and disease forecasting and monitoring techniques; these include counting insects and the use of weather-based data to predict the occurrence of plant pathogens in food crops. Finally, Penn State is studying pest resistance in apples in a cooperative project with the University of Vermont and four or five other states to study how to increase resistance in host or crop plants through selective breeding.

Comprehensive State Ground Water Protection Program — Since 1984, EPA has encouraged states to develop state ground water protection strategies and programs, and supported the states' efforts with technical and financial assistance. In 1989, EPA established a high-level Ground-Water Task Force to "develop a strategy for the direction EPA will take in ground-water protection." The task force released its final report that sets forth a new strategy to ensure comprehensive protection of the nation's ground water resources. A key component of this strategy is to actively involve state officials in developing and implementing Comprehensive State Ground Water Protection Programs (CSGWPPs). EPA will promote the development of CSGWPPs through technical and financial assistance to the states. To the extent authorized by federal statute and consistent with federal program objectives, EPA will defer to state policies, priorities, and standards once the agency recognizes that a state has developed a comprehensive protection program.

Wellhead Protection Programs — The Safe Drinking Water Act requires each state to prepare a Wellhead Protection (WHP) Program to protect public water supply wells from all potential sources of contamination. In many instances, regional agencies and local governments have taken the initiative in pursuing WHP. As of September 30, 1992, EPA has approved 25 state WHP programs. Some states are developing measures to deal with agricultural sources within WHP areas. In Florida, regulation of pesticide use within WHP areas is awaiting modeling of pesticide behavior in soil and water for selected restricted-use pesticides. Also, efforts to develop policy or regulations for governing nutrient discharges to ground water have begun. The 1990 Farm Bill includes a provision to make cropland within WHP areas eligible for inclusion in the WQIP and the CRP.

Drinking Water Program Implementation — The Safe Drinking Water Act directs EPA to establish minimum national drinking water standards which set legally enforceable limits on the amounts of potentially harmful substances, including some pesticides and nitrate, in drinking water. Under Congress' direction, EPA has granted, since 1974, primary enforcement authority to fifty states and four territories.

Pesticide Management Plans — Because of site-specific differences in ground water sensitivity and pesticide usage, EPA believes that states are in the best position to tailor pesticide prevention management measures to local conditions. Under the Agency's pesticide and Ground Water Strategy released in 1991, states implement State Pesticide Management Plans (SMPs). In line with this approach, EPA is providing funding and guidance to states to assist them in developing generic SMPs, and in building the state's capacity to evaluate such factors as ground water vulnerability, monitoring data, and how and where the pesticide of concern may be used.

The ground water strategy explains that under FIFRA, EPA may require states to develop chemical-specific SMPs for a particular pesticide of concern as a condition of continued use of that pesticide. The SMPs may vary widely from state to state, depending on a state's ground water sensitivity assessments, the level of pesticide usage in the state, and the state's ground water protection philosophy. The SMPs must include several components, including discussion of roles and responsibilities, legal authorities, prevention actions, available resources, monitoring, enforcement, and response detections.

Underground Injection Control Program — A provision of the Safe Drinking Water Act mandates the development of an EPA-approved underground injection control (UIC) program for each state, U.S. possession, or territory. The purpose of the program is to prevent contamination of underground sources of drinking water by injection wells, classified into five categories by the EPA. Class V wells include agricultural drainage wells, which may pose a high potential for ground water contamination. Agricultural drainage wells may receive field drainage from precipitation and floodwaters, irrigation return flow, and animal yard, feedlot, or dry runoff. Potential contaminants include suspended solids, pesticides, nutrients,

salts, organics, metals, and microbes including pathogens. Current EPA regulations authorize Class V wells to operate by rule if: (1) their existence was reported to the states or EPA within the specified time; and (2) they do not contaminate an underground source of drinking water to the extent that it would violate a maximum contaminant level (MCL) or otherwise endanger public health.

New York City Watershed Program

A situation which has received a great deal of attention is the efforts which the farm community, New York City, local government, and New York State have taken to preserve water quality in the New York City Watershed area. This successful effort is based upon the prospective voluntary adoption of best management practices to control nonpoint source pollution by the more than 550 dairy farmers in the New York City Watershed area. Let me briefly outline the successful voluntary program.

Farming has been practiced in the New York City Watershed area of Delaware, Schoharie, Sullivan, and Greene counties since long before New York City came to rely on the watershed for most of its water supply. The City has preserved its water quality in the midst of agricultural production for decades. Efforts to improve farming practices, especially through the adoption of soil and water conservation techniques, with the leadership of the Soil Conservation Service delivered through the local Soil and Water Conservation Districts and the Agricultural Stabilization and Conservation Service, have allowed farmers to maintain the economic viability of their farms by keeping their topsoil on the land. This voluntary, locally based effort by farmers has a proven record of success, not just in New York State but in most parts of the United States.

Agriculture in the Watershed has been changing. The pressures of the economics of dairy farming have led to larger herds of dairy cows, intensification of land use for crop production, and greater concentrations of animal waste. New measures, based upon the proven path of voluntary and locally based approaches, need to be implemented to cope with the increased requirements for drinking water protection and raw water quality maintenance in the New York City Watershed area. The Whole Farm Planning Approach Program is being implemented to meet the needs of farmers in the watershed, as well as the metropolitan-area urban public, which is dependent upon this surface water supply. This approach was the result of a lot of hard work by all who were concerned about long-term protection of the City's water quality, while maintaining the agricultural economy of the area.

In mid-1990, New York City circulated draft mandatory restrictive agricultural land use regulations in order to meet their goal of drinking water source protection without resorting to a costly filtration system. Uniform and inflexible regulations were seen as unworkable and undesirable by the local agricultural community due to their negative impact upon the farm economy of the region.

In December 1990, the New York City Department of Environmental Protection and the New York State Department of Agriculture and Markets cooperated in convening an Ad Hoc Task Force on Agriculture and New York City Watershed Regulations. This group was composed of local farmers, local agricultural, environmental and government organizations, state representatives, and technical advisors. The Task Force was comprised of a Policy Group and a Technical Support Group. Members of the Policy Group represented agencies that are directly involved in issuing and administering the proposed watershed regulations, groups that are affected by the regulations, and organizations that may contribute to facilitating them.

The goal of the Task Force was to find an alternative to a mandatory set of rules and regulations which would still achieve the desired level of water quality protection. Over the course of a year the Whole

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Farm Planning/Best Management Practices approach for the New York City Watershed concept was developed and evolved.

Farming in the New York City water supply watersheds presents a complicated environmental management problem. Farming methods and practices are a potential source of nonpoint source pollution and present a risk of pathogen introduction, siltation, toxics, and nutrients introduction to the City's reservoirs. Farm practice pollution control is critical for meeting the City's anti-degradation objectives, as well as the avoidance criteria of the Federal Surface Water Treatment Rule and the State Filtration Rule. On the other hand, farming is a preferred land use as compared with more intensive uses like second homes, which pose even greater threats to the City's drinking water quality, with significant long-term environmental benefits, and the City wants to take all appropriate steps to keep farming economically viable and in control of the land.

A locally developed and administered program of best management practices, tailored farm by farm, with the voluntary cooperation of the farm operator, would contribute far more to achieving the avoidance criteria, as well as enhancing the viability of the farm enterprise and the agricultural economy. Discussions in the Ad Hoc Task Force convinced members of the Task Force representing the City and the farm community that the regulatory proposal took a purely water quality perspective and set absolute technological standards for all farm practices, to be applied uniformly in all farm situations (uniform set-backs from streams, berming pastures, control of all pesticide use, etc.).

The City, after consulting with appropriate regulatory bodies and after full review of federal and state regulations, was satisfied that such a program would meet the avoidance criteria for effective watershed regulation, and represents the best strategy for dealing with concerns of both the City and the farm community.

Whole Farm Planning/Best Management Practice Program Option
Guiding Principles — In place of the agricultural regulations, farmers have the option of participating in a voluntary Whole Farm Planning/Best Management Practice Program. These are the guiding principles for the program:

- The objective of the program is to protect the sources of the New York City water supply, while keeping farms in operation. Agriculture should be continued and promoted as a preferred land use in the New York City watersheds. Except for a general prohibition to safeguard against individual farm operators who exhibit a willful and irresponsible intent to pollute in a manner that threatens to significantly increase pollution levels and degrades the source waters of the City's water supply, the program will be entirely voluntary.

- The preferred approach to source protection for farms is the use of Best Management Practices (BMPs) developed to meet water pollution control policies under the 1989 NYS Nonpoint Source Water Pollution Control Act and section 319 of the Federal Clean Water Act amendments of 1987.

- The mechanism of choice for selecting agricultural BMPs is preparation of a Whole Farm Plan for each farm. A collateral objective for each Whole Farm Plan is to sustain and improve the economic viability of the farm. Whole Farm Plans will be prepared by a local county project team, including personnel from the County Soil and Water Conservation District, Cornell Cooperative Extension, and the Soil Conservation Service.

  Whole Farm Plans will involve these components: soil erosion control, animal waste management, plant nutrient management, domestic animal pathogen management, and chemical and pesticide

management. Whole Farm Plans will address these agricultural contaminants: nutrients, pathogens, sediments, toxicants, and organic matter. The level of control required for each Whole Farm Plan should depend on the presence of hydrologically sensitive areas.

- Incentives, including cost-sharing, will be made available by the City to participating farmers, supplemented by a reasonable mix of state, federal and local funding sources, if available.

- Continuing education, professional training, and local involvement are essential components of the Whole Farm Program.

The Whole Farm approach to drinking water quality source protection integrates selected management practices intended to provide short- and long-term protection of water quality, with a farm business plan designed to sustain a profitable agricultural enterprise, given the mix of physical, capital, and management resources available to and consistent with the objectives of the farm operator. Development of a farm plan to meet these twin goals requires a comprehensive assessment of all elements of the farm property, as well as the business strategies and practices that affect both.

The evaluation of current farming conditions and practices and the development of options for both the farm business enterprise and water quality protection will be a collaborative venture between the farm operator and the Cooperative Extension/Soil and Water District County Project Team, supported by the Soil Conservation Service, Cornell University faculty and staff, New York State Soil and Water Conservation Committee, and the New York City Department of Environmental Protection.

The systematic use of the Whole Farm Planning approach to accomplish pollution prevention in a large watershed system has not been previously attempted anywhere. The Whole Farm Plan is a new concept which requires the integration, and some modification, of the diverse views and convictions of the agencies involved. The purpose of Phase I of the Agricultural Watershed Protection Program is to perfect, test, and demonstrate the Whole Farm Planning approach on selected farms, and to strengthen the New York City/local partnership in the process.

Locally-Administered Whole Farm Planning/Best Management Practice Program — The City has established a locally administered program for the planning and implementation of Whole Farm Plans, in conjunction with watershed farm operators, with assistance from the New York State Soil and Water Conservation Committee, the Soil and Water Conservation Districts, Cornell Cooperative Extension, the New York State Water Resources Institute, the New York State Department of Environmental Conservation, the New York State Department of Agriculture and Markets, the Soil Conservation Service, and other appropriate institutions.

This program is responsible for:

- Reviewing existing BMPs for their applicability to watershed pollution control objectives.

- Developing and implementing a series of immediate demonstration programs with local farm operators to test the feasibility and define the methodologies of the Whole Farm Planning approach to source protection.

- Working with farmers to prepare Whole Farm Plans, and implementing those plans.

- Establishing a voluntary Whole Farm Planning/Best Management Practices Program for the entire farm community.

Voluntary Participation — Until December 31, 1996, the City is offering farm operators the opportunity to voluntarily participate in the Whole Farm Planning/Best Management Practice Program. A goal of 85 percent participation in this program by farmers throughout the watershed has been established.

Farm operators who choose to participate will be given until December 31, 1996, to work with their County Project Team to develop a Whole Farm Plan and agree to install practices according to the schedule outlined in the plan. Farm operators voluntarily participating in the Whole Farm Planning/Best Management Practices Program will be held harmless and not required to amend the farm practices agreed to in their whole Farm Plan even if, after the evaluation of the entire program in 1997, the City, in consultation with the Watershed Agricultural Council, determines there are changes needed in the watershed regulations or agricultural program. Participating farm operators would still remain responsible for violations of existing federal, state, and local standards pertaining to water quality.

Cost-Sharing — Participating farm operators will receive City cost-sharing for both the planning and implementation of the Whole Farm Planning/Best Management Practices Program, to the full extent of any cost incurred, adjusted for whatever funding is otherwise made available under existing or future federal and state agricultural water quality and other cost-sharing programs. The City will pay the cost to the farmer of participating in development of the Whole Farm Plan. Costs incurred shall include BMP operation and maintenance costs identified in the Whole Farm Plan, to the extent they represent new and additional farm operating costs considered necessary to the pollution prevention objectives of the plan.

Review of Progress in 1997 — During 1997, the City, with the assistance of the Watershed Agricultural Council and other appropriate public and private parties, will engage in a review of the results of the voluntary agricultural best management program. This review will assess the extent to which the practices and facilities called for by the Whole Farm Plans have been, or are being, adopted on schedule and are being properly maintained. Also needed is an evaluation of whether the results are consistent with the requirements of the avoidance criteria and the City's anti-degradation water quality objectives. If the review does not justify a continuation of the program in its adopted form, the City will submit to the New York State Department of Health such revisions to the watershed regulations as it deems necessary to continue to meet its obligations and responsibilities.

The City will work with the Watershed Agricultural Council on developing parameters and criteria for evaluating the agricultural program in 1997, including a variety of program and regulatory options to consider in the event that changes may be needed.

Implementation of Principles and Standards — Agricultural BMPs, as developed by New York State in support of the nonpoint source water pollution control policies of State Law and section 319 of the Federal CWA Amendments of 1987, are the preferred methodologies and techniques for implementing these principles and standards on farms in the New York City watershed system. The Whole Farm Planning approach will be employed to tailor the applicability of relevant BMPs to conditions peculiar to each farm, while providing for a farm management plan that sustains or enhances the efficiency, productivity, and economic profitability of the farm enterprise.

Scientific uncertainty exists when relating agricultural practices to their effects on raw water compliance with drinking water standards. Drinking water standards for raw water at its source covering some of the agricultural contaminants of concern are not defined. Therefore, as a general rule, Whole Farm Plans should call for the design, installation, management, and maintenance of any combination of BMPs necessary to limit the release of nutrients, organic matter, domestic animal-borne pathogens, toxic chemicals, and soil to any surface or ground water body, consistent with applicable state and federal laws and regulations, as well as with the water quality goals established for the watershed. In those cases

where it can be shown that an activity on a specific farm leads to an actual violation of a legally adopted water quality standard, the farm shall be required to alter the activity to the extent necessary to meet the water quality standards.

While it may be possible to achieve zero discharge of some contaminants during some periods (i.e., avoiding winter land application of manure or relying wholly on biocontrols or cultural practices to control some pests) universal attainment of zero discharge for all agricultural contaminants at their source is not practically achievable.

BMP Implementation — The implementation of Whole Farm Plans may be viewed as a two-level process. First, the "installation" of physical structures prescribed by the farm plan will need to be arranged. These structures may include grass waterways, manure storage facilities, barnyard improvements, diversions, etc. Engineering expertise is needed from the design through final certification of construction. Engineering technical assistance needed includes: gathering of site-specific data on soil type, drainage characteristics, and topography; preparing construction drawings, specifications, and contract documents; reviewing design with the landowner; assisting the landowner in securing a contractor; surveying and staking out the project site; inspecting ongoing installations/constructions; and certifying that projects meet contract standards.

The second level of implementing Whole Farm Plans requires the integration of a farm's physical, human, and time resources so that prescribed changes can be incorporated into the operational routine of the farm. This level of implementation involves an array of educational activities targeted at changing perceptions, attitudes, practices, and beliefs of farm managers.

Summary of New York Watershed Program — Additionally, New York has taken a similar approach to its statewide nonpoint source program. In accordance with guidance provided by state agencies, individual counties have formed County Water Quality Coordinating committees, which in turn have developed County Water Quality Strategies. These strategies identify water quality problems and outline programs to address these problems. The strategies focus on the use of education and technical assistance to prevent and remediate water quality issues at the local level. Because these programs and actions originate at the local level, the opportunity for success is greatly enhanced. When citizens have ownership of solutions to problems, action occurs and progress follows. The farm community has responded positively on this issue, as they have in the past, to programs which recognize their needs while pursuing water quality objectives.

While New York is still in Phase I of the process and much has yet to be accomplished to prove that the process ultimately works, I believe this farm-by-farm approach is tentatively accepted by the farm community in the watershed as a much preferred alternative to a traditional top-down, standard-setting, enforcement, penalty system of regulation. In fact, I am persuaded that the latter approach cannot be made to work for farms, each of which is somewhat difference from the other.

Let me summarize the important principles embodied in this approach to nonpoint pollution prevention that has been adopted as the alternative to a uniform regulatory system for the farm sector of New York City's watershed.

- The system for pursuing the City's water quality objectives, as they are affected by the agricultural segment of the watershed community, was arrived at by negotiation and consensus — not by fiat.

- The program is locally delivered and administered by an existing — not a new — group of institutions with whom farmers are familiar; who understand farming science, methods and techniques, and farm business operations; and whom farmers trust.

- The responsible regulatory institution — in this case, New York City's Department of Environmental Protection — has created contractual relationships with these locally based delivery entities to serve its public policy objectives, and has established a collaborative mechanism with the farm community generally to assure continued communication, momentum, and support.

- The cost of both the farm planning process and the installation of practices called for by each plan to achieve the pollution prevention goals of the responsible agency is financed by the responsible agency — or, in any case, not by the farmer. Once the front-end costs are overcome, these improvements will benefit the economic operation of the farm.

- The program is voluntary, but there is sufficient unchallengeable legal authority in the background, coupled with a time threshold for a high rate of sign-up, to spur participation.

- Improved and sustainable (unsubsidized) farm profitability, combined with 100 percent cost-sharing for planning and the installation of water-quality-related capital improvements and practices, creates strong incentives for farm participation.

Wetlands Regulations

Let me now turn to another area addressed in the CWA debate — wetlands regulations. NASDA strongly believes that many of our nation's wetlands are highly valuable resources that must be conserved and enhanced. At the same time, any federal program to protect wetlands must also preserve private property rights and allow for a balance between economical agricultural production and wetland conservation.

The debate over federal wetlands policy has proven to be one of the most contentious and difficult issues facing Congress. Clearly, the federal government has a role in stemming the rate of wetlands loss and encouraging restoration of areas that have been degraded by pollution or careless development activity. The policy development process is complicated by the reality that 75 percent of the nation's wetlands resource in the lower 48 states is privately owned and that much of that resource is located near large population centers.

Conserving and restoring the nation's wetlands will require an enormous commitment of privately owned land, money and expertise. It cannot be accomplished without the involvement of the private sector, particularly the people who own wetlands, in conservation and restoration activities.

The need for wetlands regulatory reform cannot be dismissed. The federal regulatory wetlands program in effect today under section 404 of the Clean Water Act is not the product of a carefully considered and fully debated legislative policy. Current federal wetlands law is the result of 20 years of bureaucratic decisions and judicial rulings under very general statutory authority — authority that does not mention the word "wetlands."

NASDA, therefore, believes that in order to protect wetlands and preserve private property rights, the following modifications must be made to section 404 during the Clean Water Act reauthorization.

Wetland Definition and Delineation — Wetlands should be defined as lands which have a predominance of hydric soils and which are inundated by surface water at a frequency and duration sufficient to support,

and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated conditions. This definition generally includes swamps, marshes, bogs, and similar areas.

In implementing this definition, rules should be established to delineate such wetlands, which —

- result in the delineation of lands as wetlands only if clear evidence of wetlands hydrology, hydrophytic vegetation, and hydric soils are present during the period in which such delineation is made;

- result in the classification of vegetation as hydrophytic only if such vegetation is more typically adapted to wet soil conditions than to dry soil conditions or is equally adapted to wet or dry soil conditions;

- result in the classification of lands as wetlands only if some obligate wetlands vegetation is found to be present during the period of delineation;

- result in the conclusion that wetlands hydrology is present only if water is found to be present at the surface of such lands for at least 21 consecutive days during the growing season (defined as the period between the average date of the last frost in the spring and the average date of the first frost in the autumn) in which such delineation is made and for 21 consecutive days in the growing season in a majority of the years for which records are available; and

- does not result in the classification of lands as wetlands that are temporarily or incidentally created.

For the purpose of delineating wetlands, normal circumstance should be determined on the basis of the factual circumstances in existence at the time the delineation is made.

Classification System — In order to preserve and protect truly valuable wetlands, a classification system should be developed for lands which meet the above definition. The system could restrict activity on high value wetlands, allow for permitted activities on moderate value wetlands, and exempt low value wetlands from regulations. In cases where economic production is denied on a class of wetlands, compensation should be provided to the land owner.

The category of wetlands statutorily exempt from regulations should include: 1) land that was both manipulated and cropped before December 23, 1985 (prior converted cropland), 2) wetlands that serve limited wetlands functions, and 3) insignificantly small wetlands.

Normal Farming Practice Exemption — Current law allows normal farming practices on wetlands without a section 404 permit. That "normal farming practice" exemption should be clarified to mean normal ongoing practices as defined by the Secretary of Agriculture, in consultation with the Cooperative Extension Service for each state and the land grant university system and agricultural colleges of the state. Existing practices and such other practices as may be identified in consultation with the affected industry or community should be taken into account.

Mitigation Requirements & Delineation Activities — Farmers, ranchers and natural resource managers believe the federal government needs to speak with one voice. However, because of the inconsistency caused by separate determinations made under the Farm Bill and the Clean Water Act, producers have

too often received conflicting answers from the four different agencies currently having some regulatory responsibility for wetlands.

Unfortunately, the problem seems to be worsening. Recently, the EPA made a decision to join the Corps in using the 1987 Army Corps of Engineers manual when defining a wetland, while the Soil Conservation Service and the Fish and Wildlife Service are using a different definition from the 1990 Farm Bill. A wetlands determination will now be made from two different definitions, two different regulations and four different agencies.

Mitigation requirements for agricultural wetlands under section 404 should be revised to be consistent with the swampbuster requirements in the 1990 Farm Bill.

The 1990 Farm Bill also directs the Soil Conservation Service and the Fish and Wildlife Service to identify wetlands. Any identification or classification system established under the Clean Water Act for agricultural lands should be consistent with those contained in the 1990 Farm Bill.

Wetlands Reserve Program — The 1990 Farm Bill authorized the Wetlands Reserve Program (WRP) for the restoration and protection of wetlands through the purchase of easements on prior converted cropland and farmed wetlands. In fiscal 1992, Congress appropriated $46.357 million to USDA for a pilot program and set a maximum enrollment of 50,000 acres. Landowners demonstrated substantial interest in the restoration and protection of agricultural wetlands. Owners of 2,337 farms submitted bids.

More than 60 percent of the total accepted acreage (30,868 acres) will be restored to wetlands; 14,105 acres will be restored to marshlands, wet meadows, or potholes; 3,374 acres will be restored to other types of wetlands; and 1,542 acres are riparian areas or upland buffers adjacent to restored wetlands that will provide habitat complimentary to the wetlands. An estimated 7,509 acres will directly benefit the recovery of threatened or endangered species.

Due to a permanent commodity program base acreage reduction of 10,113 acres, it is estimated that deficiency payments will be reduced by $3.4 million during the 1993 to 1998 period, and CRP rental payments will be reduced by about $700,000 since 2,056 CRP acres are entering the program.

Congress appropriated no additional funds for the WRP in fiscal 1993. NASDA believes continued and increased funding will assist in conserving and enhancing our wetlands resource.

Executive Branch MOA — The four federal agencies with wetlands protection responsibilities signed a Memorandum of Agreement (MOA), in January 1994, recognizing the SCS as the lead federal agency for delineating wetlands on agricultural lands. The agreement — signed by SCS, EPA, the Army Corps of Engineers (Corps), and the Fish and Wildlife Service (FWS) — is designed to enable farmers to rely on SCS wetland maps for determining the extent of wetlands for both the Farm Bill's Swampbuster program and section 404 of the CWA.

The MOA said the agencies "recognize and value the important contribution of agricultural producers to our society, our economy, and our environment." It stated they were committed to "ensuring that federal wetlands programs are administered in a manner that minimizes the impacts on affected landowners to the fullest extent consistent with the important goal of protecting wetlands." The MOA pledged to minimize "duplications and inconsistencies" between Swampbuster and section 404.

According to the MOA, the Administrator of EPA has the ultimate authority to determine the geographic scope of waters of the United States subject to jurisdiction under the CWA, including the section 404

regulatory program. It further states that the Secretary of USDA, acting through the SCS Chief, has the ultimate authority to determine the geographic scope of wetlands for Swampbuster purposes and to make delineations relative to Swampbuster, in consultation with FWS. ("Consultation" is defined for purposes of the MOA as SCS providing FWS an opportunity for full participation in the action being taken and for timely review and comment on the findings of SCS prior to a final wetland delineation pursuant to the requirements of the Farm Bill.) The purpose of the MOA is to specify that determinations made by SCS on agricultural lands, in consultation with FWS, will be accepted by EPA and the Corps for determining section 404 wetland jurisdiction. EPA and the Corps will also accept SCS determinations on non-agricultural lands that are either narrow bands immediately adjacent to, or small pockets interspersed among, agricultural lands.

The MOA defines "agricultural lands" as intensively used and managed cropland, hayland, pasture land, orchards, vineyards, and areas which support wetland crops such as cranberries, taro, watercress, and rice. Lands intensively used and managed for pasture or hayland where the natural vegetation has been removed and replaced with planted grasses or legumes are considered "agricultural lands."

"Agricultural lands" do not include rangelands, forest lands, wood lots, or tree farms. Lands where natural vegetation has not been removed, even though that vegetation may be regularly grazed or mowed and collected as forage or fodder, are not considered "agricultural lands."

Lands owned or operated by a USDA program participant that are not agricultural lands may be delineated by SCS in coordination with EPA and the Corps, and in consultation with FWS at the landowners request. ("Coordination" means that SCS will contact the Corps or EPA and provide an opportunity for review, comment and approval of the findings — in other words, EPA and the Corps will have final approval of non-agricultural land delineations.)

Delineations made on agricultural lands will be done using the National Food Security Act Manual, Third Edition. For delineations on non-agricultural lands, the 1987 Corps Wetland Delineation Manual will be used.

A final written delineation made by SCS will be adhered to by all four agencies for a period of five years. Producers wishing to manipulate a potential wetland after the five-year period expires, will need to contact SCS for an update or face possible violation penalties. SCS may change a wetland determination during the five-year period if new information "warrants" a revision. Such new information may include data on landscape changes caused by a major flood or a landowner's notification of intent to abandon agricultural use, and the return of wetland conditions on a prior converted cropland.

The MOA establishes a monitoring and review process. EPA will lead the four agencies in establishing inter-agency oversight for delineations done by SCS. These reviews will occur, at a minimum, on a quarterly basis for the first year, on a semi-annual basis for the second year, and annually thereafter. When the interagency group cannot resolve a pending issue, EPA may designate a geographic area as a "special case" and assume the responsibility of making the delineation rather than SCS.

Finally, the MOA provides that landowners for whom SCS makes a delineation for either Swampbuster or section 404 will be afforded the opportunity to appeal such determinations through the SCS appeals process. The Corps and EPA, however, have the right, on a case-by-case basis, to determine that a revised delineation resulting from an appeal is not valid for purposes of section 404 jurisdiction.

While many in agriculture welcomed the MOA when it was announced, a more detailed review of the Agreement indicates that SCS may not be in charge of wetlands determination. Not only is the definition

of an "agricultural land" inadequate, but a number of loopholes exist which allow EPA to continue to control the process. Congress should not codify the MOA in any legislation, but instead should include H.R. 1089 in the reauthorization of the CWA. H.R. 1089 is a bill which truly provides for a single federal agency — the Soil Conservation Service — to make all technical determinations with respect to wetlands or converted wetlands on agricultural lands.

CONCLUSION

Mr. Chairman, thank you for the opportunity to participate in this very important hearing on nonpoint source pollution, wetlands and reauthorization of the Clean Water Act. In order to reduce complex and diverse nonpoint source pollution, a commitment of time and resources is necessary, similar to the 20-year commitment our country has made to eliminating point source pollution. However, management of this problem will require a different approach than that of point source pollution because, unlike point source pollution, NPS pollution is primarily a weather-related phenomenon that can be managed, but not feasibly eliminated. The NPS management programs in the CWA should be reasonable, voluntary, and based on incentives, education and technical assistance. Let me restate my earlier thought: If you give us, the states, the type of timeframe given to point source pollution and an opportunity to develop a combination of programs which meet our local needs while reaching certain benchmarks along the way, I am confident we will see an improvement in water quality. NASDA believes the bipartisan alternative more closely tracks this principle and would be preferable to H.R. 3948.

I'll be happy to answer any questions you may have.

T E S T I M O N Y

Statement of
E. Benjamin Nelson
Governor of Nebraska

before the

Committee on Public Works and Transportation
Subcommittee on Water Resources and Environment
U. S. House of Representatives

on

Clean Water Act Reauthorization, H.R. 3948

May 26, 1994

NATIONAL GOVERNORS' ASSOCIATION
Hall of the States • 444 North Capitol Street • Washington, DC 20001-1572 • (202) 624-5300

GOOD MORNING MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, I'M BEN NELSON, GOVERNOR OF NEBRASKA. I AM HERE TODAY REPRESENTING THE NATIONAL GOVERNORS' ASSOCIATION. WE APPRECIATE THE OPPORTUNITY TO PROVIDE INPUT ON CHAIRMAN MINETA'S REAUTHORIZATION AMENDMENTS BEFORE THE FULL COMMITTEE TAKES ACTION ON THE BILL.

THE GOVERNORS' PRIMARY CONCERN IS A CLEAN ENVIRONMENT. OUR PURPOSE IS NOT TO WEAKEN FEDERAL REGULATIONS, BUT RATHER, TO PROMOTE CHANGES THAT CREATE A SAFER, HEALTHIER ENVIRONMENT.

LET ME BEGIN BY CLEARLY STATING THAT THE GOVERNORS ARE COMMITTED TO PASSAGE OF AMENDMENTS TO THE CLEAN WATER ACT THIS YEAR. WE HAVE INVESTED SIGNIFICANT TIME AND ENERGY THROUGH NGA TO ENSURE CONTINUED IMPROVEMENTS IN THE PROGRAMS THAT PROTECT THE QUALITY OF THE NATION'S WATER. GOVERNORS CONSIDER THE PROTECTION OF PUBLIC HEALTH AND WATER AS AMONG OUR MOST IMPORTANT RESPONSIBILITIES. WE HAVE PASSED SOUND LEGISLATION AT THE STATE LEVEL, AND WE HAVE WORKED WITH CONGRESS OVER THE YEARS TO ENACT SOUND FEDERAL LAWS. GOVERNORS WANT AN IMPROVED CLEAN WATER ACT. IT IS EASY TO FALL INTO EMPTY DEBATES ABOUT "STRONGER" AND "WEAKER." MEASURING THE EFFECTIVENESS OF THE LAW SHOULD BE BASED ON REALITY -- NOT RHETORIC.

THE EXISTING FEDERAL WATER POLLUTION CONTROL ACT (CLEAN WATER ACT) IS GENERALLY CONSIDERED AN EFFECTIVE ENVIRONMENTAL LAW THAT HAS RESULTED IN SIGNIFICANT IMPROVEMENTS TO WATER QUALITY ACROSS THE COUNTRY. ON THIS POINT, CONGRESS, THE ADMINISTRATION, AND THE GOVERNORS AGREE. IN FACT, THERE IS LITTLE DISAGREEMENT ABOUT CLEAN WATER OBJECTIVES. THE ROUTE WE CHOOSE TO REACH THE OBJECTIVES, HOWEVER, WILL DETERMINE HOW FAST WE GET THERE, AND AT WHAT COST, OR WHETHER WE GET THERE AT ALL. THE GOVERNORS BELIEVE THAT REAUTHORIZATION SHOULD INCREASE THE EFFECTIVENESS OF THE LAW AND PROVIDE FOR IMPROVEMENTS TO WATER QUALITY COMMENSURATE WITH THE INVESTMENT OF NEW RESOURCES.

I COMMEND CHAIRMAN MINETA FOR MAKING CLEAN WATER ACT REAUTHORIZATION A CLEAR PRIORITY THIS YEAR. I ALSO COMMEND MR. MINETA AND MR. APPLEGATE FOR YOUR WORK OVER THE PAST YEAR TO OBTAIN INPUT THROUGH HEARINGS TO DEVELOP A REAUTHORIZATION BILL. IN MOST RESPECTS, THE SUBSTITUTE AMENDMENT TO H.R. 3948 IDENTIFIES THE CLEAN WATER ISSUES OF GREATEST IMPORTANCE TO GOVERNORS, INCLUDING NONPOINT SOURCE POLLUTION, WATERSHED PLANNING, STATE REVOLVING FUNDS FOR WASTEWATER INFRASTRUCTURE, STORMWATER MANAGEMENT, AND WETLANDS PROTECTION.

ADDITIONALLY, I WOULD LIKE TO COMMEND THE CHAIRMAN'S RECOGNITION OF THE NEED FOR INCREASED FUNDING LEVELS TO FULLY CAPITALIZE THE STATE REVOLVING LOAN PROGRAM AND TO ADEQUATELY FUND THE IMPLEMENTATION OF NEW AND EXISTING CLEAN WATER REQUIREMENTS. CURRENT FUNDING LEVELS ARE CLEARLY INADEQUATE IN THE FACE OF PROJECTED NEEDS. THE GOVERNORS SUPPORT AN ANNUAL APPROPRIATION OF $5 BILLION ($2 BILLION AT A MINIMUM) THROUGH THE YEAR 2000 TO CAPITALIZE STATE REVOLVING FUNDS. CONGRESS MUST APPROPRIATE

MONIES THAT REFLECT THE HIGHER AUTHORIZATION LEVELS IN H.R. 3948 TO CONFIRM THE NATION'S LONG-TERM COMMITMENT TO ENVIRONMENTAL PROTECTION. A MIXED MESSAGE IS SENT TO OUR CITIZENS WHEN CONGRESS IMPOSES NEW CLEAN WATER REQUIREMENTS ON STATES, LOCALITIES, AND THE REGULATED COMMUNITY WHILE APPROPRIATING FUNDS AT THE LOWEST LEVELS IN THE HISTORY OF THE CLEAN WATER PROGRAM.

WE HAVE LEARNED A GREAT DEAL SINCE THE LANDMARK FEDERAL WATER POLLUTION CONTROL ACT OF 1972. IN 1994, WE MUST ACHIEVE A MORE EFFECTIVE CLEAN WATER PARTNERSHIP THAT BUILDS UPON THE EXPERIENCE OF THE LAST 22 YEARS AND TAKES ADVANTAGE OF THE CAPABILITY AND COMMITMENT DEVELOPED OVER THAT TIME. TO DATE, WE HAVE BEEN WORKING ON WHAT, IN SOME RESPECTS, ARE THE EASIEST PROBLEMS. NOW, WE WILL HAVE TO WORK NOT ONLY HARDER, BUT SMARTER.

A SUCCESSFUL PARTNERSHIP MUST ACKNOWLEDGE THE LIMITED RESOURCES AVAILABLE TODAY FOR WATER RESOURCE MANAGEMENT AND DEMAND IMPROVED INTERGOVERNMENTAL COOPERATION IN ORDER TO MAXIMIZE EXISTING RESOURCES. ADDITIONALLY, THE FEDERAL-STATE-LOCAL RELATIONSHIP MUST BE REFINED TO STREAMLINE REQUIREMENTS IN A WAY THAT REMOVES UNNECESSARY AND UNPRODUCTIVE BURDENS ON STATE AND LOCAL GOVERNMENTS IN THE IMPLEMENTATION OF CLEAN WATER ACT REQUIREMENTS.

REGARDING THE CHAIRMAN'S SUBSTITUTE AMENDMENTS TO H.R. 3948, I WOULD LIKE TO FIRST ACKNOWLEDGE A COUPLE AREAS OF THE BILL IN WHICH YOU HAVE CLEARLY LISTENED AND RESPONDED TO CONCERNS RAISED BY GOVERNORS.

FIRST, IN ADDITION TO INCREASED AND CONTINUED FUNDING, WE GREATLY APPRECIATE YOUR PROPOSED IMPROVEMENTS TO MAKE THE STATE REVOLVING LOAN PROGRAMS MORE EFFICIENT AND EFFECTIVE. THE BILL MAINTAINS BROAD ELIGIBILITIES FOR STATE REVOLVING LOAN FUNDS, WHICH ALLOWS THE USE OF FUNDS TO IMPROVE WATER QUALITY IN BOTH TRADITIONAL AND INNOVATIVE WAYS. THE BILL ALSO RECOGNIZES THE NEED TO PROVIDE SPECIAL ASSISTANCE TO CERTAIN NEEDY COMMUNITIES BY OFFERING LOANS WITH NEGATIVE INTEREST RATES AND EXTENDED REPAYMENT PERIODS. THE GOVERNORS RECOMMEND THAT THE BILL AUTHORIZE STATES TO IDENTIFY SUCH NEEDY OR "HARDSHIP COMMUNITIES" BASED ON STATE-DEVELOPED AFFORDABILITY CRITERIA TO ALLOW FLEXIBILITY WITHOUT A DESIGNATED POPULATION CUT-OFF. THIS APPROACH MAKES SENSE BECAUSE THE SIZE OF SMALL COMMUNITIES AND THE CHARACTERISTICS OF ECONOMICALLY DISADVANTAGED COMMUNITIES VARIES SIGNIFICANTLY FROM STATE TO STATE.

SECOND, THE GOVERNORS APPLAUD THE AMENDMENTS TO ENSURE FEDERAL CONSISTENCY WITH STATE WATER QUALITY REQUIREMENTS AND PROGRAMS, INCLUDING A WAIVER OF SOVEREIGN IMMUNITY. THE BILL APPROPRIATELY CLARIFIES THAT FEDERAL ACTIVITIES ARE SUBJECT TO THE REQUIREMENTS OF THE CLEAN WATER ACT IN AN ENFORCEABLE MANNER CONSISTENT WITH THE LAW'S APPLICABILITY TO ALL PERSONS OUTSIDE OF THE FEDERAL GOVERNMENT. THE GOVERNORS MAINTAIN A STRONG POSITION IN SUPPORT OF ENSURING FEDERAL COMPLIANCE IN ALL ENVIRONMENTAL STATUTES.

A FUNDAMENTAL CONCERN THAT GOVERNORS SHARE ABOUT THE BILL STEMS FROM AN UNDERLYING THEME TO TRANSFORM THE FEDERAL-STATE RELATIONSHIP IN A MANNER THAT WILL CRIPPLE SUCCESSFUL WATER QUALITY EFFORTS UNDERWAY AT THE STATE, LOCAL, AND GRASSROOTS LEVELS. THE ACCOMPLISHMENTS ACHIEVED UNDER THE CURRENT ACT DEMONSTRATE THE VALUE OF A FRAMEWORK IN WHICH THE FEDERAL GOVERNMENT PROVIDES POLICY AND TECHNICAL GUIDANCE THAT STATES CAN APPROPRIATELY TAILOR TO MEET LOCAL NEEDS. WITHOUT CLEAR JUSTIFICATION, H.R. 3948 PROPOSES TO SIGNIFICANTLY EXPAND FEDERAL AUTHORITY OVER GROUNDWATER, ANTIDEGRADATION OF STATE WATERS, AND APPLICABILITY OF FEDERAL WATER QUALITY STANDARDS WITHOUT PUBLIC NOTICE AND HEARING IN THE STATE. HISTORICALLY, THESE AREAS OF WATER RESOURCE MANAGEMENT HAVE BEEN UNDER STATE JURISDICTION. THE EXISTING FRAMEWORK FOR THE FEDERAL-STATE RELATIONSHIP SHOULD BE REFINED -- NOT REVERSED.

ADDITIONALLY, WE ARE DISAPPOINTED THAT THE AMENDMENTS CONTAIN NO PROVISION TO ENSURE THAT THE U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) UTILIZES A RISK-BASED APPROACH THAT IS CONSISTENT AND ACCESSIBLE TO INTERESTED CITIZENS WHEN DEVELOPING CLEAN WATER REGULATIONS. A RISK-BASED APPROACH MAKES PUBLIC HEALTH SENSE WHILE ENSURING THAT REQUIREMENTS CAN BE IMPLEMENTED IN A COST-EFFECTIVE MANNER AT THE FEDERAL, STATE, AND LOCAL LEVELS. THE GOVERNORS PROPOSE THAT THE EPA ADMINISTRATOR SHOULD INCORPORATE RISK ASSESSMENT AND COST-BENEFIT ANALYSIS, TAKING QUANTIFIABLE AND QUALITATIVE MEASURES INTO ACCOUNT, WHEN DEVELOPING REGULATIONS. ADDITIONALLY, WE PROPOSE THAT THE ADMINISTRATOR, AT THE PETITION OF THE GOVERNOR, SHOULD AUTHORIZE STATES TO TRANSFER GRANT FUNDS BETWEEN WATER QUALITY PROGRAMS AND TARGET STATE WATER QUALITY PRIORITIES, AS WELL AS THE GOALS OF THE CLEAN WATER ACT.

I WOULD LIKE TO ILLUSTRATE OUR CONCERNS WITH SOME SPECIFIC PROVISIONS OF THE LEGISLATION THAT ARE PARTICULARLY IMPORTANT TO GOVERNORS.

NONPOINT SOURCE POLLUTION

THE GOVERNORS EMBRACE NONPOINT SOURCE OBJECTIVES AND ARE COMMITTED TO DEVELOPING EFFECTIVE STRATEGIES THAT WILL REDUCE POLLUTION CAUSED BY RUNOFF FROM AGRICULTURAL, COMMERCIAL, AND RESIDENTIAL SITES. HOWEVER, UNLIKE INDUSTRIAL SOURCES THAT CAN BE REGULATED AT THE POINT OF DISCHARGE TO DEMONSTRATE MEASURABLE REDUCTIONS IN POLLUTION, NONPOINT SOURCE RUNOFF REQUIRES THE HIGHEST DEGREE OF INNOVATION AND FLEXIBILITY TO ACHIEVE PROGRESS. AFTER TWENTY YEARS OF REGULATING INDUSTRIAL AND MUNICIPAL POINT SOURCES OF POLLUTION, THE GOALS ARE NOT YET ACHIEVED. OVERCOMING THE COMPLEXITY AND VARIETY OF EXISTING NONPOINT SOURCE CONTROL PROBLEMS WILL CLEARLY TAKE SIGNIFICANT FUNDING, TIME, AND EDUCATION.

WE SUPPORT THE FRAMEWORK PROPOSED IN H.R. 3948 IN THAT IT BUILDS ON THE EXISTING NONPOINT SOURCE MANAGEMENT PROGRAM AND CLEARLY IDENTIFIES A GOAL TO ATTAIN WATER QUALITY STANDARDS IN FIFTEEN YEARS. WE BELIEVE THE

APPROPRIATE FEDERAL ROLE IS TO PROVIDE FINANCIAL AND TECHNICAL ASSISTANCE, AS WELL AS OVERSIGHT OF STATE PROGRAMS. WE ALSO BELIEVE IT IS APPROPRIATE THAT STATES RETAIN PRIMARY RESPONSIBILITY FOR NONPOINT SOURCE PROGRAMS. TO MEET THIS RESPONSIBILITY, STATES SHOULD BE REQUIRED TO IMPLEMENT A NONPOINT SOURCE PROGRAM THAT ADDRESSES POLLUTION OF THREATENED OR IMPAIRED WATERS. HOWEVER, I URGE YOU TO RECONSIDER THE ASSUMPTION THAT REQUIRING STATES TO IMPOSE MANDATORY, ENFORCEABLE MEASURES ON INDIVIDUAL FARMERS AND LANDOWNERS WILL EFFECTIVELY REDUCE NONPOINT SOURCE RUN-OFF.

WE BELIEVE THAT STATE AND LOCAL GOVERNMENT CAN DEMONSTRATE NONPOINT SOURCE SUCCESS UNDER THE CURRENT FEDERAL AND STATE PROGRAM FRAMEWORK IF GIVEN A REASONABLE TIMEFRAME TO DO SO. FOR INSTANCE, IN NEBRASKA, OUR STATE PROGRAM ALONE (NOT INCLUDING FEDERAL FUNDS), HAS RESULTED IN THE IMPLEMENTATION OF 7,404 MILES OF TERRACES, 443 GRADE STABILIZATION STRUCTURES, 754 IRRIGATION TRAILWATER RECOVERY PITS, 8,061 ACRES OF GRASSED WATERWAYS, 577 IRRIGATION SURGE VALVES, AND 10,867 ACRES OF PASTURE AND RANGE SEEDING, ALL OF WHICH HAVE A DIRECT AND POSITIVE EFFECT ON SURFACE WATER QUALITY. ALL OF MY STATE'S 23 NATURAL RESOURCES DISTRICTS EITHER HAVE IN PLACE OR ARE DEVELOPING GROUNDWATER QUALITY MANAGEMENT PLANS AND IMPLEMENTATION SCHEDULES TO ADDRESS NONPOINT SOURCES. THESE ARE BUT A FEW EXAMPLES OF VOLUNTARY STATE AND LOCAL LEAD INITIATIVES, WHICH, GIVEN REASONABLE TIME, WILL DEMONSTRATE POSITIVE RESULTS.

THE BEST WAY TO ASSURE A PRODUCTIVE NONPOINT SOURCE PROGRAM IS TO BASE IT ON AN EDUCATIONAL APPROACH -- NOT AN ENFORCEMENT APPROACH. IN NEBRASKA, WE HAVE APPROXIMATELY 40,000 FARMS OF MORE THAN 50 ACRES IN SIZE. WE HAVE EXPERIENCE WITH THIS EXACT SITUATION AND CAN ASSURE YOU THAT IT WORKS.

ON BEHALF OF THE GOVERNORS, I MUST TAKE ISSUE WITH THE MANDATORY, ENFORCEABLE NATURE OF THE NONPOINT SOURCE PROGRAM PROPOSED IN THE BILL. REGULATORY ENFORCEMENT-ORIENTED APPROACHES ARE THE BEST BET FOR GETTING THE WORST PRODUCT IN THE LONGEST TIMEFRAME. WE MUST LEARN FROM THE PRESCRIPTIVE APPROACH THAT HAS PLAGUED THE SUPERFUND PROGRAM. AS THE GOVERNOR OF A STATE WITH A SIGNIFICANT AMOUNT OF RURAL LAND AREA AND AGRICULTURAL PRODUCTION, I AM A FIRM BELIEVER IN COMPLIANCE THROUGH EDUCATION AND OTHER NON-ENFORCEABLE MEANS (I.E. PROPER TRAINING AND MAINTENANCE OF DETENTION BASINS AND PONDS, REVEGETATION OF ERODED AREAS, AND GRASSED WATERWAYS). INDIVIDUAL FARMERS AND LANDOWNERS WANT TO PROTECT THEIR LAND FOR FUTURE GENERATIONS. GRASSROOTS SUPPORT FOR A NONPOINT PROGRAM IS ESSENTIAL TO OBTAINING THE LONG-TERM COMPLIANCE THAT WILL RESULT IN POLLUTION REDUCTIONS THROUGHOUT THE YEARS.

LET ME SUGGEST TO YOU THAT A MANDATORY APPROACH WILL SEVERELY LIMIT THE ABILITY OF STATES TO "GET OFF THE DIME" WITH AN EFFECTIVE NONPOINT SOURCE PROGRAM THAT HAS SUPPORT FROM THE AGRICULTURAL COMMUNITY. FURTHER, WE MAINTAIN THAT IMPOSING MANDATORY, ENFORCEABLE MEASURES AT THE NATIONAL LEVEL WILL BRING VOLUNTARY COMPLIANCE IN ALL STATES TO A SCREECHING HALT. STATES MUST MAINTAIN THE UTMOST FLEXIBILITY IN REACHING THE GOAL OF WATER

QUALITY STANDARDS BASED ON A COMBINATION OF INCENTIVES, REGULATORY AND VOLUNTARY MEASURES, EDUCATION, AND TRAINING TO ADDRESS LOCAL PRIORITIES WITHIN WATERSHEDS AND COMMUNITIES.

WATERSHED PLANS

AS IN THE NONPOINT SOURCE ARENA, SUCCESS IN WATERSHED MANAGEMENT WILL BE THE RESULT OF ENSURING LOCAL OWNERSHIP OF A HOLISTIC APPROACH THAT ACHIEVES MULTIPLE OBJECTIVES WITH INNOVATION AND EFFICIENCY. WE APPLAUD YOUR INCLUSION OF PROVISIONS AUTHORIZING STATES TO TAKE A HOLISTIC APPROACH TO WATER RESOURCE MANAGEMENT ON A WATERSHED BASIS. ALTHOUGH STATES CAN DEVELOP WATERSHED PLANS UNDER CURRENT LAW, THERE ARE BUREAUCRATIC BARRIERS THAT MAKE IT DIFFICULT TO TARGET FUNDS AND COMPLY WITH THE INDIVIDUAL REQUIREMENTS OF FEDERAL PROGRAMS.

THE CHAIRMAN'S AMENDMENTS RECOGNIZE THE BENEFITS OF THE WATERSHED APPROACH AND PROVIDE SOME DESIRABLE INCENTIVES, BUT STILL PROPOSE PRESCRIPTIVE FEDERAL CRITERIA FOR INDIVIDUAL PLANS AND NEW LAYERS OF BUREAUCRACY TO OBTAIN FEDERAL APPROVAL OF A STATE PROGRAM. A MICRO-MANAGED FEDERAL APPROVAL PROCESS MAY ULTIMATELY DISCOURAGE STATES FROM DEVELOPING A WATERSHED PROGRAM. I URGE YOU TO REVIEW THE NONPOINT SOURCE AND WATERSHED MANAGEMENT PROPOSALS IN THE STATE PACKAGE THAT IDENTIFY AND HOLD STATES ACCOUNTABLE TO THE SAME GOALS AS THE CHAIRMAN'S AMENDMENTS, YET ALLOW FOR THE INNOVATION AND FLEXIBILITY THAT IS ABSOLUTELY NECESSARY TO REALISTICALLY ACHIEVE THOSE GOALS.

GROUNDWATER MANAGEMENT

WHILE GOVERNORS STRONGLY SUPPORT NATIONAL RECOGNITION OF STATE GROUNDWATER PROTECTION EFFORTS, AN EXPANSION OF THE SCOPE OF THE CLEAN WATER ACT TO IMPOSE FEDERAL AUTHORITY OVER GROUNDWATER IS UNPRECEDENTED AND UNNECESSARY. STATES HOLD AUTHORITY TO ADDRESS INSTANCES WHERE GROUNDWATER POLLUTION MAY IMPACT NAVIGABLE SURFACE WATERS. GROUNDWATER IS SO HIGHLY VARIABLE IN ITS USES AND OCCURRENCE THAT IT MUST BE MANAGED THROUGH STATE AND LOCAL PROGRAMS TAILORED TO PROTECT AGAINST THE SPECIFIC THREATS THAT MAY EXIST IN A PARTICULAR COMMUNITY OR STATE. STATES HAVE LONG RECOGNIZED THE VITAL IMPORTANCE OF GROUNDWATER, AND ARE ACTIVELY INVOLVED WITH GROUNDWATER MONITORING, PROTECTION, AND MANAGEMENT PROGRAMS.

FOR INSTANCE, IN MY STATE WE HAVE PASSED LEGISLATION AND ARE IMPLEMENTING PROGRAMS DEALING WITH WELL CONSTRUCTION, WELL ABANDONMENT, CHEMIGATION, SPECIAL PROTECTION AREAS, GROUNDWATER QUALITY MANAGEMENT AREAS, SECONDARY CONTAINMENT, WELLHEAD PROTECTION, AND LEAKY UNDERGROUND STORAGE TANKS. IN ADDITION, EACH OF OUR STATE'S 23 NATURAL RESOURCES DISTRICTS HAS DEVELOPED A GROUNDWATER MANAGEMENT PLAN AND IMPLEMENTATION SCHEDULE.

CURRENTLY, GROUNDWATER QUALITY IS DEALT WITH IN TWENTY OR THIRTY FEDERAL ENVIRONMENTAL STATUTES. THE GOVERNORS DO NOT BELIEVE THAT NEW FEDERAL AUTHORITY IS NEEDED AT THIS TIME. IF CONGRESS INTENDS TO ESTABLISH

A NATIONAL GROUNDWATER PROTECTION POLICY, IT SHOULD BE DEVELOPED IN A COMPREHENSIVE MANNER, OUTSIDE OF THE CLEAN WATER ACT, AS A MEANS TO RESOLVE INCONSISTENCIES AMONG ALL FEDERAL ACTIVITIES THAT AFFECT GROUNDWATER. MERELY ADDING REFERENCES TO GROUNDWATER WITHIN EXISTING CLEAN WATER PROGRAMS WILL CREATE CONFUSION, AND RESULT IN MORE WORK FOR STATES -- WITHOUT MORE MONEY -- AND WITHOUT COMMENSURATE IMPROVEMENTS IN WATER QUALITY.

ANTIDEGRADATION POLICY

CODIFICATION OF THE EXISTING REGULATORY POLICY ON ANTIDEGRADATION INTO THE STATUTE MUST BE DONE WITH GREAT CAUTION. UNDER EXISTING REGULATIONS, STATES HAVE DEVELOPED AND IMPLEMENTED ANTIDEGRADATION POLICIES TO PROTECT AND MAINTAIN EXISTING USES AND CONTROL DEGRADATION OF WATERS. AS WRITTEN, H.R. 3948 UNNECESSARILY IMPOSES A "NO GROWTH" REQUIREMENT THAT IS OF SERIOUS CONCERN TO GOVERNORS. THE BILL PROHIBITS STATES FROM APPROVING INCREASES OR CHANGES IN RECEIVING WATER QUALITY UNLESS WE CAN ASSURE THAT ALL POINT AND NONPOINT SOURCES ARE SUBJECT TO ALL APPLICABLE AND ENFORCEABLE REQUIREMENTS OF THE ACT. THIS APPROACH OFFERS NO SITE-SPECIFIC FLEXIBILITY, WHICH, IN EFFECT, WILL PROHIBIT VOLUNTARY INITIATIVES AND COMMUNITY GROWTH. THE EXISTING ANTIDEGRADATION POLICY SHOULD BE MAINTAINED WITH CLEAR GUIDANCE FOR IMPLEMENTATION.

WATER QUALITY STANDARDS

UNDER CURRENT LAW, THE NATURE OF THE FEDERAL-STATE RELATIONSHIP TO DEVELOP AND IMPLEMENT WATER QUALITY STANDARDS AT THE STATE LEVEL IS APPROPRIATE, WHILE THE OPPORTUNITY FOR STATE INPUT IN THE ENVIRONMENTAL PROTECTION AGENCY'S DEVELOPMENT OF FEDERAL STANDARDS IS INADEQUATE. THE MOST IMPORTANT NEED FOR IMPROVED WATER QUALITY STANDARDS IS BETTER SCIENCE BASED ON CREDIBLE DATA.

H.R. 3948 INAPPROPRIATELY ALTERS THE FEDERAL-STATE RELATIONSHIP BY MAKING FEDERAL STANDARDS AUTOMATICALLY APPLY TO WATERS IN STATES THAT HAVE NOT OBTAINED APPROVAL OF STATE-DEVELOPED STANDARDS WITHIN THREE YEARS. THE AMENDMENTS ELIMINATE THE EXISTING PROVISION THAT REQUIRES THE FEDERAL GOVERNMENT TO CONDUCT A PUBLIC NOTICE AND COMMENT PROCESS BEFORE IMPOSING MANDATORY FEDERAL STANDARDS WITHIN A STATE. SUCH FEDERAL INTRUSION IS UNWARRANTED. STATES MUST MAINTAIN PRIMARY RESPONSIBILITY TO DEVELOP DEFENSIBLE, IMPLEMENTABLE, AND ENVIRONMENTALLY PROTECTIVE STANDARDS THAT REFLECT LOCAL CONDITIONS.

STORMWATER MANAGEMENT

THE GOVERNORS AGREE THAT REDUCING STORMWATER CONTAMINATION IS IMPORTANT IN ACHIEVING THE FISHABLE, SWIMMABLE GOAL OF THE CLEAN WATER ACT. THE GOVERNORS STRESS, HOWEVER, THAT THE LAW MUST RECOGNIZE THE DIFFERENCES BETWEEN STORMWATER AND TYPICAL POINT SOURCE DISCHARGES. ALTHOUGH IT IS DISCHARGED AT DISCRETE OUTFALLS, STORMWATER IS REALLY NONPOINT POLLUTION GENERATED BY RUNOFF FROM STREETS, PARKING LOTS, BUILDINGS, AND LAND. THE REGULATION OF POINT SOURCE DISCHARGES IS BASED ON KNOWN FLOWS, PROCESSES, PLANT PERFORMANCES, AND TECHNOLOGIES NOT

AVAILABLE FOR STORMWATER. THE GOVERNORS BELIEVE THAT H.R. 3948 SHOULD CLEARLY AUTHORIZE THE USE OF SITE-SPECIFIC MEASURES, INCLUDING ENFORCEABLE NONPERMIT APPROACHES (I.E., USE OF DESIGN MEASURES AND POROUS PAVEMENT TO MINIMIZE RUN-OFF FROM PARKING LOTS, FREQUENT VACUUMING OF CONCRETE GRID PAVEMENTS, INSPECTION OF BASINS AND PONDS) TO CONTROL STORMWATER. THE BILL ALSO SHOULD EXPLICITLY AUTHORIZE STATES TO PRIORITIZE STORMWATER CONTROL ACTIVITIES BASED ON PUBLIC HEALTH RISK, WATER QUALITY, AND COST-EFFECTIVENESS.

WETLANDS PROTECTION

THE GOVERNORS STRONGLY BELIEVE THAT WETLANDS MANAGEMENT MUST BE IMPROVED BY STREAMLINING THE FEDERAL REGULATORY REQUIREMENTS AND ENHANCING THE STATES' ROLE IN WETLANDS MANAGEMENT. THE GOVERNORS SUPPORT H.R. 3948'S INCLUSION OF THE NATIONAL GOAL TO ACHIEVE NO NET LOSS OF THE NATION'S REMAINING WETLAND BASE, AS DEFINED BY BOTH ACREAGE AND FUNCTION. THE GOAL OF NO NET LOSS CAN BE MOST EFFECTIVELY MET WITH POLICIES THAT STRIVE TO AVOID WETLANDS ALTERATIONS AND THAT RECOGNIZE THE VARIOUS QUALITIES OF WETLANDS, TAKING REGIONAL VARIATIONS INTO ACCOUNT.

THE STATES' ROLE IN WETLANDS PROTECTION SHOULD BE STRENGTHENED BY INCREASING THE FEASIBILITY FOR STATES TO ASSUME THE FEDERAL PROGRAM AND BY EXPLICITLY AUTHORIZING THE U.S. CORPS OF ENGINEERS TO GRANT STATES GENERAL PERMIT AUTHORITY. THE LATTER PROVISION IS INCLUDED IN H.R. 3948. REGARDING STATES' ABILITY TO ASSUME THE FEDERAL PROGRAM, THE GOVERNORS BELIEVE THAT EACH STATE THAT ASSUMES THE PROGRAM SHOULD NEGOTIATE A METHOD OF FEDERAL OVERSIGHT APPROPRIATE TO ITS CIRCUMSTANCES. OVERSIGHT IN THE FORM OF AN ANNUAL PROGRAM AUDIT, ELIMINATING THE ENVIRONMENTAL PROTECTION AGENCY'S AUTHORITY TO VETO INDIVIDUAL STATE PERMITS, SHOULD BE AN OPTION. THIS QUESTION COULD BE REVISITED AS A STATE PROGRAM MATURES.

CLARIFICATION OF STATE WATER QUALITY CERTIFICATION

FOR SEVERAL YEARS REPRESENTATIVES OF STATE GOVERNMENT HAVE BEEN CALLING FOR CLARIFICATION OF SECTION 401 OF THE CLEAN WATER ACT. AS YOU KNOW, THE ACT PROVIDES EXPLICIT AUTHORITY TO STATES TO ISSUE OR DENY WATER QUALITY CERTIFICATION FOR FEDERAL PROJECTS THAT WILL DISCHARGE POLLUTANTS INTO STATE WATERS. THIS AUTHORITY IS CONSISTENT WITH STATE PRIMACY OVER WATER RESOURCES AND IS AN ESSENTIAL TOOL FOR THE STATES TO USE IN COMPREHENSIVELY MANAGING WATER RESOURCES. INCREASINGLY, STATES PLAY THE CENTRAL ROLE IN INTEGRATING WATER QUALITY AND WATER QUANTITY MANAGEMENT, UTILIZING TOOLS SUCH AS WATERSHED PLANNING. WHILE MOST COURTS HAVE INTERPRETED THE PROVISION BROADLY, A FEW COURTS HAVE IMPROPERLY NARROWED STATE AUTHORITY TO DENY OR CONDITION WATER QUALITY CERTIFICATION BASED ON ANY IMPACT OTHER THAN CHEMICAL POLLUTION FROM POINT SOURCES (NOT PHYSICAL AND BIOLOGICAL FACTORS, AS WE BELIEVE CONGRESS INTENDED).

IF STATES ARE TO CONTINUE TO TAKE INNOVATIVE AND SUCCESSFUL STEPS TOWARD IMPROVING THE QUALITY AND OVERALL HEALTH OF THEIR WATER RESOURCES, OUR ABILITY TO EFFECTIVELY UTILIZE ALL AVAILABLE AUTHORITIES MUST BE ASSURED.

STATE WATER QUALITY CERTIFICATION IS CRITICAL TO THE SUCCESSFUL ACHIEVEMENT OF COMPREHENSIVE WATER MANAGEMENT GOALS AND THE ULTIMATE SUCCESS OF THE CLEAN WATER ACT. MY COLLEAGUES AND I URGE YOU TO ENACT THE CLARIFICATION THAT WILL ENSURE THAT RESPONSIBLE STATE WATER MANAGEMENT ACTIVITIES ARE NOT DISRUPTED BY AN ARBITRARILY NARROW INTERPRETATION OF STATE CERTIFICATION AUTHORITY. AS AN EXAMPLE, I SUGGEST YOU REFER TO SECTION 602 OF THE SENATE'S CLEAN WATER ACT REAUTHORIZATION BILL, S. 2093, FOR LANGUAGE THAT ADDRESSES OUR CONCERN.

DEFERENCE TO STATE WATER LAW

CONGRESSIONAL INTENT REGARDING DEFERENCE TO THE STATES' ROLE TO ALLOCATE QUANTITIES OF WATER AND PROTECTION OF STATE WATER RIGHTS IS CLEARLY EXPRESSED IN THE GOALS AND OBJECTIVES OF THE CLEAN WATER ACT. THIS FUNDAMENTAL PRINCIPLE OF DEFERENCE, WHICH IS CODIFIED IN MANY OTHER FEDERAL ENVIRONMENTAL STATUTES, MUST NOT BE WEAKENED IN THIS REAUTHORIZATION. I STRONGLY ENCOURAGE THE COMMITTEE TO REITERATE AND CLARIFY CONGRESSIONAL POLICY ON THIS VITAL ISSUE BY ADOPTING LANGUAGE TO CLARIFY IN SECTION 510 OF THE ACT, WHICH GOVERNS STATE AUTHORITY, THE EFFECT OF THE POLICY PRONOUNCED IN THE ACT'S GOALS AND OBJECTIVES.

WHILE OUR OBJECTIVES TO IMPROVE THE QUALITY OF THE NATION'S RIVERS AND STREAMS ARE IN STRONG AGREEMENT, WE BELIEVE THAT SOME OF THE PROVISIONS IN H.R. 3948 REFLECT A DIFFERENT APPROACH TO ACHIEVING CLEAN WATER THAN THE FRAMEWORK PROPOSED BY GOVERNORS. AT A MEETING EARLY THIS YEAR, REPRESENTATIVES OF 15 GOVERNORS -- MOSTLY VETERANS OF CLEAN WATER PROGRAMS -- UNANIMOUSLY AGREED THAT THE LEGISLATIVE PROPOSALS UNDER CONSIDERATION ARE NOT "IMPLEMENTABLE" IN MANY RESPECTS. PUT SIMPLY THOSE WHO RUN THE PROGRAM FOR STATES THINK THAT THE PROPOSALS ARE SET UP TO FAIL. TO DEMONSTRATE OUR COMMITMENT TO MAINTAIN A STRUCTURE AND A PROCESS THAT WILL IMPROVE WATER QUALITY IN A PROTECTIVE, COST-EFFECTIVE MANNER, WE HAVE DEVELOPED A STATE PROPOSAL FOR YOUR CONSIDERATION IN REAUTHORIZATION DISCUSSIONS.

I BELIEVE YOU ARE AWARE OF THE STATE PACKAGE (PRESENTED AS AMENDMENTS TO CURRENT LAW), WHICH REFLECTS A STATE PERSPECTIVE ON HOW BEST TO IMPROVE AND STRENGTHEN THE CLEAN WATER ACT. IT ALSO INCORPORATES IMPORTANT ELEMENTS OF "REINVENTING GOVERNMENT" INTO A STRUCTURE AND PROCESS THAT IS INTENDED, NOT JUST FOR SHOW, BUT FOR WORK THAT WILL PRODUCE REAL WORLD RESULTS. THE STATE PACKAGE WAS DEVELOPED BY AN AD HOC CLEAN WATER WORKING GROUP COMPOSED OF REPRESENTATIVES OF MORE THAN 25 GOVERNORS (AND OPEN TO ALL STATES). IT HAS BEEN REVIEWED BY ALL GOVERNORS. NOT SURPRISINGLY, WE CANNOT CLAIM UNANIMITY AMONG THE STATES ON EVERY DETAIL IN THE PACKAGE. HOWEVER, YOU CAN BE CONFIDENT THAT IT HAS BROAD AND STRONG SUPPORT, WITH NO SUBSTANTIAL DISAGREEMENT ON ITS BASIC ELEMENTS. I ASK THAT A COPY OF THE STATE PACKAGE BE INCLUDED IN THE RECORD OF THIS HEARING.

I UNDERSTAND THAT SOME ELEMENTS OF THE STATE PACKAGE HAVE BEEN INCORPORATED INTO A CLEAN WATER DISCUSSION DRAFT, KNOWN AS THE

BIPARTISAN ALTERNATIVE, DEVELOPED BY SEVERAL MEMBERS OF THIS COMMITTEE. I STRONGLY ENCOURAGE YOU TO CONSIDER THE STATE PACKAGE AND THE BIPARTISAN ALTERNATIVE, TO THE EXTENT THE PROPOSALS ARE CONSISTENT (IN PARTICULAR ON NONPOINT SOURCE AND WATERSHED MANAGEMENT, ANTIDEGRADATION, AND WATER QUALITY STANDARDS), AS VEHICLES TO FACILITATE REACHING BROAD-BASED AGREEMENT ON CRITICAL ISSUES.

AGAIN, THE GOVERNORS COMMIT TO WORKING TOWARD THE PASSAGE OF A STRONGER CLEAN WATER ACT THAT WILL PROVIDE NEW OPPORTUNITIES TO SATISFY FEDERAL REQUIREMENTS BASED ON THE MOST EFFECTIVE ROUTE TO IMPROVED WATER QUALITY AT THE STATE AND LOCAL LEVELS. WE LOOK FORWARD TO CONTINUING TO WORK TOGETHER ON THIS IMPORTANT REAUTHORIZATION.

THAT CONCLUDES MY WRITTEN TESTIMONY. MR. CHAIRMAN AND MEMBERS, THANK YOU FOR THE OPPORTUNITY TO TESTIFY TODAY. I AM HAPPY TO ANSWER ANY QUESTIONS AT THIS TIME. I WOULD ALSO LIKE TO INTRODUCE RANDOLPH WOOD, MY DIRECTOR OF ENVIRONMENTAL QUALITY. RANDY WAS HEAVILY INVOLVED IN THE STATE CLEAN WATER WORKING GROUP THAT DEVELOPED THE STATE PACKAGE AND CAN ANSWER QUESTIONS SPECIFIC TO THAT WORK OR TO NEBRASKA'S WATER PROGRAMS.

NATIONAL
GOVERNORS'
ASSOCIATION

Governor of South Carolina
Chairman

Howard Dean
Governor of Vermont
Vice Chairman

Executive Director

Hall of the States
444 North Capitol Street
Washington, D.C. 20001
Telephone (202) 624-5300

April 27, 1994

The Honorable Norman Mineta
Chairman
Committee on Public Works and Transportation
U.S. House of Representatives
2165 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

Over the past six months NGA has worked very hard with the Senate Environment and Public Works Committee, the Administration, and more recently with your staff to develop a Clean Water Act reauthorization proposal that will produce significant improvements in this important program. We are pleased that the amendments under development for consideration by your Committee reflect the results of this effort in key areas. We believe, however, the proposed amendments still do not adequately address some critical state concerns.

We appreciate your support in working with you and your staff to develop changes in the legislation before it receives final action by your Committee. We remain committed to working towards passage of amendments to the Clean Water Act that ensure continued improvements in the program to protect the quality of the nation's waters.

To that end, we transmit the enclosed objectives statement and clean water package presented as amendments to current law that reflects a state perspective on how best to improve and strengthen the Clean Water Act. This package was developed through a process that may be unprecedented in its scope and inclusiveness involving an ad hoc clean water working group composed of representatives of more than twenty-five Governors (and open to all states). It has been reviewed by all Governors.

A state perspective was developed in this fashion because all of those involved in the ongoing discussions expressed frustration with a legislative

process that, despite numerous opportunities for consultation, still fell short of achieving a common understanding and agreement on critical issues. Our objective in offering this package is to present the views of states more systematically and in context as broad alternative approaches that reflect a coherent perspective on how to maintain and strengthen an effective clean water partnership between the states and the federal government.

Not surprisingly, we cannot claim unanimity among the states on every detail in this package. However, you can be confident that it has broad and strong support, with no substantial disagreement on its basic elements. Some important matters are not yet included in this package to allow for a dialogue between the representatives of state and local elected officials. Any additional elements of the package will be forwarded to you and your staff when they become available.

We believe that this package can be a valuable tool for facilitating understanding and agreement on critical issues as S. 1114 comes up for consideration by the full Senate. Our hope is that you and your staff will accept and review this package in the spirit in which it is offered.

We believe that a more effective clean water partnership must build upon the experience of the last 22 years and take advantage of the capability and commitment developed over that time. We do not believe that we have serious disagreements concerning clean water objectives and that the state package can help us find a more effective route to improved water quality. We have asked NGA staff to meet with your staff to discuss the state package and we look forward to continuing to work together on this important reauthorization.

Sincerely,

Bob Miller

Governor Bob Miller
Chair
Committee on Natural Resources

Fife Symington

Governor Fife Symington
Vice Chair
Committee on Natural Resources

Enclosure

c: Representative Douglas Applegate
Representative Bud Shuster

04/07/94

DRAFT

OVERVIEW OF STATE OBJECTIVES for CLEAN WATER ACT REAUTHORIZATION

The existing Federal Water Pollution Control Act is an extremely effective environmental law that has resulted in significant improvements to the quality of the nation's waters. On this fact, Congress, the Administration, the Governors, and their representatives on water policy agree. Further, in reauthorizing the act, states believe that changes should be made to increase the effectiveness of the law to provide for commensurate improvements to water quality. To accomplish this objective, the Governors and their representatives propose a state package of Clean Water Act amendments to the current law for consideration in the ongoing reauthorization discussions in Congress.

The objectives of the enclosed amendments are to continue the enhancement of water quality programs based upon a federal-state partnership that recognizes that limited resources for water resource management demand improved intergovernmental cooperation. The federal-state-local relationship should be refined to streamline requirements in a way that removes unnecessary burdens on state and local governments in the implementation of Clean Water Act requirements. More specifically, the states' proposed Clean Water Act amendments will achieve water quality priorities by:

- Reducing nonpoint source pollution (NPS) through clear performance objectives, and by providing financial and technical assistance to states and affected landowners;

- Establishing a flexible framework for states to develop watershed programs that address the improvement of impaired waters based on manageable hydrologic units;

- Reducing costs and improve efficiency by utilizing relative risk analysis and cost-benefit tools in the development of regulations under the Clean Water Act;

- Increasing flexibility, without imposing new unfunded mandates, in order to allow states and local governments to target resources towards the most serious water quality problems;

- Improving and maintaining municipal wastewater infrastructure by fully capitalizing state revolving loan funds which will provide needed financial support to construct sewers and treatment plants for the nation's communities, as well as address other priority water quality projects;

- Preserving the states' role in developing and implementing water quality standards, taking regional variations into account;

- Limiting the states' management burden, while providing for greater flexibility for municipalities, to attain water quality standards under the stormwater management program;

- Ensuring that federal activities that impact water quality are consistent with state water quality programs and subject to enforcement for violations of Clean Water Act requirements;

- Defining a balanced and rational approach for protection of the nation's important wetlands;
- Endorsing the process for effectively managing combined sewer overflows (CSOs) contained in EPA's negotiated and published CSO policy;
- Providing opportunities for states to promote pollution prevention as an alternative to traditional regulatory approaches;
- Clarifying an active role for states and other government entities that serve as co-regulators to formally assist the U.S. Environmental Protection Agency in the development of Clean Water Act regulations;
- Clarifying and expanding states' authority to issue or deny water quality certification for federally licensed activities that result in discharge of pollutants to state waters to achieve protection of designated uses established as part of water quality standards;
- Modifying the authorized funding level for Clean Water Act state program grants to offset the impact of inflation and reflect states' needs to implement the mandates contained in the 1987 amendments as well as requirements contained in the upcoming reauthorization; and
- Clarifying the deference of the Clean Water Act to state laws to allocate water and to protect rights established under state laws.

For additional information regarding the state package of Clean Water Right amendments, please contact Tom Curtis of NGA at 202/624-5389 or Robbi Savage of ASIWPCA at 202/898-0905.

4/7/94

DRAFT

NONPOINT SOURCE MANAGEMENT

Objective

Under current federal law, nonpoint source pollution is primarily addressed by demonstration projects that states submit to EPA to compete for limited federal funds. Many states have developed voluntary and regulatory measures to reduce nonpoint source pollution, however federal guidance and assistance for state programs has been minimal. This amendment improves current law by building on existing efforts under section 319 and other nonpoint source activities in the states to retain flexibility for states in developing an effective program to meet the identified goal to attain water quality standards in 15 years.

Proposed Amendment

A. Deadlines

Requires States to achieve nonpoint source controls sufficient to attain water quality standards within 15 years after reauthorization. States propose that real progress can be made towards meeting water quality standards in 15 years if given significant flexibility in the development of programs. After 20 years of program implementation, the goals of point source pollution control are not yet achieved. In view of the magnitude, complexity, and variety of existing nonpoint source control problems, the 15-year goal is ambitious, but is a workable target for states to develop and implement a program tailored to local priorities.

B. Guidance, Program Implementation, and Funding

Requires USEPA to develop technical guidance on nonpoint source control strategies, including typical management measures.

Requires States to develop a program that includes any combination of voluntary and regulatory elements sufficient to achieve the goal of attaining standards by the statutory deadline.

Every five years, requires States to indicate reasonable further progress toward the goal of attaining water quality standards in 15 years. The 5-year review will enable states to continue receiving federal funding and to avoid imposition of a federal nonpoint source program. Reasonable further progress may be indicated by a tailored combination of improvements in water quality (including biological indicators), adoption of enforceable measures, and documented implementation of voluntary control measures.

Increases federal funding under section 319 to $1 billion annually over a 5-year period.

C. Nonpoint Source Control Requirements in a Watershed Management Plan

Adds an incentive under the watershed management amendment to address the relationship between requirements under the Clean Water Act and the Coastal Zone Management Act, as amended by CZARA in 1990. States with approved watershed programs may apply CWA section 319 or CZARA section 6217(b) programs, or any combination thereof, to satisfy nonpoint source control requirements under both Acts (see Watershed Management amendment).

1 *April 7, 1994*

2 SEC. 319. NONPOINT SOURCE MANAGEMENT PROGRAMS.

3 (a) STATE ASSESSMENT REPORTS. -

4 (1) CONTENTS.—The Governor of each State shall, after notice and opportunity for
5 public comment, prepare and submit to the Administrator for approval, a report which -

6 (A) identifies those navigable waters within the State which, without additional
7 action to control nonpoint sources of pollution, cannot reasonably be expected to
8 attain or maintain applicable water quality standards or the goals and requirements of
9 this Act;

10 (B) identifies those categories and subcategories of nonpoint sources or, where
11 appropriate, particular nonpoint sources which add significant pollution to each
12 portion of the navigable waters identified under subparagraph (A) in amounts which
13 contribute to such portion not meeting such water quality standards or such goals and
14 requirements,

15 (C) describes the process, including intergovernmental coordination and public
16 participation, for identifying ~~best management practices and~~ measures to control each
17 category and subcategory of nonpoint sources and, where appropriate, particular
18 nonpoint sources identified under subparagraph (B) and to reduce, to the maximum
19 extent practicable, the level of pollution resulting from such category, subcategory, or
20 source; and

(D) identifies and describes State and local programs for controlling pollution added from nonpoint sources to, and improving the quality of, each such portion of the navigable waters, including but not limited to those programs which are receiving Federal assistance under subsections (h) and (i).

(2) INFORMATION USED IN PREPARATION.—In developing, reviewing, and revising the report required by this ~~section~~ subsection, the State (A) may rely upon information developed pursuant to sections 208, 303(e), 304(f), 305(b), and 314, and other information as appropriate, and (B) may utilize appropriate elements of the waste treatment management plans developed pursuant to sections 208(b) and 303, to the extent such elements are consistent with and fulfill the requirements of this section.

(3) REVIEW AND REVISION — Not later than 18 months after the date of the enactment of the Water Quality Act of 1994, and every 5 years thereafter, the State shall review, revise and submit to the Administrator the report required by this subsection.

(b) STATE MANAGEMENT PROGRAMS. -

(1) IN GENERAL.—The Governor of each State, for that State or in combination with adjacent States, shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval a management program which such State proposes to implement in the first ~~four~~ five fiscal years beginning after the date of

submission of such management program for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters.

(2) SPECIFIC CONTENTS – Each management program proposed for implementation under this subsection shall include each of the following:

(A) An identification of the ~~best management practices and~~ measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated under ~~paragraph (1)(B)~~ subsection (a)(1)(B), taking into account the impact of the ~~practice~~ measure on ground water quality.

(B) An identification of programs (including, as appropriate, enforceable policies and mechanisms, nonregulatory or regulatory programs ~~for enforcement~~, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects) to ~~achieve implementation of the best management practices by the categories, subcategories, and particular nonpoint sources designated under subparagraph (A)~~ manage categories, subcategories, or particular nonpoint sources to the degree necessary to provide for a reasonable likelihood of attainment of water quality standards within 15 years of enactment of the Water Quality Act of 1994 for those waters identified under subsection (a)(1)(A).

(C) A schedule containing interim goals and ~~annual~~ milestones for ~~(i) utilization of the program implementation methods identified in subparagraph (B), and (ii)~~

~~implementation of the best management practices identified in subparagraph (A) by the categories, subcategories, or particular nonpoint sources designated under paragraph (I)(B). Such schedule shall provide for utilization of the best management practices at the earliest practicable date.~~ making reasonable progress toward the attainment of standards, which may be demonstrated by any combination of improvements in water quality (including biological indicators), adoption of enforceable nonpoint source control measures and documented implementation of voluntary nonpoint source control measures.

(D) ~~A certification of~~ After the date of the enactment of the Water Quality Act of 1994, a certification by the attorney general of the State or States (or the chief attorney of any State water pollution control agency which has independent legal counsel) that the laws of the State or States, as the case may be, provide adequate authority to implement such management program or, if there is not such adequate authority, a list of such additional authorities as will be necessary to implement such management program. A schedule and commitment by the State or States to seek such additional authorities as expeditiously as practicable.

(E) Sources of Federal and other assistance and funding (other than assistance provided under subsections (h) and (i)) which will be available in each of such fiscal

1 years for supporting implementation of such ~~practices and~~ measures and the purposes
2 for which such assistance will be used in each of such fiscal years.
3 (F) An identification of Federal financial assistance programs and Federal development
4 projects for which the State will review individual assistance applications or
5 development projects for their effect on water quality pursuant to the procedures set
6 forth in Executive Order 12372 as in effect on September 17, 1983, to determine
7 whether such assistance applications or development projects would be consistent
8 with the program prepared under this subsection; for the purposes of this
9 subparagraph, identification shall not be limited to the assistance programs or
10 development projects subject to Executive Order 12372 but may include any
11 programs listed in the most recent Catalog of Federal Domestic Assistance which may
12 have an effect on the purposes and objectives of the State's nonpoint source pollution
13 management program.
14 (G) A description of the monitoring or other assessment which will be carried out
15 under the program for the purposes of monitoring and assessing the effectiveness of
16 the program, including the attainment of interim goals and milestones.
17 (H) An identification of activities on Federal lands in the State that are inconsistent
18 with the State management program.

(3) UTILIZATION OF LOCAL AND PRIVATE EXPERTS.—In developing and implementing a management program under this subsection, a State shall, to the maximum extent practicable, involve local public and private agencies and organizations which have expertise in control of nonpoint sources of pollution.

(4) DEVELOPMENT ON WATERSHED BASIS—A State shall, to the maximum extent practicable, develop and implement a management program under this subsection on a watershed-by-watershed basis within such State.

(c) ADMINISTRATIVE PROVISIONS. -

(1) COOPERATION REQUIREMENT.—Any report required by subsection (a) and any management program and report required by subsection (b) shall be developed in cooperation with local, substate regional, and interstate entities which are actively planning for the implementation of nonpoint source pollution controls and have either been certified by the Administrator in accordance with section 208, have worked jointly with the State on water quality management planning under section 205(j), or have been designated by the State legislative body or Governor as water quality management planning agencies for their geographic areas.

(2) TIME PERIOD FOR SUBMISSION OF ~~REPORTS AND~~ MANAGEMENT PROGRAMS.-

—Each ~~report and~~ management program shall be submitted to the Administrator ~~during the 18-month period beginning on the date of the enactment of this section~~ within 30

1 months of the issuance by the Administrator of the final guidance under subsection (o)
2 and every 5 years thereafter. Each program submission after the initial submission
3 following enactment of the Water Quality Act of 1994, shall include a demonstration of
4 reasonable further progress toward the goal of attaining water quality standards within
5 15 years of enactment of the Water Quality Act of 1994, including documentation of
6 the degree to which the State has achieved the interim goals and milestones contained
7 in the previous program submission. This demonstration shall take into account the
8 adequacy of Federal funding under this section.
9 (d) APPROVAL OR DISAPPROVAL OF REPORTS AND MANAGEMENT PROGRAMS. -
10 (1) DEADLINE.—Subject to paragraph (2), not later than 180 days after the date of
11 submission to the Administrator of any report or revised report or management program
12 under this section (other than subsections (h), (i), and (k)), the Administrator shall either
13 approve or disapprove such report or management program, as the case may be. The
14 Administrator may approve a portion of a management program under this subsection. If
15 the Administrator does not disapprove a report, management program, or portion of a
16 management program in such 180-day period, such report, management program, or
17 portion shall be deemed approved for purposes of this section.

(2) PROCEDURE FOR DISAPPROVAL.—If, after notice and opportunity for public comment and consultation with appropriate Federal and State agencies and other interested persons, the Administrator determines that -

(A) the proposed management program or any portion thereof does not meet the requirements of subsection (b)(2) of this section or is not likely to satisfy, in whole or in part, the goals and requirements of this Act;

(B) adequate authority does not exist, or adequate resources are not available, to implement such program or portion;

(C) the schedule for implementing such program or portion is not sufficiently expeditious; or

(D) the practices and measures proposed in such program or portion ~~are not adequate to reduce the level of pollution in navigable waters in the State resulting from nonpoint sources and to improve the quality of navigable waters in the State;~~ **will not result in reasonable progress toward the attainment of applicable water quality standards under section 303 as expeditiously as possible but not later than 15 years following the date of enactment of the Water Quality Act of 1994;**

the Administrator shall within 6 months of the receipt of the proposed program notify the State of any revisions or modifications necessary to obtain approval. The State shall thereupon have an additional ~~3~~ **6** months to submit its revised management program

and the Administrator shall approve or disapprove such revised program within three months of receipt.

(3) FAILURE OF STATE TO SUBMIT REPORT.—If a Governor of a State does not submit ~~the report~~ a report or revised report required by subsection (a) within the period specified by subsection (c)(2), the Administrator shall, within ~~30~~ 18 months after the date ~~of the enactment of this section~~ on which such report is required to be submitted under subsection (a), prepare a report for such State which makes the identifications required by paragraphs (l)(A) and (1)(B) of subsection (a). Upon completion of the requirement of the preceding sentence and after notice and opportunity for comment, the Administrator shall report to Congress on his actions pursuant to this section.

(4) FAILURE OF STATE TO SUBMIT MANAGEMENT PROGRAM.— If a State fails to submit a management program or revised management program under subsection (b) or the Administrator does not approve such a management program, the Administrator shall prepare and implement a management program for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters in accordance with subsection (b). If the Administrator intends to disapprove a program submitted by a State, the Administrator shall first notify the Governor of the State in writing of the modifications necessary to meet the requirements of this section. The Administrator shall provide adequate public notice and an opportunity for a public

1 hearing for all interested parties. If, after taking into account the level of funding actually
2 provided as compared with that authorized under subsection (j), the Administrator
3 determines that a State has failed to demonstrate reasonable further progress toward the
4 attainment of water quality standards as required, the State shall revise its program within
5 12 months of that determination in a manner sufficient to achieve attainment of water
6 quality standards by the statutory deadline. If a State fails to make such a program
7 revision or the Administrator does not approve such a revision, the Administrator shall
8 prepare and implement a nonpoint source management program for that state.
9 (e) LOCAL MANAGEMENT PROGRAMS; TECHNICAL ASSISTANCE.—If a State fails to
10 submit a management program under subsection (b) or the Administrator does not approve such
11 a management program, a local public agency or organization which has expertise in, and
12 authority to, control water pollution resulting from nonpoint sources in any area of such State
13 which the Administrator determines is of sufficient geographic size may, with approval of such
14 State, request the Administrator to provide, and the Administrator shall provide, technical
15 assistance to such agency or organization in developing for such area a management program
16 which is described in subsection (b) and can be approved pursuant to subsection (d). After
17 development of such management program, such agency or organization shall submit such
18 management program to the Administrator for approval. If the Administrator approves such
19 management program, such agency or organization shall be eligible to receive financial

1 assistance under subsection (h) for implementation of such management program as if such
2 agency or organization were a State for which a report submitted under subsection (a) and a
3 management program submitted under subsection (b) were approved under this section. Such
4 financial assistance shall be subject to the same terms and conditions as assistance provided to a
5 State under subsection

6 (f) TECHNICAL ASSISTANCE FOR STATE.—Upon request of a State, the Administrator may
7 provide technical assistance to such State in developing <u>and implementation of</u> a management
8 program approved under subsection (b) for those portions of the navigable waters requested by
9 such State.

10 (g) INTERSTATE MANAGEMENT CONFERENCE. -

11 (1)CONVENING OF CONFERENCE; NOTIFICATION; PURPOSE.—If any portion of the
12 navigable waters in any State which is implementing a management program approved
13 under this section is not meeting applicable water quality standards or the goals and
14 requirements of this Act as a result, in whole or in part, of pollution from nonpoint sources
15 in another State, such State may petition the Administrator to convene, and the
16 Administrator shall convene, a management conference of all States which contribute
17 significant pollution resulting from nonpoint sources to such portion. If, on the basis of
18 information available, the Administrator determines that a State is not meeting applicable
19 water quality standards or the goals and requirements of this Act as a result, in whole or in

1 part, of significant pollution from nonpoint sources in another State, the Administrator
2 shall notify such States. The Administrator may convene a management conference under
3 this paragraph not later than 180 days after giving such notification, whether or not the
4 State which is not meeting such standards requests such conference. The purpose of such
5 conference shall be to develop an agreement among such States to reduce the level of
6 pollution in such portion resulting from nonpoint sources and to improve the water quality
7 of such portion. Nothing in such agreement shall supersede or abrogate rights to quantities
8 of water which have been established by interstate water compacts, Supreme Court
9 decrees, or State water laws. This subsection shall not apply to any pollution which is
10 subject to the Colorado River Basin Salinity Control Act. The requirement that the
11 Administrator convene a management conference shall not be subject to the provisions of
12 section 505 of this Act.
13 (2) STATE MANAGEMENT PROGRAM REQUIREMENT. —To the extent that the States
14 reach agreement through such conference, the management programs of the States which
15 are parties to such agreements and which contribute significant pollution to the navigable
16 waters or portions thereof not meeting applicable water quality standards or goals and
17 requirements of this Act will be revised to reflect such agreement. Such management
18 programs shall be consistent with Federal and State law.
19 (h) GRANT PROGRAM. -

(1) GRANTS FOR **PREPARATION AND** IMPLEMENTATION OF **REPORTS AND** MANAGEMENT PROGRAMS.—Upon application of a State ~~for which a report submitted under subsection (a) and a management program submitted under subsection (b) is approved under this section,~~ the Administrator ~~shall~~ **may** make grants **under this subsection,** subject to such terms and conditions as the Administrator considers appropriate, ~~under this subsection~~ to such State for the purpose of assisting the State in ~~implementing such management program~~ **preparing a report under subsection (a) and in preparing and implementing a management program under subsection (b). Grants for implementation of such management program may be made only after such report and management program are approved under this section.** Funds reserved pursuant to section 205(j)(5) of this Act may be used to develop and implement such management program. **The Administrator is authorized to provide funds to a State if necessary to implement an approved portion of a State program or to implement a component of a Federally established program.** (2) APPLICATIONS.—An application for a grant under this subsection in any fiscal year shall be in such form and shall contain such other information as the Administrator may require, including an identification and description of the best management practices and measures which the State proposes to assist, encourage, or require in such year with the Federal assistance to be provided under the grant.

(3) FEDERAL SHARE.—The Federal share of the cost of each ~~management program implemented~~ report prepared and management program prepared and implemented with Federal assistance under this subsection in any fiscal year shall not exceed ~~60~~ 75 percent of the cost incurred by the State in ~~implementing~~ preparing such a report and preparing and implementing such management program and shall be made on condition that the non-Federal share of program implementation is provided from non-Federal sources.

(4) LIMITATION ON GRANT AMOUNTS.— The Administrator shall establish, after consulting with the States, maximum and minimum grants for any fiscal year to promote equity between States and effective nonpoint source management. Notwithstanding any other provision of this subsection, not more than 15 percent of the amount appropriated to carry out this subsection may be used to make grants to any one State, including any grants to any local public agency or organization with authority to control pollution from nonpoint sources in any area of such State. The minimum percentage of funds allocated to each of the States shall be 0.5 percent of the amount appropriated.

~~(5) PRIORITY FOR EFFECTIVE MECHANISMS.—For each fiscal year beginning after September 80, 1987, the Administrator may give priority in making grants under this subsection, and shall give consideration in determining the Federal share of any such~~

1 ~~grant, to States which have implemented or are proposing to implement management~~
2 ~~programs which will—~~
3 ~~(A) control particularly difficult or serious nonpoint source pollution problems,~~
4 ~~including, but not limited to, problems resulting from mining activities;~~
5 ~~(B) implement innovative methods or practices for controlling nonpoint sources of~~
6 ~~pollution, including regulatory programs where the Administrator deems appropriate;~~
7 ~~(C) control interstate nonpoint source pollution problems; or~~
8 ~~(D) carry out ground-water quality protection activities which the Administrator~~
9 ~~determines are part of a comprehensive nonpoint source pollution control program,~~
10 ~~including research, planning, ground water assessments, demonstration programs,~~
11 ~~enforcement, technical assistance, education, and training to protect ground water~~
12 ~~quality from nonpoint sources of pollution.~~
13 (5) ALLOCATION OF GRANT FUNDS -- Grants under this section shall be allocated
14 to states with approved programs in a fair and equitable manner and be based upon
15 rules and regulations promulgated by the Administrator which shall take into
16 account the extent and nature of the nonpoint sources of pollution in each state and
17 other relevant factors.
18 (6) AVAILABILITY FOR OBLIGATION.—The funds granted to each State pursuant to
19 this subsection in a fiscal year shall remain available for obligation by such State for

the fiscal year for which appropriated. The amount of any such funds not obligated by the end of such fiscal year shall be available to the Administrator for granting to other States under this subsection in the next fiscal year.

(7) LIMITATION ON USE OF FUNDS. — ~~States may use funds from grants made pursuant to this section for financial assistance to persons only to the extent that such assistance is related to the costs of demonstration projects.~~ States may use up to 70% of funds from grants made pursuant to this section for:

(A) providing financial assistance with respect to those activities whose principle purpose is protecting and improving water quality; and

(B) assistance related to the cost of preparing or implementing the State management program.

(C) providing incentive grants to individuals to implement a site specific water quality plan not to exceed 75% of the cost of the project from all federal sources.

(D) land acquisition or conservation easements consistent with a site-specific water quality plan.

(8) ~~SATISFACTORY PROGRESS.~~ COMPLIANCE WITH STATE MANAGEMENT PROGRAM. ~~No grant may be made under this subsection in~~ In any fiscal year ~~to a State which in the preceding fiscal year received a grant under this subsection unless~~ in which the Administrator determines that ~~such~~ a State ~~made satisfactory progress in~~

1 ~~such preceding fiscal year in meeting the schedule specified by such State under~~
2 ~~subsection (b)(2).~~ **has not made satisfactory progress in the preceding fiscal year in**
3 **meeting the schedule specified in such State under subsection (b)(2)(C), the**
4 **Administrator is authorized to withhold grants pursuant to this section in whole or**
5 **part to the State after adequate written notice is provided to the Governor of that**
6 **State.**
7 (9) MAINTENANCE OF EFFORT. — No grant may be made to a State under this
8 subsection in any fiscal year unless such State enters into such agreements with the
9 Administrator as the Administrator may require to ensure that such State will maintain its
10 aggregate expenditures from all other sources for programs for controlling pollution added
11 to the navigable waters in such State from nonpoint sources and improving the quality of
12 such waters at or above the average level of such expenditures in its two fiscal years
13 preceding the date of enactment of this subsection.
14 (10) REQUEST FOR INFORMATION.—The Administrator may request such information,
15 data, and reports as he considers necessary to make the determination of continuing
16 eligibility for grants under this section.
17 (11) REPORTING AND OTHER REQUIREMENTS.—Each State shall report to the
18 Administrator on an annual basis concerning (A) its progress in meeting the schedule of
19 milestones submitted pursuant to subsection (b)(2)(C) of this section, and (B) to the extent

1 that appropriate information is available, reductions in nonpoint source pollutant loading
2 and improvements in water quality for those navigable waters or watersheds within the
3 State which were identified pursuant to subsection (a)(1)(A) of this section resulting from
4 implementation of the management program.
5 (12) LIMITATION ON ADMINISTRATIVE COSTS.—For purposes of this subsection,
6 administrative costs in the form of salaries, overhead, or indirect costs for services
7 provided and charged against activities and programs carried out with a grant under this
8 subsection shall not exceed in any fiscal year 10 percent of the amount of the grant in
9 such year, except that costs of implementing enforcement and regulatory activities,
10 education. training, technical assistance, demonstration projects, and technology transfer
11 programs shall not be subject to this limitation.
12 (13) ALLOTMENT STUDY.— The Administrator, in consultation with the States, shall
13 conduct a study of whether the allocation of funds under subsection (h)(5) appropriately
14 reflects the costs of nonpoint source control measures for different nonpoint source
15 categories and subcategories and of options for better reflecting such costs in the
16 allotment of funds. Not later than 5 years after the date of enactment of the Water
17 Quality Act of 1994, the Administrator shall transmit to Congress a report on the results
18 of the study conducted under this subsection, together with recommendations.
19 (i) GRANTS FOR PROTECTING GROUNDWATER QUALITY. -

(1) ELIGIBLE APPLICANTS AND ACTIVITIES.—Upon application of a State for which a report submitted under subsection (a) and plan submitted under subsection (b) is approved under this section, the Administrator shall make grants under this subsection to such State for the purpose of assisting such State in carrying out groundwater quality protection activities which the Administrator determines will advance the State toward implementation of a comprehensive nonpoint source pollution control program. Such activities shall include, but not be limited to, research, planning, groundwater assessment, demonstration programs, enforcement, technical assistance, education and training to protect the quality of groundwater and to prevent contamination of groundwater from nonpoint sources of pollution.

(2) APPLICATIONS.—An application for a grant under this subsection shall be in such form and shall contain such information as the Administrator may require.

(3) FEDERAL SHARE; MAXIMUM AMOUNT. The Federal share of the cost of assisting a State in carrying out groundwater protection activities in any fiscal year under this subsection shall be 50 percent of the costs incurred by the State in carrying out such activities, except that the maximum amount of Federal assistance which any State may receive under this subsection in any fiscal year shall not exceed ~~$150,000~~ **$500,000**.

(4) REPORT.—The Administrator shall include in each report transmitted under subsection (m) a report on the activities and programs implemented under this subsection during the preceding fiscal year.

(j) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out subsections (h) and (i) not to exceed $70,000,000 for fiscal year 1988, $100,000,000 per fiscal year for each of fiscal years 1989 and 1990, ~~and $130,000,000 for fiscal year 1991; except that for each of such fiscal years not to exceed $7,500,000~~ **$130,000,000 for each of fiscal years 1991, 1992, and 1993, $400,000,000 for fiscal year 1994, $500,000,000 for fiscal year 1995, $600,000,000 for fiscal year 1996, $700,000,000 for fiscal year 1997, $800,000,000 for fiscal year 1998, $900,000,000 for fiscal year 1999, and $1,000,000,000 for fiscal year 2000; except that for each of such fiscal years not to exceed $25,000,000** may be made available to carry out subsection (i). Sums appropriated pursuant to this subsection shall remain available until expended.

(k) CONSISTENCY OF OTHER PROGRAMS AND PROJECTS WITH MANAGEMENT PROGRAMS.—The Administrator shall transmit to the Office of Management and Budget and the appropriate Federal departments and agencies a list of those assistance programs and development projects identified by each State under subsection (b)(2)(F) for which individual assistance applications and projects will be reviewed pursuant to the procedures set forth in Executive Order 12372 as in effect on September 17, 1983. Beginning not later than sixty days

after receiving notification by the Administrator, each Federal department and agency shall modify existing regulations to allow States to review individual development projects and assistance applications under the identified Federal assistance programs and shall accommodate, according to the requirements and definitions of Executive Order 12372, as in effect on September 17, 1983, the concerns of the State regarding the consistency of such applications or projects with the State nonpoint source pollution management program.

(1) COLLECTION OF INFORMATION.—The Administrator shall collect and make available, through publications and other appropriate means, information pertaining to management practices and implementation methods, including, but not limited to, (1) information concerning the costs and relative efficiencies of best management practices for reducing nonpoint source pollution; and (2) available data concerning the relationship between water quality and implementation of various management practices to control nonpoint sources of pollution.

(m) REPORTS OF ADMINISTRATOR. -

(1) ~~ANNUAL~~ BIENNIAL REPORTS.—Not later than January 1, ~~1988, and each January 1~~ **1995, and biennially** thereafter, the Administrator shall transmit to the Committee on Public Works and Transportation of the House of Representatives and the Committee on Environment and Public Works of the Senate, a report ~~for the preceding fiscal year~~ on the activities and programs implemented under this section and the progress made in reducing

pollution in the navigable waters resulting from nonpoint sources and improving the quality of such waters.

~~(2) FINAL REPORT. — Not later than January 1, 1990, the Administrator shall transmit to Congress a final report on the activities carried out under this section. Such report,~~

(2) CONTENTS. — Each report submitted under paragraph (1), at a minimum, shall -

(A) describe the management programs being implemented by the States by types and amount of affected navigable waters, categories and subcategories of nonpoint sources, and types of ~~best management practices~~ measures being implemented;

(B) describe the experiences of the States in adhering to schedule and implementing ~~best management practices~~ the measures provided by states in subsection (b);

(C) describe the amount and purpose of grants awarded pursuant to subsections (h) and (i) of this section;

(D) identify, to the extent that information is available, the progress made in reducing pollutant loads and improving water quality in the navigable waters;

(E) indicate what further actions need to be taken to attain and maintain in those navigable waters (i) applicable water quality standards, and (ii) the goals and requirements of this Act;

1 (F) include recommendations of the Administrator concerning future programs
2 (including enforcement programs) for controlling pollution from nonpoint sources;
3 and
4 (G) identify the activities and programs of departments, agencies, and
5 instrumentalities of the United States which are inconsistent with the management
6 programs submitted by the States and recommend modifications so that such activities
7 and programs are consistent with and assist the States in implementation of such
8 management programs.
9 (n) SET ASIDE FOR ADMINISTRATIVE PERSONNEL.—Not ~~less~~ more than 5 percent of the funds
10 appropriated pursuant to subsection (j) for any fiscal year shall be available to the Administrator
11 to maintain personnel levels at the Environmental Protection Agency at levels which are adequate
12 to carry out this section in such year.

1 (o) GUIDANCE ON BEST MANAGEMENT PRACTICES AND MEASURES. —

2 (1) IN GENERAL. – The Administrator, in consultation with appropriate
3 Federal and State departments and agencies, and after providing notice and
4 opportunity for public comment, shall publish guidance to identify best
5 management practices and measures which may be undertaken under management
6 programs established pursuant to this section.

7 (2) PUBLICATION. — The Administrator shall publish proposed guidance
8 under this subsection not later than 6 months after the date of the enactment of this
9 subsection and shall publish final guidance under this subsection not later than 18
10 months after such date of enactment. The Administrator shall periodically review
11 and revise the final guidance at least every 3 years after its publication.

12 (3) BEST MANAGEMENT PRACTICES AND MEASURES DEFINED. — For the
13 purposes of this subsection, the term 'best management practices and measures'
14 means economically achievable measures for the control of the addition of
15 pollutants from existing and new categories and classes of nonpoint sources of
16 pollution which reflect the greatest degree of pollutant reduction achievable
17 through the application of the best available nonpoint pollution control practices ,
18 technologies, processes, siting criteria, operating methods, or other alternatives.

19

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WATERSHED MANAGEMENT

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Objective

Although States can develop watershed plans under current law, there are cross-program barriers that make it difficult to target funds and comply with individual program requirements under a watershed approach. This amendment will improve current law by encouraging comprehensive watershed management to maintain and enhance water quality and support living resources, in keeping with the philosophy of Sections 319(b)(4) and 303(e). The amendment enables States to blend activities to efficiently and effectively carry out the law and build broad public support. The goal is to create a process for States, as the primary platform for carrying out the program, can facilitate carrying out the law at the local level, without additional layers of bureaucracy.

> The law should build on lessons learned and not create a prescriptive approach in Washington that may not work well for all the different ecosystems, water-related activities, and water quality programs of each State.
>
> To provide a flexible, optional watershed protection approach to states, the law should offer incentives for States and local entities and avoids unnecessary impediments in the process.
>
> The law should provide for clearly defined roles and responsibilities, with States having the option to undertake a watershed type program. EPA's role should be to remove administrative barriers, identify effective "tools," facilitate solutions to address interstate issues, and provide technical assistance and research.

Proposed Amendment

A. Program Development and Implementation

Supports State efforts to set up a watershed program if they choose, identify responsible entities, foster participation, expand the scope of the program over time as appropriate, approve watershed plans, support implementation and report on progress.

Deems State watershed program approved unless disapproved in a public process.

B. Incentives

The watershed approach will be successful because it provides efficiencies and opportunities for innovative solutions, facilitates achievement of multiple objectives, and allows greater local ownership to produce a higher likelihood of success. New layers of requirements or sanctions will discourage States from proceeding with the watershed approach. Although money is important, it is not a determining factor.

> Consolidated grants - Authorizes EPA to:
>
> > Align funding and programs with watershed objectives and priorities.
> > Eliminate duplication and improve efficiency/effectiveness.

Provide flexibility in use of funding.
Allow States to develop and implement multi-year work plans.

Permits - Allows States to extend permit terms for up to 10 years in order to better use resources.

Funding - Makes watershed activities clearly eligible to receive funding under the Act.

Relationship of 319 and CZARA - Adds an incentive to address the relationship between requirements under the Clean Water Act and the Coastal Zone Management Act, as amended by CZARA in 1990. States with approved watershed programs may apply CWA section 319 or CZARA section 6217(b) programs, or any combination thereof, to satisfy nonpoint source control requirements under both Acts.

1 April 7, 1994

2 WATERSHED MANAGEMENT PROGRAMS

3 SEC. 321. (a) DEFINITIONS, FINDINGS AND PURPOSE. —

4 (1) DEFINITIONS. — As used in this section:

5 (A) ECOSYSTEM. — The term "ecosystem" means a community of plants

6 and animals (including humans) and the environment (including but not

7 limited to surface water, the ground water with which it interacts, and riparian

8 areas) upon which a community depends.

9 (B) ENVIRONMENTAL GOALS. — The term "environmental goals" means

10 the goals and more detailed objectives,specified by States or State-designated

11 responsible entities to protect, restore, and maintain water resources and

12 aquatic ecosystems within a watershed, including applicable water quality

13 standards and wetlands protection goals established under this Act.

14 (C) STATE. — The term "State" means any State, territory, or Indian tribe

15 described in section 528(e)(2)

16 (b) STATE WATERSHED MANAGEMENT PROGRAM. —

17 (1) SUBMISSION OF PROGRAM TO ADMINISTRATOR. — A State may, at any time,

18 submit a watershed management program to the Administrator for approval.If the

19 Administrator does not disapprove a State watershed management program within

20 180 days of submittal or 240 days of a request for a public hearing pursuant to

21 Subsection (b)(2), whichever is later, such program shall be deemed approved for the

1 purposes of this section. The Administrator shall approve the program if the program
2 includes, at a minimum, the following elements:
3 (A) The identification of the State agency with primary responsibility
4 for overseeing and approving watershed management plans in general.
5 (B) The description of any responsible entities (including any
6 appropriate State agency or substate agency) to be utilized in implementing
7 the program and a description of their responsibilities.
8 (C) A description of the scope of the program. In establishing the
9 scope of the program, the State may address one or more watersheds
10 concurrently or sequentially. The scope of the State program may expand over
11 time with respect to the watersheds and issues to be addressed under the
12 program.
13 (D) Provisions for carrying out an analysis, consistent with the
14 established scope of the program, of the problems within each watershed
15 covered under the program.
16 (E) An identification of watershed management units for which
17 management plans will be developed, taking into consideration those waters
18 where water quality is threatened or impaired or otherwise in need of special
19 protection. A watershed management unit identified under the program may
20 include waters and associated land areas in more than 1 State if the Governors
21 of the States affected jointly designate the watershed management unit, and

may include waters and associated lands managed or owned by the Federal Government.

(F) A description of the activities required of responsible entities (as specified under subsection (f)(1)) and a description of the watershed plan approval process of the State.

(G) Documentation of the public participation in development of the program and description of the procedures that will be used for public participation in the development and implementation of watershed plans.

(H) The identification of statewide environmental goals that will be pursued in each watershed, including, at a minimum, attainment of state water quality standards and the objectives of this Act, and, as appropriate, other State objectives.

(2) DISAPPROVAL.— If the Administrator intends to disapprove a program of a State submitted under this subsection, the Administrator shall by a written notification advise the State of the intent to disapprove and the reasons for disapproval. If, within 30 days of receipt of such notice, a State so requests , the Administrator shall conduct a public hearing in the State on the intent to disapprove and the reasons for said disapproval. A State may resubmit a revised program that addresses the reasons stated in the notification. If a State requests a public hearing, the Administrator shall conduct the hearing in that State and issue a final determination within 240 days of receipt of the State watershed management program submittal.

1 (3) MODIFICATION OF PROGRAM. — Each State with a watershed management
2 program that has been approved by the Administrator under this section may, at any
3 time, modify the watershed management program of the State. Any such
4 modification shall be submitted to the Administrator and shall remain in effect unless
5 and until the Administrator determines that the modified program no longer meets the
6 requirements of this section. In such event the provisions of Subsection (b)(2) shall
7 apply.
8 (4) STATUS REPORTS. — Each State with a watershed management program that
9 has been approved by the Administrator pursuant to this subsection shall, not later
10 than 1 year after the date of approval, and annually thereafter, submit to the
11 Administrator an annual watershed program summary status report that includes
12 descriptions of any modifications to the program. The status report shall include a
13 listing of requests made for watershed plan development and a listing of plans
14 prepared and submitted by local or regional entities and the actions taken by the State
15 on such plans including the reasons for those actions. A State may use the report to
16 satisfy any reporting requirements under sections 106, 314, 319, 320, and 604(b).
17 (c) WATERSHED AREA IN 2 OR MORE STATES. — If a watershed management unit is
18 designated to include land areas in more than 1 State, the Governors of States within the
19 watershed management unit shall jointly determine the responsible entity or entities.
20 (d) ELIGIBLE WATERSHED MANAGEMENT AND PLANNING ACTIVITIES. — In addition to
21 activities eligible to receive assistance under other sections of this Act as of the date of
22 enactment of this subsection, the following watershed management activities conducted by

1 or on behalf of the States pursuant to a watershed management program that is approved by
2 the Administrator under this section shall be considered to be eligible to receive assistance
3 under sections 205(j), 319(h), 320, and 604(b) —
4 (1) characterizing the waters and land uses;
5 (2) identifying and evaluating problems within the watershed;
6 (3) selecting short-term and long-term goals for watershed management;
7 (4) developing and implementing measures and practices to meet identified
8 goals;
9 (5) identifying and coordinating projects and activities necessary to restore or
10 maintain water quality or other related environmental objectives within the
11 watershed;
12 (6) identifying the appropriate institutional arrangements to carry out a
13 watershed management plan that has been approved or adopted by the State under
14 this section;
15 (7) updating the plan;
16 (8) conducting training and public participation activities; and
17 (9) any other activity considered appropriate by the Administrator.
18 (e) PUBLIC PARTICIPATION.— Each State shall establish procedures to encourage the public
19 to participate in its program and in developing and implementing comprehensive watershed
20 management plans under this section. A State watershed management program shall include a
21 process for public involvement in watershed management to the maximum extent practicable. As
22 a minimum, this should include the formation and participation of public advisory groups during

1 State watershed program development. States must provide adequate public notice and an
2 opportunity to comment on the State watershed program prior to submittal of the program to the
3 Administrator for approval.

4 (f) APPROVED OR STATE-ADOPTED PLANS.—

5 (1) MINIMUM REQUIREMENTS.— A State with a watershed management program that
6 has been approved by the Administrator under this section may approve or adopt a
7 watershed management plan if the plan satisfies the following conditions:

8 (A) If the watershed includes waters that are not meeting water quality
9 standards at the time of submissions, the plan —

10 (i) identifies the environmental objectives of the plan including, at a
11 minimum, State water quality standards, goals and objectives under this Act,
12 and any other environmental goals the responsible planning entity or entities
13 consider appropriate;

14 (ii) identifies pollutants, stressors, and sources causing the
15 impairment of the waters;

16 (iii) identifies actions that are necessary to achieve the environmental
17 objectives of the plan, including source reduction of pollutants to achieve
18 any allocated load reductions consistent with the requirements of section
19 303(d), and the priority for implementing the actions;

20 (iv) contains an implementation schedule with milestones, and the
21 identification of persons responsible for implementing the actions, that
22 demonstrates that water quality standards will be attained as expeditiously

1 as practicable, but not later than any applicable deadline under this Act, and
2 that all other environmental goals identified in the watershed management
3 plan will be attained as expeditiously as practicable;
4 (v) contains documentation of the public participation in the
5 development of the plan and a description of the public participation process
6 that will be used during the plan implementation;
7 (vi) specifies a process to monitor and evaluate progress toward
8 meeting environmental goals; and
9 (vii) specifies a process to revise the plan as necessary.
10 (B) For waters in the watershed attaining water quality standards at the time
11 of submission (including threatened waters), the plan identifies the projects and
12 activities necessary to maintain water quality standards and attain or maintain other
13 environmental goals after the date of approval or adoption of the plan.
14 (2) TERMS OF APPROVED OR ADOPTED PLAN.— Each plan that is approved or adopted
15 by a State under this subsection shall be effective for a period of not more than 10 years
16 and include a planning and implementation schedule with milestones within that period.
17 A revised and updated plan may be approved or adopted by the State prior to the
18 expiration of the period specified in the plan pursuant to the same conditions and
19 requirements that apply to an initial plan for a watershed approved under this subsection.
20 (g) GUIDANCE.— Not later than 1 year after the date of enactment of this section, the
21 Administrator shall after consultation with the States issue guidance on provisions that States may

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consider for inclusion in watershed management programs and State-approved or State-adopted watershed management plans under this section.

INCENTIVES FOR WATERSHED MANAGEMENT

(a) ACTIVITIES OF FEDERAL AGENCIES.—Section 401 is amended by adding at the end the following new subsection:

(e) CERTIFICATION OF WATERSHED MANAGEMENT PLAN REQUIREMENTS.—In addition to the certification authority granted to a State under this section, a State shall have the authority to certify, in the manner prescribed in subsection (a), whether activities that require water quality permits or licenses referred to in subsection (a) comply with any applicable requirements under a watershed management plan that has been approved pursuant to section 321.

(b) POINT SOURCE PERMITS.—Section 402 (33 U.S.C. 1343) is amended by adding at the end the following new subsection:

(q) WATERSHED MANAGEMENT.—

(1) IN GENERAL.—Notwithstanding section 301(b)(1)(C), a permit may be issued with a limitation that does not meet applicable water quality standards, if—

(A) the receiving water is in a watershed with a watershed management plan that has been approved pursuant to section 321;

(B) the plan includes enforceable requirements under the law of a State or a political subdivision of a State for nonpoint source pollutant load

1 reductions that, in combination with point source requirements, will meet
2 applicable water quality standards under this Act before the date of
3 expiration of the plan; and
4 (C) the point source does not have a history of significant
5 noncompliance with its effluent limitations under a permit issued under this
6 section, as determined by the Administrator or a State with authority to issue
7 permits under this section.
8 (2) SYNCHRONIZED PERMIT TERMS.—Notwithstanding subsection (b)(1)(B), the
9 term of a permit issued under this section may be extended for a period of 5 years
10 beyond the date of expiration of the permit if the discharge is located in a
11 watershed management unit for which a watershed management plan will be
12 developed pursuant to section 321.
13 (3) 10-YEAR PERMIT TERMS.—Notwithstanding subsection (b)(1)(B), the term of
14 a permit issued under this section may be for a fixed term not exeeding 10 years for
15 any point source located in a watershed management unit established under section
16 321 with respect to which a plan has been approved or adopted by the State if the
17 plan provides for the attainment and maintenance of water quality standards
18 (including designated uses) in the affected waters, unless receiving waters do not
19 meet water quality standards due to the point source discharge. If necessary, a
20 permit issued pursuant to this paragraph may be revised at any time to meet water
21 quality standards.

1 (c) NONPOINT SOURCE CONTROLS.—Section 319 (33 U.S.C. 1329), as amended by section
2 302, is further amended by adding at the end the following new subsection:
3 (p) WATERSHED MANAGEMENT PROGRAMS.—If a State with a watershed management
4 program that has been approved by the Administrator pursuant to section 321 makes a
5 showing satisfactory to the Administrator that the State watershed and nonpoint source
6 management programs will provide for the protection of coastal waters generally and also
7 contains the following:
8 (1) Identifying Land Uses.—The identification of, and a continuing process
9 for identifying, land uses which, individually or cumulatively, may cause or
10 contribute significantly to a degradation of-
11 (A) those coastal waters where there is a failure to attain or maintain
12 applicable water quality standards or protect designated uses, as determined
13 by the State pursuant to its water quality planning processes; or
14 (B) those coastal waters that are threatened by reasonably foreseeable
15 increases in pollution loadings from new or expanding sources.
16 (2) Identifying Critical Coastal Areas.—The identification of, and a
17 continuing process for identifying, critical coastal areas adjacent to coastal waters
18 referred to in paragraph (1)(A) and (B), within which any new land uses or
19 substantial expansion of existing land uses shall be subject to the applicable
20 requirements of a watershed plan approved or adopted by the State.

The Administrator shall approve the State watershed program as meeting the requirements under the authority of the Administrator of this Act and the Coastal Zone Act Reauthorization Amendments of 1990.

MULTIPURPOSE GRANTS

SEC.519. (a) IN GENERAL.—The Administrator may provide assistance to a State with a watershed management program that has been approved by the Administrator under section 321 in the form of a multipurpose grant that would provide for single application, work plan and review, matching, oversight, and end-of-year closeout requirements for grant funding under sections 104(b)(3), 104(g), 106, 314(b), 319, 320, and 604(b).

(b) TERMS.—The Administrator may attach terms that shall apply for more than 1 year to a grant made pursuant to subsection (a). A State that receives a grant under subsection (a) may focus activities funded under the provisions referred to in subsection (a) on a priority basis in a manner consistent with watershed management plans approved by the State under section 321(f).

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RISK ASSESSMENT/COST-BENEFIT ANALYSIS

Objective

This amendment improves existing law by ensuring that EPA consistently utilizes a risk-based approach within the regulatory development process in order to allow for the cost-effective implementation of Clean Water Act requirements at the federal, state, and local level. A risk-based approach should also support the States' needs to set priorities when implementing Clean Water Act requirements by allowing the transferability of grant funds to target state priorities.

Proposed Amendment

At the end of section 101, insert the following new subsections:

> "(h) It is the policy of Congress that the development and implementation of water quality protection programs pursuant to this Act shall produce benefits to the public health, safety, and the environment that justify the cost to the Government and the public of implementation of and compliance with federal requirements. The cost-benefit analysis shall consider both quantifiable and qualitative measures. In accordance with this policy, the Administrator of the Environmental Protection Agency shall identify, assess, and document alternative regulatory approaches for protecting water quality in this Nation and shall develop regulations and guidance based upon the best obtainable scientific, technical, economic, and other information including the risk reduction benefits achievable by the identified alternatives. In the event that the required assessment cannot be made or selected regulatory approach does not achieve maximum net benefits, the Administrator shall report the reasons therefor to Congress.
>
> (I) It is the policy of Congress that the Administrator shall support state efforts to develop and implement statewide priorities to meet goals and objectives of this Act."

At the end of section 102, insert the following new subsection:

> "(e) The Administrator may authorize the governor to transfer funds provided under this Act (other than directed for revolving loan funds or infrastructure construction) between water quality programs to facilitate the state's efforts to implement its priority clean water activities to achieve the goals and objectives of this Act."

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STATE REVOLVING LOAN PROGRAM (SRF)

Objective

The State Revolving Funds (SRFs) have not been fully capitalized due to reduced appropriations. To continue the State/Federal partnership, Congress must assist communities in their effort to meet Clean Water Act mandates. The goal of the 1987 Act was to create and adequately capitalize a SRF program to address local construction of wastewater treatment facilities in perpetuity. The SRF is the only economically viable long term infrastructure funding mechanism, but improvements must be made to increase efficiency. Currently, there are over $200 billion in State-estimated unmet infrastructure needs.

Proposed Amendments

Title VI is amended in its entirety as follows:

A. Eligibilities

Maintains broad SRF eligibilities under Title VI, without limiting the eligibility of activities designed to achieve water quality improvements which allows states to use SRFs in both traditional and innovative ways. Land and easement acquisition related to all treatment works are made eligible.

B. Disadvantaged Communities

Provides special assistance for those communities in greater need of SRF assistance to make projects economically viable without endangering the ability of the SRF to revolve in perpetuity. Non-SRF assistance programs can offset match requirements (with respect to the non-Federal share) if the assistance is necessary to allow the project to proceed.

C. Project Requirements

Provides additional relief from across-the-board Title II and cross-cutting project requirements to make projects affordable, maximize environmental results, and assure the program can be competitive in the market place. Clarifies that these federal requirements apply to a State's program until 2001, after which time federal monies will no longer be made directly available to SRFs.

D. Prioritization

Strengthens States' ability to set priorities and target assistance based on greatest environmental needs, including nonpoint source and watershed activities. There are no additional setasides for special purposes, (e.g. watershed projects).

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E. Authorization Levels

Authorizes $5 billion annually for the SRF to build a program adequate to address $200 billion in existing documented needs and new mandates contemplated in reauthorization.

F. Administrative Costs

Increases funds for SRF administration in perpetuity based on the cumulative size of the fund.

G. SRF Technical Assistance

Authorizes States to provide technical and financial management assistance to communities for small systems and credit such assistance as an offset to State match requirements.

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TITLE VI–STATE WATER POLLUTION CONTROL REVOLVING FUNDS

Title VI is amended to read as follows:

SEC. 601. GRANTS TO STATES FOR ESTABLISHMENT OF REVOLVING FUNDS.

(a) GENERAL AUTHORITY.–Subject to the provisions of this title, the Administrator shall make capitalization grants to each state for the purpose of establishing a water pollution control revolving fund for providing assistance to accomplish the goals of this Act.

(b) SCHEDULE OF GRANT PAYMENTS.–The Administrator and each state shall jointly establish a schedule of payments under which the Administrator will pay to the state the amount of each grant to be made to the state under this title. Such schedule shall be based on the state's intended use plan under section 606(c) of this Act, except that-

(1) such payments shall be made in quarterly installments, and

(2) such payments shall be made as expeditiously as possible, but in no event later than the earlier of-

(A) 8 quarters after the date such funds were obligated by the state, or

(B) 12 quarters after the date such funds were allotted to the state.

SEC. 602. CAPITALIZATION GRANT AGREEMENTS.

(a) GENERAL RULE.–To receive a capitalization grant with funds made available under this title and section 205(m) of this Act, a state shall enter into an agreement with the Administrator which shall include but not be limited to the specifications set forth in subsection (b) of this section.

(b) SPECIFIC REQUIREMENTS.–The Administrator shall enter into an agreement under this section with a state only after the state has established to the satisfaction of the Administrator that-

(1) the state will accept grant payments with funds to be made available under this title and section 205(m) of this Act in accordance with a payment

schedule established jointly by the Administrator under section 601(b) of this Act and will deposit all such payments in the water pollution control revolving fund established by the state in accordance with this title;

(2) the state will deposit in the fund from state moneys an amount equal to at least 20 percent of the total amount of all capitalization grants which will be made to the state with funds to be made available under this title and section 205(m) of this Act on or before the date on which each quarterly grant payment will be made to the state under this title, except that upon application to the administrator by the state, such deposit to the fund shall be reduced in an amount equal to the sum of state funds distributed outside the fund during the previous federal fiscal year by the state as assistance to disadvantaged communities as defined under this title for the purpose of meeting the goals of this act; not withstanding this paragraph and section 603(b), a state's reduction annually in the deposit to the fund may not equal 20% of the capitalization grant received.

(3) the state will enter into binding commitments to provide assistance in accordance with the requirements of this title in an amount equal to 120 percent of the amount of each such grant payment within 1 year after the receipt of such grant payment;

(4) all funds in the fund will be expended in an expeditious and timely manner;

(5) all funds in the fund as a result of capitalization grants under this title and section 205(m) of this Act will first be used to assure maintenance of progress, as determined by the Governor of the state, toward compliance with enforceable deadlines, goals, and requirements of this Act, including the municipal compliance deadline;

(6) treatment works eligible under section 603(c)(1) of this Act which will be constructed in whole or in part (before fiscal year 2001) with funds directly made available by capitalization grants under this title and on 205(m) of this Act will meet the requirements of, or otherwise be treated (as determined by the Governor of the state) under sections 201(b), 201(g)(3), 204(b)(1), 204(d)(2), 218, 511(c)(1), and 513

of this Act in the manner as treatment works constructed with assistance under title II of this Act;

(7) in addition to complying with the requirements of this title, the state will commit or expend each quarterly grant payment which it will receive under this title in accordance with laws and procedures applicable to the commitment or expenditure of revenues of the state;

(8) in carrying out the requirements of section 606 this Act, the state will use accounting, audit, and fiscal procedures conforming to generally accepted government accounting standards;

(9) the state will require as a condition of making loan or providing other assistance, as described in section 603(d) of this Act, from the fund that the recipient of such assistance will maintain project accounts in accordance with generally accepted government accounting standards; and

(10) the state will make annual reports to the Administrator on the actual use of funds in accordance with section 606(d) of this Act.

(c) TECHNICAL ASSISTANCE FOR SMALL SYSTEMS

(1) DEFINITIONS.- As used in this subsection:

(A) Small system - The term "small system" means an existing or proposed publicly owned treatment works or a subsurface sewage disposal system that serves 10,000 or fewer individuals.

(B) Technical Assistance - The term "technical assistance" includes without limitation technical and financial management assistance provided by a state to a small system.

(2) Technical Assistance

(A) In General-

(1) Offset- Subject to subparagraphs (B) and (C), each state may reduce the amount that would otherwise be required to be deposited by the state as state matching funds under subsection (b)(2) by an amount equal to the value of technical assistance provided by the state from funds made available by the state.

(2) treatment of offset with respect to binding commitments.- Each state may reduce the amount of assistance provided in accordance with binding commitments that would otherwise be required under subsection (b)(3) by an amount equal to the value of the offset of state matching funds made pursuant to this paragraph.

(B) Maximum offset.- For each state the total amount of the offset of state matching funds made pursuant to this paragraph for a fiscal year may not exceed the greater of

(i) an amount equal to 2 percent of the amount of the capitalization grant received by the state pursuant to this section or

(ii) $100,000; or

(iii) 1/4 percent per year of the cumulative state and federal capitalization of the fund.

(d) Other Federal Authorities - A state's obligation to comply with Federal laws and authorities other than those contained within this act which are applicable to a state's award of assistance under this title shall be deemed to have been satisfied if such assistance is awarded pursuant to a state statute, rule executive order, or program which addresses the intent of such Federal authorities. Federal laws or authorities not satisfied by this subsection shall apply only to funds directly made available by federal capitalization grants. All federal laws or authorities other than those in this Act shall cease to be applicable to the award of assistance by a state once the state has obligated funds directly made available by Federal capitalization grants.

SEC. 603. WATER POLLUTION CONTROL REVOLVING LOAN FUNDS.

(a) REQUIREMENTS FOR OBLIGATION OF GRANT FUNDS – Before a state may receive a capitalization grant with funds made available under this title and section 205(m) of this Act, the state shall first establish a water pollution control revolving fund which complies with the requirements of this section.

(b) ADMINISTRATION – Each state water pollution control revolving fund shall be administered by an instrumentality of the state with such powers and limitations as may

be required to operate such fund in accordance with the requirements and objectives of this Act.

(c) PROJECTS ELIGIBLE FOR ASSISTANCE

(1) IN GENERAL - The funds available to each state water pollution control revolving fund shall be used only for providing assistance to projects or portions thereof with respect to which a principal benefit is protecting or improving water quality to a municipality, intermunicipal agency, interstate agency, state agency, or other person. Such projects may be derived without limitation from the following activities:

(A) The construction of a publicly owned treatment works as defined in section 212 of this act.

(B) The implementation of a management program established under section 319.

(C) The implementation of a conservation and management plan under section 320.

(D) The implementation of a watershed management plan.

(E) The acquisition of property rights for the restoration or protection of public or privately owned riparian areas.

(F) The implementation of measures to improve the efficiency of public water use.

(G) The construction of privately owned public treatment works where the assistance recipient is a municipality

(H) The development of plans to prevent public water pollution

(2) REVOLVING FUND -The fund shall be established, maintained, and credited with repayments, and the fund shall be available in perpetuity for assisting eligible projects.

(3) ELIGIBILITY OF LAND - Assistance provided pursuant to paragraph (1) may include the cost of obtaining any necessary land, easement, or right-of-way with respect to which the assistance recipient is not the owner (at the time of assistance),

except that the amount provided as assistance may not exceed the acquisition price (as determined in accordance with the uniform relocation and real property acquisition policies act of 1970 (42 U.S.C. 4601 et seq.))

(d) TYPES OF ASSISTANCE – Except as otherwise limited by state law, a water pollution control revolving fund of a state under this section may be used only-

(1) to make loans, on the condition that-

(A) such loans are made at or below market interest rates, including interest free loans, at terms not to exceed 20 years, except as provided in subparagraph (B) as follows;

(B) annual principal and interest payments will commence not later than 1 year after completion of any project and all loans will be fully amortized not later than 20 years after project completion, except that in the case of a disadvantaged community (as defined in subsection (i)(1)), a state may extend the term of a loan not to exceed 40 years after project completion or the design life of the treatment works, whichever is less.

(C) the recipient of a loan will establish a dedicated source of revenue for repayment of loans; and

(D) the fund will be credited with all payments of principal and interest on all loans;

(2) to buy or refinance the debt obligation of municipalities and intermunicipal and interstate agencies within the state at or below market rates, where such debt obligations were incurred after March 7, 1985;

(3) to guarantee, or purchase insurance for, local obligations where such action would improve credit market access or reduce interest rates;

(4) as a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the state if the proceeds of the sale of such bonds will be deposited in the fund;

(5) to provide loan guarantees for similar revolving funds established by municipalities or intermunicipal agencies;

(6) to earn interest on fund accounts; and

(7) for the reasonable costs of administering the fund and conducting activities under this title, except that such amounts shall not exceed the greater of 4 percent of all grant awards to such fund under this title, or 1/2 percent per year of the total amount of the capitalization grants made available to the state under this title and the funds deposited by the state from sums made available by the state.

(e) LIMITATION TO PREVENT DOUBLE BENEFITS – If a state makes, from its water pollution revolving fund, a loan which will finance the cost of facility planning and the preparation of plans, specifications, and estimates for construction of publicly owned treatment works, the state shall ensure that if the recipient of such loan receives a grant under section 201(g) of this Act for construction of such treatment works and an allowance under section 201(l)(1) of this Act for non-Federal expanded for such planning and preparation, such recipient will promptly repay such loan to the extent of such allowance.

(f) CONSISTENCY WITH PLANNING REQUIREMENTS –The state may provide financial assistance from its water pollution control revolving fund only with respect to a project which is not inconsistent with plans, if any, developed under sections 205 (j) , 208, 303 (e) , 319 and 320 of this Act or watershed management plans.

(g) PRIORITY LIST REQUIREMENTS.–The state may provide financial assistance from its water pollution control revolving fund to a project or activity only if such project or activity is on the state's priority list. Such assistance may be provided regardless of the rank of such project or activity on such list.

(h) ELIGIBILITY OF NON-FEDERAL SHARE OF CONSTRUCTION GRANT PROJECTS – A state water pollution control revolving fund may provide assistance (other than under subsection (d)(1) of this section) to a municipality or intermunicipal or interstate agency with respect to non-Federal share of the costs of a treatment works project for which such municipality or agency is receiving assistance from the

1 Administrator under any other authority only if such assistance is necessary to allow
2 such project to proceed.
3 (i) ASSISTANCE FOR DISADVANTAGED COMMUNITIES.-
4 (1) DISADVANTAGED COMMUNITY DEFINED. - As used in this subsection,
5 the term "disadvantaged community" means a service area, or portion thereof as
6 determined by the state, of a treatment works with respect to which the average
7 annual residential sewage treatment charges meet, or would be expected to meet,
8 affordability criteria established after providing for public review and comment by
9 the state in which the treatment works is located, in accordance with guidelines
10 established by the Administrator in cooperation with the states.
11 (2) Assistance Subsidy - In any case in which the state provides assistance
12 pursuant to subsection (d) to a disadvantaged community, the state may provide
13 such additional subsidization from the fund, including the subsidization of
14 principal, as is necessary to ensure conformity with affordability criteria
15 established by the state.
16 (3) Community Assistance Subsidy Amount - The total amount of assistance
17 subsidy made by a state pursuant to paragraph (2) to a disadvantaged community
18 may not exceed $20,000,000.
19 (4) Total Assistance Subsidy - For each fiscal year, the total amount of assistance
20 subsidy made by a state pursuant to paragraph (2) may not exceed 20 percent of
21 the amount of the capitalization grant received by the state for the year, or 20
22 percent of the annual average of all capitalization grants, whichever is greater.
23 **SEC. 604. ALLOTMENT OF *FUNDS*.**
24 (a) FORMULA -- Sums authorized to be appropriated to carry out this section for
25 each of fiscal years 1989 and 1990 shall be allotted by the Administrator in
26 accordance with section 205(c) of this Act.
27 (b) RESERVATION OF FUNDS FOR PLANNING -- Each state shall reserve each
28 fiscal year 1 percent of the sums allotted to such state under this section for such

1 fiscal year, or $100,000, whichever amount is greater, to carry out planning under
2 sections 205(j), and 303(e) of this Act or state watershed programs.
3 (c) ALLOTMENT PERIOD –
4 (1) PERIOD OF AVAILABILITY FOR GRANT AWARD – Sums allotted to a
5 state under this section for a fiscal year shall be available for obligation by the
6 state during the fiscal year for which sums are authorized and during the following
7 fiscal year.
8 (2) REALLOTMENT OF UNOBLIGATED FUNDS -The amount of any allotment
9 not obligated by the state by the last day of the 2-year period of availability
10 established by paragraph (1) shall be immediately reallotted by the Administrator
11 on the basis of the same ratio as is applicable to sums allotted under title II of this
12 Act for the second fiscal year of such 2-year period. None of the funds reallotted
13 by the Administrator shall be reallotted to any state which has not obligated all
14 sums allotted to such state in the first fiscal year of such 2-year period.
15 **SEC. 605. CORRECTIVE ACTION**
16 (a) NOTIFICATION OF NONCOMPLIANCE – If the Administrator determines that
17 a state has not complied with its agreement with the Administrator under section 602
18 of this Act or any other requirement of this title, the Administrator shall notify the
19 state of such noncompliance and the necessary corrective action.
20 (b) WITHHOLDING OF PAYMENTS – If a state does not take corrective action
21 within 60 days after the date a state receives notification of such action under
22 subsection (a), the Administrator shall withhold additional payments to the state
23 until the Administrator is satisfied that the state has taken the necessary corrective
24 action.
25 (c) REALLOTMENT OF WITHHELD PAYMENTS – If the Administrator is not
26 satisfied that adequate corrective actions have been taken by the state within 12
27 months after the state is notified of such actions under subsection (a), the payments
28 withheld from the state by the Administrator under subsection (b) shall be made

1 available for reallotment in accordance with the most recent formula for allotment of
2 funds under this title.
3 **SEC. 606. AUDITS, REPORTS AND FISCAL CONTROLS; INTENDED USE PLAN.**
4 (a) FISCAL CONTROL AND AUDITING PROCEDURES.–Each state electing to
5 establish a water pollution control revolving fund under this title shall establish
6 fiscal controls and accounting procedures sufficient to assure proper accounting
7 during appropriate accounting periods for–
8 (1) payments received by the fund;
9 (2) disbursements made by the fund; and
10 (3) fund balances at the beginning and end of the accounting period.
11 (b) ANNUAL FEDERAL AUDITS – The Administrator shall, at least on an annual
12 basis, conduct or require each state to have independently conducted reviews and
13 audits as may be deemed necessary or appropriate by the Administrator to carry out
14 the objectives of this section. Audits of the use of funds deposited in the water
15 pollution revolving fund established by such state shall be conducted in accordance
16 with the auditing procedures of the General Accounting Office, including chapter 75
17 of title 31, United States Code.
18 (c) INTENDED USE PLAN – After providing for public comment and review, each
19 state shall annually prepare a plan identifying the intended uses of the amounts
20 available to its water pollution control revolving fund. Such intended use plan shall
21 include, but not be limited to-
22 (1) a list of those projects for construction of publicly owned treatment works
23 on the state's priority list developed pursuant to section 216 of this Act and a list
24 of activities eligible for assistance under sections 319 and 320 of this Act or necessary
25 for the implementation of a watershed management plan;
26 (2) a description of the short- and long-term goals and objectives of its water
27 pollution control revolving fund;

(3) information on the activities to be supported, including a description of project categories, discharge requirements under titles III and IV of this Act, terms of financial assistance, and communities served;

(4) assurances and specific proposals for meeting the requirements of paragraphs (3), (4), (5), and (6) of section 602(b) of this Act; and

(5) the criteria and method established for the distribution of funds.

(d)ANNUAL REPORT – Beginning the first fiscal year after the receipt of payments under this title, the state shall provide an annual report to the Administrator describing how the state has met the goals and objectives for the previous fiscal year as identified in the plan prepared for the previous fiscal year pursuant to subsection (c), including identification of loan recipients, loan amounts, and loan terms and similar details on other forms of financial assistance provided from the water pollution control revolving fund.

(e) ANNUAL FEDERAL OVERSIGHT REVIEW –The Administrator shall conduct an annual oversight review of each state plan prepared under subsection (c), each state report prepared under subsection (d), and other such materials as are considered necessary and appropriate in carrying out the purposes of this title. After reasonable notice by the Administrator to the state or the recipient of a loan from a water pollution control revolving fund, the state or loan recipient shall make available to the Administrator such records as the Administrator reasonably requires to review and determine compliance with this title.

(f) APPLICABILITY OF TITLE II PROVISIONS – Except to the extent provided in this title, the provisions of title II shall not apply to grants under this title.

SEC. 607. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated to carry out the purposes of this title $5,000,000,000 for each of fiscal years 1995 through 2000.

4/7/94

DRAFT

STATE WATER QUALITY STANDARDS DEVELOPMENT

Objective

While the nature of the federal-state relationship to develop and implement water quality standards at the state level is appropriate, the opportunity for state input in EPA's criteria development is inadequate. Additionally, there is a need for better science and improved coordination of federal water quality monitoring programs to develop criteria based on credible data. This amendment improves current law by updating federal section 304 criteria so that States can fulfill their responsibility to set defensible, implementable and environmentally protective standards.

Proposed Amendment

A. State Role

Requires EPA to update section 304 criteria to maintain the states' primary authority to develop water quality standards that reflect local conditions, adequately consider risk, and are affordable to the regulated community.

> Requires EPA to develop a comprehensible plan on issuing the criteria, with a strong State consultation role. The plan must reflect risk-based priorities.
>
> Continues to apply current promulgation requirements, if EPA finds State standards are deficient.
>
> Reviews and revises standards on a 5-year cycle, consistent with the watershed approach to program management and review.

B. Antidegradation Policy

Maintains the current policy on antidegradation and the States' authority to determine which waters are most appropriate for the highly restrictive designation of "outstanding national resource water."

C. Monitoring

Requires the 305(b) report to be submitted to EPA every 5 years; coordinates federal programs in consultation with the States; and codifies the inter-agency water quality monitoring task force.

1 **SEC. 202 WATER QUALITY CRITERIA AND STANDARDS.**

2 (a) CRITERIA DOCUMENTS.- Section 304(a) (33 U.S.C. 1314(a)) is

3 amended-

4 (1) by striking "(a)(1) The Administrator" and inserting the following:

5 "(a) CRITERIA AND INFORMATION.-

6 (1) IN GENERAL - The Administrator';

7 (2) IN PARAGRAPH (1)(A), by striking the semicolon at the end and

8 inserting "and the sediment associated with the bodies of water ; and";

9 (3) in paragraph (2)-

10 (A) by inserting after "(2)" the following:

11 "INFORMATION.-";

12 (B) by striking "and" at the end of sub-paragraphs (B) and (C); and

13 (C) by striking the period at the end of the paragraph and inserting

14 "; and (E) for toxic pollutants, on numerical pollutant concentration

15 criteria that are sufficient to ensure the attainment of designated uses

16 established by a State",

17 (4) in paragraph (3), by inserting after "(3)" the following:

18 "PUBLICATION OF CRITERIA AND INFORMATION.-";

19 (5) in paragraph (4)

20 (A) by striking "(4) The Administrator" and inserting the following:

21 "(4) INFORMATION.-

22 "(A) IN GENERAL.- The Administrator";

23 (B) in the first sentence, by striking "fecal coliform, and pH "

24 and inserting "pathogens or indicators of pathogens (or both),

25 pH, oil, and grease"; and

26 (C) by adding at the end the following new subparagraph:

"(B) PUBLICATION OF CRITERIA.- Not later than 3 years after the date of enactment of this subparagraph, the Administrator shall publish criteria pursuant to paragraph (1)-

"(i) for those pollutants or factors that the Administrator determines pose the greatest risk to the physical, chemical, or biological integrity of waters from precipitation related events; and

(ii) that, on the basis of the potential for improving water quality and enhancing the protection of the aquatic life and wildlife, programmatic needs, or effectiveness, would provide the greatest benefit in the restoration and protection of the physical, chemical, and biological integrity of waters."

(6) by striking paragraph (5) and inserting the following new paragraph:

"(5) PLAN.-

"(A) IN GENERAL.- Not later than 2 years after the date of enactment of the Water Pollution Prevention and Control Act of 1994, and every 5 years thereafter, the Administrator shall prepare and publish, in consultation with the States, in the Federal Register a plan for the development of criteria and information pursuant to this subsection including guidance on their application and use during the 5-year period beginning on the date of publication of the plan, and, after providing opportunity for public review and comment, submit the plan to Congress.

"(B) REQUIREMENTS FOR PLAN.- Each plan prepared pursuant to this paragraph shall identify the relative need, considering risk-based

1 priorities, for new or revised criteria. The plan should consider the
2 following as appropriate-
3 "(i) human health criteria;
4 "(ii) aquatic life criteria for fresh waters and waters of the
5 estuarine zone, the territorial sea, the contiguous zone, and the
6 ocean;
7 "(iii) sediment criteria
8 "(iv) criteria for pollutants associated with nonpoint sources of
9 pollution;
10 "(v) criteria for pollutants associated with lakes;
11 "(vi) wildlife criteria; and
12 "(vii) biological criteria.
13 "(C) SCHEDULE FOR PUBLICATION OF FINAL CRITERIA.- Each
14 plan prepared pursuant to this paragraph shall establish a schedule
15 for the publication of final criteria that the Administrator determines
16 would result in the greatest benefit to human health and the
17 environment.
18 (7) in paragraph (6)-
19 (A) by striking "(6) The Administrator" and inserting the following:
20 "(6) PUBLICATION OF INFORMATION.- The Administrator"; and
21 (B) by striking "and annually thereafter, for purposes of section
22 301(h) of this Act" and inserting "and every 5 years thereafter," and
23 (8) by adding at the end of the following new paragraphs:
24 "(9) REQUIREMENTS FOR REGISTRANTS OF PESTICIDES.-
25 "(A) IN GENERAL.-Beginning on the date of enactment of this
26 paragraph, the Administrator shall require the registrant of a pesticide
27 under the Federal Insecticide, Fungicide, and Rodenticide Act (7

1 U.S.C. 136 et seq.), to provide, as expeditiously as practicable but
2 not later than 2 years after the date of registration or reregistration of
3 the pesticide, information that is sufficient to publish criteria for the
4 pesticide pursuant to paragraph (1), unless the Administrator
5 determines, on the basis of the proposed use of the pesticide, that it
6 is unlikely that a biologically significant amount of the pesticide (as
7 determined by the Administrator) or any metabolite of the pesticide
8 will have a harmful effect on water quality.
9 "(B) APPLICABILITY.- This paragraph shall not apply with respect
10 to any data submitted for a registration or reregistration that the
11 Administrator determines was complete on or before the date of
12 enactment of this paragraph.
13 "(C) USE OF EXISTING DATA, INFORMATION, AND STUDIES.-
14 In carrying out this paragraph, to the extent practicable, the
15 Administrator shall use existing data, information, and studies
16 submitted for the registration or re-registration of a pesticide. If the
17 Administrator finds that additional information is required, the
18 Administrator shall require the information be submitted pursuant to
19 the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136
20 et seq.).
21 "(10) POLICY CONCERNING PREMANUFACTURE NOTICES.- Not
22 later than 1 year after the date of enactment of this paragraph, the
23 Administrator shall establish a policy to ensure that information
24 necessary to publish criteria pursuant to this subsection for chemical
25 substances that are the subject of a premanufacture notice pursuant to
26 section 5 of the Toxic Substances Control Act (15 U.S.C. 2604) shall be

1 submitted to the Administrator, unless the Administrator finds that the
2 chemical substance-
3 "(A) will not be discharged to waters or to a publicly owned
4 treatment works; or
5 "(B) will be discharged from a negligible number of facilities in a
6 negligible quantity.
7 "(11) FISH CONSUMPTION GUIDANCE.- Not later than 2 years after
8 the enactment of this paragraph, and from time-to-time thereafter as
9 necessary, the Administrator, in cooperation with the heads of
10 appropriate Federal and State agencies and other interested persons,
11 shall prepare and publish guidance concerning contaminant levels in
12 finfish and shellfish for use by States in the development and issuance of
13 finfish and shellfish consumption advisories to protect recreational and
14 subsistence fishers.".
15 (b) WATER QUALITY STANDARDS.-Section 303(33 U.S.C. 1313) is
16 amended-
17 (1) by striking subsections (a) and (b);
18 (2) by redesignating subsection (c) as subsection (a);
19 (3) by redesignating subsections (d) through (h) as subsections (c)
20 through (g); and
21 (4) in subsection (a) (as redesignated by paragraph (2))-
22 (A) Striking "3" and inserting "5";
23 (B) in second sentence of paragraph (1), by inserting after "Results
24 of such review" the following: "(including the designated uses for the
25 navigable waters involved, the water quality criteria for the waters
26 based on the uses and any changes to the antidegradation policy of
27 the State)";

1 (C)in subparagraph (2)(A)- in the fourth sentence,
2 strike "their use and value" and insert "the criteria
3 developed under section 304(a), the use of the water and the
4 value";
5 (C) by adding at the end the following new paragraphs:
6 "(5)(A) Each use designation made under this paragraph shall apply to
7 the designated water.
8 "(B) Not later than 3 years after the date of enactment of this
9 paragraph, and as part of any subsequent 5 year review of State
10 water quality standards, each State shall report to the Administrator
11 the designated uses of waters within the State.
12 "(C) On the date that is 5 years after the date of enactment of this
13 paragraph, for all waters of the United States for which a use has not
14 been designated, the Administrator shall promulgate appropriate uses
15 under section, unless a State establishes an designated use for the
16 waters under this section.
17 (c) ANTIDEGRADATION.-Section 303 (33 U.S.C. 1313), as amended by
18 subsection (b), is further amended by inserting after subsection (a) the
19 following new subsection:
20 "(b) ANTIDEGRADATION POLICY.-
21 "(1) IN GENERAL.- Each State shall develop and implement an
22 antidegradation policy. Any state that does not have an approved policy
23 shall submit a policy to the Administrator within 2 years of enactment
24 of this subsection, In accordance with applicable regulations, the
25 Administrator shall review and approve or disapprove the policies
26 submitted and any revisions to policies adopted by States.
27

1 (2) Each state shall have procedures for implementing the state's approved
2 antidegradation policy. The Administrator shall, in consultation with the States, issue
3 implementation guidance for state consideration within one year of enactment.
4
5 (2) OUTSTANDING NATIONAL RESOURCE WATERS.-
6 "(A) IN GENERAL.- If a high quality water constitutes an
7 outstanding national resource water (as described in subparagraph
8 (B)), the water shall be maintained and protected by the State.
9 "(B) STATE DESIGNATION OF OUTSTANDING NATIONAL
10 RESOURCE WATERS.-
11 (i) Not later than 5 years after the date of enactment of this
12 clause. Each State shall consider for designation as outstanding
13 national resource waters, waters within a national park or national
14 wilderness area and waters of exceptional recreational or
15 ecological significance. Each State shall develop a program to
16 protect outstanding national resource waters within the State that
17 are designated by the State.
18 (ii) The State shall include in the antidegradation policy
19 provisions allowing any citizen of the State to petition for the
20 designation of a particular water as an outstanding national
21 resource water.

1 **MONITORING**

2

3 **Sec. 305(b)(1) is amended by striking ",by April 1, 1975, and shall bring up to date by**
4 **April 1, 1976, and biennially thereafter," and inserting:**
5 ", no later than 5 years after the date of enactment of this paragraph and every 5 years
6 thereafter,"

7

8 **Sec. 305 is amended by adding at the end the following new subsection:**
9 "(c) Water Quality Monitoring Task Force -
10 (1) IN GENERAL - The President shall maintain the Intergovernmental Task Force
11 on Water Quality Monitoring established to carry out the directive issued in 1991
12 under the Office of Management and Budget memorandum numbered M-92-01. The
13 Task Force shall advise with respect to the coordination of Federal monitoring
14 programs and the support of state efforts.
15 "(2) Membership of Task Force - The Task Force shall be composed of-
16 (A) a representative of the Administrator who shall be a cochairperson of the
17 Task Force;
18 (B) a representative of the Director of the United States Geological Survey, who
19 shall be a cochairperson of the Task Force;
20 (C) representatives of appropriate Federal agencies; and
21 (D) representatives of state, interstate and tribal environmental protection
22 agencies and natural resources agencies.
23 (3) RESPONSIBILITIES - The Task Force shall -
24 (A) review and make recommendations regarding the implementation of
25 Federal water quality monitoring programs; and
26 (B) recommend procedures to ensure that Federal monitoring programs are
27 responsive to the needs of states to the fullest extent possible.

1 "(4) STRATEGY - Not later than 1 year after the date of enactment of this
2 subsection, the Task Force shall submit to Congress a strategy for the coordination
3 and improved implementation of water quality monitoring programs, including
4 needed changes and the adequacy monitoring program funding provided for in the
5 Act. No later than 3 years after the date of enactment of this subsection and every 5
6 years thereafter, the Task Force shall submit a report to Congress on progress
7 achieved in implementing the strategy and appropriate revisions to the strategy."

4/7/94

DRAFT

FEDERAL CONSISTENCY/WAIVER OF SOVEREIGN IMMUNITY

Objective

Under current law, federal agencies are subject to the requirements of the Clean Water Act. This amendment improves the existing provision by adding a waiver of sovereign immunity. This provision clarifies that federal activities are subject to the requirements of the Clean Water Act in an enforceable manner consistent with provisions applicable to persons other than the federal government.

A. Applicability to the Federal Government

Clarifies that federal entities are subject to, and must comply with all federal, state, and local requirements (including service charges, penalties, and fines) with respect to the abatement of water pollution.

Ensures that the federal government is still responsible for sites that it may not currently own but had jurisdiction over at the time of the discharge of runoff or pollutants.

B. Waiver of Sovereign Immunity

Inserts a waiver of sovereign immunity provision into the Clean Water Act and tightens the circumstances under which a presidential exemption may be granted. Does not modify the provision addressing exemptions for military property but the possibility of making this provision more narrow was desirable. The National Association of Attorneys General (NAAG) is consulting with some of their members that may have suggested language in the future.

DRAFT

SOVEREIGN IMMUNITY

Section 313(a) (33 U.S.C. 1323(a)) is amended by striking all preceding subsection (b) and inserting the following-

"SEC. 313. Federal Facilities Pollution Control

"(a) APPLICABILITY OF FEDERAL STATE, INTERSTATE, AND LOCAL LAWS.-

"(1) IN GENERAL.-Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government-

(A) having jurisdiction over any property or facility, or

"(B) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, or

(C) which had jurisdiction over a facility at the time of activities that resulted in the discharge or runoff of pollutants.

and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity, including the payment of service charges.

"(2) TYPES OF ACTIONS COVERED.-Paragraph (1) shall apply-

"(A) to any requirement whether substantive or procedural (including any record keeping or reporting requirement, any requirement respecting permits, and any other requirement),

"(B) to the exercise of any Federal, State, or local administrative authority, and

"(C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.

"(3) PENALTIES AND FINES.-The Federal, State, interstate, and local substantive and procedural requirements, administrative authority, and process and sanctions

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1 referred to in paragraph (1) include all administrative orders and all civil and
2 administrative penalties and fines, regardless of whether such penalties or fines are
3 punitive or coercive in nature or are imposed for isolated, intermittent, or continuing
4 violations.
5 "(4) SOVEREIGN, IMMUNITY.-
6 "(A) Waiver.-The United States hereby expressly waives any immunity
7 otherwise applicable to the United States with respect to any requirement,
8 administrative authority, and process and sanctions referred to in paragraph (1)
9 (including any injunctive relief, any administrative order. any civil or
10 administrative- penalty or fine referred to in paragraph (3), or any reasonable service
11 charge).
12 "(B) PROCESSING FEES. - The reasonable service charges referred to in this
13 paragraph includes fees or charges assessed in connection with the processing
14 and issuance of permits, renewal of permits, amendments to permits, review of
15 plans, studies, and other documents, and inspection and monitoring of facilities, as
16 well as any other nondiscriminatory charges that are assessed in connection with a
17 Federal, State, interstate, or local water pollution regulatory program.
18 "(5) EXEMPTIONS.-
19 "(A) GENERAL AUTHORITY OF PRESIDENT.-The President may exempt any
20 effluent source of any department, agency, or instrumentality in the executive
21 branch from compliance with any requirement to which paragraph (1) applies if
22 the President determines it to be in the paramount interest of the United States
23 to do so; except that no exemption may be granted from the requirements of
24 section 306 or 307 of this Act.
25 "(B) LIMITATION.-No exemptions shall be granted under -subparagraph (A) due
26 to lack of appropriation
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"(C) TIME PERIOD.-Any exemption under subparagraph (A) shall be for a period not in excess of 1 year, but additional exemptions may be granted for periods of not to exceed 1 year upon the President's making a new determination.

"(D) MILITARY PROPERTY.-In addition to any exemption of a particular effluent source, the President may, if the President determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at 3-year intervals.

"(E) REPORTS.-The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with the President's reason for granting such exemption.

"(6) VENUE.-Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with chapter 89 of title 28, United States Code.

"(7) PERSONAL LIABILITY OF FEDERAL EMPLOYEES.-No agent, employee, or officer of the United States shall be personally liable for any penalty, under any Federal, State, interstate, or local water pollution law with respect to any act or omission within the scope of the official duties of the agent, employee, or officer.

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"(8) CRIMINAL SANCTIONS.-An agent, employee, or officer of the United States shall be subject to any criminal sanction (including any fine or imprisonment) under any Federal or State water pollution law, but no department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government shall be subject to any such sanction.".

(b) FUNDS COLLECTED BY A STATE.- Section 313 (33 U.S.C. 1323) is further amended by adding at the end the following: -

"(C) LIMITATION ON STATE USE OF FUNDS.-Unless a State law in effect on the date of the enactment of this subsection or a State constitution requires the funds to be used in a different manner, all funds collected by a State from the Federal Government in penalties and fines imposed for the violation of a substantive or procedural requirement referred to in subsection (a) shall be used by the State only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement.".

(c)ENFORCEMENT.- Section 313 is further amended by adding at the end the following: -

"(d) FEDERAL FACILITY ENFORCEMENT.-

"(1) ADMINISTRATIVE ENFORCEMENT BY EPA -The Administrator may commence an administrative enforcement action against any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government pursuant to the enforcement authorities contained in this Act.

"(2) PROCEDURE.-The -Administrator shall initiate an administrative enforcement action against a department, agency, or instrumentality under this subsection in the same manner and under the same circumstances as an action would be initiated against any other person under this Act.

"(3) VOLUNTARY Settlement.- Any voluntary resolution or settlement of an action under this subsection shall be set forth in a consent order.

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"(4) CONFERRAL WITH EPA - No administrative order issued to a department, agency, or instrumentality under this section shall become final until such department, agency. or instrumentality has had the opportunity to confer with the Administrator.

(d) LIMITATION ON ACTIONS AND RIGHT OF INTERVENTION. - Section 313 is further amended by adding at the end the following: -

"(e) LIMITATION ON ACTIONS AND RIGHT OF INTERVENTION.-Any violation with respect to which the Administrator or Secretary as applicable, has commenced and is diligently prosecuting an action under this subsection, or for which the Administrator or Secretary, as applicable, has issued a final order and the violator has either paid a penalty or fine assessed under this subsection or is subject to an enforceable schedule of corrective actions, shall not be the subject of an enforcement action under section 505 of this Act. In any action under this subsection, any citizen may intervene as a matter of right."

(e) DEFINITION OF PERSON.-Section 502(5) (33 U.S.C. 1362(5)) is amended by inserting before the period at the end the following- "and includes any department, agency, or instrumentality of the United States".

4/7/94

WETLANDS MANAGEMENT

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Objective

Under current law, federal permits for activities that impact wetlands are issued under section 404 of the Act. States may request approval to assume the section 404 program in their state. Due to the complexity of the assumption process, only two States have obtained EPA approval to manage wetlands at the state level. This amendment improves the management of wetlands through streamlining of regulatory requirements and enhances the state role in wetlands management via section 404 assumption or issuance of state programmatic general permits.

Proposed Amendment

Title VII as proposed by Senator Graham in the Subcommittee Chairman's mark released on January 21, 1994. The major provisions of this version (described below) are largely consistent with the NGA wetlands policy, particularly in that it removes EPA's veto authority over individual permits and replaces it with "periodic review of permit decisions" made by an authorized state (see p. 7-52). Some state representatives have expressed concerns about whether EPA's veto authority should be eliminated under all circumstances, or maintained at the request of the state on a case-by-case basis to address issues of national significance. Consensus language that authorizes EPA and the state to negotiate the appropriate level of federal oversight on a sliding scale is still being discussed by the state working group and will be sent as soon as it is available.

One provision of the NGA policy that is not included in this draft is the identification of preferred mitigation sequencing options that begin with avoidance of adverse wetlands impacts.

A. National Policy

Establishes a national policy to restore wetlands and includes a commitment to no overall net loss of remaining wetlands.

B. State Assumption and Programmatic General Permits

Explicitly authorizes states to obtain programmatic general permits from the Corps of Engineers.

States that have assumed section 404 or obtained a programmatic general permit (PGP) are required to consider comments from EPA, the Corps, and the Fish & Wildlife Service (also the Departments of Interior and Commerce for PGPs) before issuing a permit, but EPA or the Corps may not veto or preempt a state permit decision.

EPA and the Corps may grant funds to an authorized state in an amount not to exceed the funds appropriated to those agencies to administer the section 404 program or issue general permits in that state.

C. Definition and Delineation of Wetlands

Codifies the current section 404(b)(1) guidelines definition of wetlands with minor modification.

Prohibits revisions to the wetlands delineation guidelines until the National Academy of Sciences has completed its ongoing study of wetlands, and only then after consultation with federal agencies and the states.

D. Mitigation Banks

Authorizes the establishment and use of public and private mitigation banks with federal oversight.

E. Intergovernmental Coordination

Establishes an intergovernmental committee to coordinate federal, state, and local government wetlands policies.

TITLE VII—WETLANDS

SEC. 701. DECLARATION OF POLICIES AND GOALS.

(a) NO NET LOSS OF WETLANDS.—Section 101(a) (33 U.S.C. 1251(a)) is amended—

(1) by striking "and" at the end of paragraph (6);

(2) by striking the period at the end of paragraph (7) and inserting "and"; and

(3) by adding at the end the following new paragraph:

"(8) it is the national policy to achieve, through regulatory and nonregulatory strategies involving all levels of government—

"(A) the conservation and restoration of wetlands to increase the quality and quantity of the wetlands resource base of the United States; and

"(B) no overall net loss of the remaining wetlands resource base of the United States.".

(b) PROTECTION OF PRIVATE PROPERTY.—Section 404 (33 U.S.C. 1344) is amended by adding at the end the following new subsection:

"(u) PROTECTION OF PRIVATE PROPERTY.—In carrying out this Act, the Administrator and the Secretary

1 of the Army shall not take private property for public use,
2 without just compensation.".

3 **SEC. 702. DEFINITION AND DELINEATION OF WETLANDS.**

4 (a) DEFINITIONS.—Section 502 (33 U.S.C. 1362) is
5 amended—

6 (1) in paragraph (7), by inserting ", including
7 wetlands" before the period; and

8 (2) by adding at the end the following new
9 paragraph:

10 "(21) The term 'wetlands' means those areas that are
11 inundated or saturated by surface water or ground water
12 at a frequency and duration sufficient to support, and that
13 under normal circumstances do support, a prevalence of
14 vegetation typically adapted to life in saturated soil condi-
15 tions. The term generally includes swamps, marshes, bogs,
16 fens, potholes, playa lakes, vernal pools, and similar
17 areas.".

18 (b) DELINEATION OF WETLANDS.—

19 (1) REVISIONS TO DELINEATION PROCE-
20 DURES.—

21 (A) IN GENERAL.—After the date of enact-
22 ment of this Act, no revisions to or clarifica-
23 tions of the guidelines for identifying and delin-
24 eating wetlands areas under section 404(a) of
25 the Federal Water Pollution Control Act (33

1 U.S.C. 1344(a)), as amended by this Act, shall
2 be issued until the National Academy of
3 Sciences has completed the study of wetlands
4 authorized by the Departments of Veterans Af-
5 fairs and Housing and Urban Development, and
6 Independent Agencies Appropriations Act, 1993
7 (Public Law 102–389).
8 (B) REVISIONS.—On completion of the
9 study required under subparagraph (A), the
10 Administrator of the Environmental Protection
11 Agency shall review the results of the study to
12 determine whether any revisions to the guide-
13 lines referred to in subparagraph (A) are nec-
14 essary. Any revision to the guidelines shall be
15 made in accordance with section 404(a)(2) of
16 such Act (as added by paragraph (3)(B)).
17 (2) CONTINUED USE OF 1987 MANUAL.—
18 (A) IN GENERAL.—Until the guidelines for
19 identifying and delineating wetlands areas are
20 issued pursuant to section 404(a) of the Fed-
21 eral Water Pollution Control Act (33 U.S.C.
22 1344(a)), as amended by this Act, the Sec-
23 retary of the Army, acting through the Chief of
24 Engineers, and the Administrator of the Envi-
25 ronmental Protection Agency shall use the

1 Corps of Engineers Wetlands Delineation Man-
2 ual issued in January 1987 (Technical Report
3 Y-87-1) and implementing guidelines to identify
4 and delineate the wetlands areas.
5 (B) AGRICULTURAL LANDS.—Wetlands lo-
6 cated on agricultural lands and associated non-
7 agricultural lands shall be delineated by the
8 Secretary of Agriculture in accordance with the
9 memorandum of agreement dated January 6,
10 1994, concerning the delineation of wetlands for
11 the purposes of section 404 of the Federal
12 Water Pollution Control Act (33 U.S.C. 1344)
13 and subtitle C of title XII of the Food Security
14 Act of 1985 (16 U.S.C. 3821 et seq.) entered
15 into by the Secretary of Agriculture, the Ad-
16 ministrator of the Environmental Protection
17 Agency, the Secretary of the Interior, and the
18 Secretary of the Army.
19 (3) DELINEATION GUIDELINES; ISSUANCE OF
20 PERMITS.—Section 404(a) (33 U.S.C. 1344(a)) is
21 amended—
22 (A) by striking "(a) The Secretary" and
23 inserting the following:
24 "(a) IN GENERAL.—
25 "(1) ISSUANCE OF PERMITS.—The Secretary";

1 (B) by adding at the end of paragraph (1)
2 the following new sentence: "The Secretary
3 shall request from the applicant any additional
4 information to complete the application not
5 later than 60 days after the Secretary receives
6 the application." ; and
7 (C) by adding at the end the following new
8 paragraph:
9 "(2) GUIDELINES.—The Administrator, in con-
10 sultation with the Secretary, the Secretary of Agri-
11 culture, and the Secretary of the Interior, after field
12 testing and notice and opportunity for public review
13 and comment, may issue guidelines to identify and
14 delineate wetlands areas. The guidelines shall—
15 "(A) be developed in consultation with the
16 States;
17 "(B) be based on the best available sci-
18 entific information, including the results of the
19 National Academy of Sciences study of wet-
20 lands authorized by the Departments of Veter-
21 ans Affairs and Housing and Urban Develop-
22 ment, and Independent Agencies Appropriations
23 Act, 1993 (Public Law 102–389); and
24 "(C) take into account regional variations
25 in hydrology, soils, and vegetation.".

1 (4) DELINEATION TRAINING AND OUTREACH.—
2 (A) TRAINING OF WETLANDS DELINEA-
3 TORS.—
4 (i) IN GENERAL.—The Secretary of
5 the Army, in cooperation with the Admin-
6 istrator of the Environmental Protection
7 Agency, the Secretary of Agriculture, and
8 the Secretary of the Interior, shall offer
9 training to Federal employees engaged in
10 the identification and delineation of wet-
11 lands pursuant to section 404(a) of the
12 Federal Water Pollution Control Act and
13 subtitle C of title XII of the Food Security
14 Act of 1985 (16 U.S.C. 3821 et seq.). The
15 training shall also be offered, to the extent
16 practicable, to employees of State and local
17 governments and private consultants en-
18 gaged in the identification and delineation
19 of wetlands.
20 (ii) REQUIREMENT FOR FEDERAL EM-
21 PLOYEES.—All Federal employees engaged
22 in the delineation of wetlands shall be
23 trained pursuant to this paragraph not
24 later than December 31, 1996.

1 (B) FUNDING FOR TRAINING PROGRAM.—
2 Of the amounts made available by appropria-
3 tions for each fiscal year beginning after the
4 date of the enactment of this Act for adminis-
5 tration of section 404 of the Federal Water Pol-
6 lution Control Act (33 U.S.C. 1344) by the
7 Corps of Engineers, the Secretary of the Army,
8 in cooperation with the Administrator, shall use
9 such amounts as are practicable to carry out
10 the program of the Corps of Engineers for—
11 (i) interagency wetlands delineation
12 training; and
13 (ii) training of Federal employees and
14 other individuals as wetlands delineators
15 authorized by section 307(e) of the Water
16 Resources Development Act of 1990 (33
17 U.S.C. 2317(e)).
18 (5) ASSISTING SMALL LANDOWNERS WITH WET-
19 LANDS DELINEATION.—
20 (A) IN GENERAL.—Of amounts made
21 available by appropriations for each fiscal year
22 beginning after the date of enactment of this
23 Act for administration of section 404 of the
24 Federal Water Pollution Control Act (33 U.S.C.
25 1344), the Secretary of the Army, acting

1 through the Chief of Engineers, and the Admin-
2 istrator of the Environmental Protection Agen-
3 cy shall use such amounts as are necessary, but
4 not to exceed a combined total of $5,000,000,
5 to assist private landowners who lack the finan-
6 cial capacity to identify or delineate wetlands in
7 order to apply for permits under that section or
8 to avoid impacts to wetlands.

9 (B) FORM OF ASSISTANCE.—The assist-
10 ance under subparagraph (A) shall be provided
11 in cooperation with the Director of the United
12 States Fish and Wildlife Service and the Chief
13 of the Soil Conservation Service and shall
14 include—

15 (i) to the maximum extent practicable,
16 the delineation of wetlands boundaries not
17 later than 90 days after receipt of a re-
18 quest for the delineation; and

19 (ii) technical assistance to owners of
20 wetlands in the preparation of wetlands
21 management plans for the lands of the
22 owners to protect and restore wetlands and
23 meet other goals of the Federal Water Pol-
24 lution Control Act (33 U.S.C. 1251 et
25 seq.), including the protection and propa-

1 gation of fish, shellfish, and wildlife, the
2 control of nonpoint and point sources of
3 pollution, the prevention and reduction of
4 erosion, and the protection of estuaries and
5 lakes.
6 (C) REGULATIONS.—Not later than 180
7 days after the date of enactment of this Act,
8 the Secretary and the Administrator of the En-
9 vironmental Protection Agency, in cooperation
10 with the Secretary of the Interior and the Sec-
11 retary of Agriculture, shall issue regulations de-
12 fining the scope of technical assistance and
13 which landowners are eligible for assistance
14 under this paragraph.
15 (6) EDUCATION AND INFORMATION.—The Sec-
16 retary of the Army, acting through the Chief of En-
17 gineers, and the Administrator of the Environmental
18 Protection Agency shall, in cooperation with the Co-
19 ordinating Committee established under section 324
20 of the Federal Water Pollution Control Act (as
21 added by section 710(b)), prepare, update on a bien-
22 nial basis, and make available to the public for pur-
23 chase at cost—
24 (A) an indexed publication containing all
25 Federal regulations, general permits, and regu-

1 latory guidance letters relevant to the permit-
2 ting of activities pursuant to section 404 of the
3 Federal Water Pollution Control Act (33 U.S.C.
4 1344); and
5 (B) information to enable the general pub-
6 lic to understand the delineation of wetlands,
7 the permitting requirements referred to in sub-
8 paragraph (A), wetlands restoration, wetlands
9 functions and values, available nonregulatory
10 programs to conserve wetlands, and other mat-
11 ters that the Secretary of the Army and the Ad-
12 ministrator of the Environmental Protection
13 Agency consider relevant.
14 **SEC. 703. REGULATION OF ACTIVITIES.**
15 (a) DEFINITIONS.—
16 (1) IN GENERAL.—Subsection (d) of section
17 404 (33 U.S.C. 1344(d)) is amended to read as fol-
18 lows:
19 "(d) DEFINITIONS.—As used in this section:
20 "(1) FILL MATERIAL.—The term 'fill material'
21 means any material that has the effect of replacing
22 portions of navigable waters or changing the bottom
23 elevation or configuration of a water body.

1 "(2) SECRETARY.—The term 'Secretary' means
2 the Secretary of the Army, acting through the Chief
3 of Engineers.".
4 (2) POLLUTANT.—Section 502(6) (33 U.S.C.
5 1362(6)) is amended by inserting "fill material,
6 dirt," after "dredged spoil,".
7 (b) DISCHARGE OF DREDGED OR FILL MATERIAL
8 DEFINED.—Section 404(d) (33 U.S.C. 1344(d)), as
9 amended by subsection (a), is further amended by adding
10 at the end the following new paragraph:
11 "(3) DISCHARGE OF DREDGED OR FILL MATE-
12 RIAL.—The term 'discharge of dredged or fill mate-
13 rial' means any addition of dredged or fill material
14 into navigable waters and includes, without limita-
15 tion, any addition or redeposit of dredged or fill ma-
16 terials, including excavated materials, into the navi-
17 gable waters that is incidental to any activity, in-
18 cluding draining, mechanized land clearing, ditching,
19 channelization, or other excavation that has or would
20 have the effect of destroying or degrading any area
21 of navigable waters.".
22 **SEC. 704. PERMIT PROCESSING IMPROVEMENTS.**
23 (a) PERMIT DECISION DEADLINES.—Section 404(a)
24 (33 U.S.C. 1344(a)), as amended by section 702(b)(3),

1 is further amended by adding at the end the following new
2 paragraphs:
3 "(3) DATE OF DECISION BY SECRETARY.—Ex-
4 cept as provided in paragraph (4), the Secretary
5 shall make a decision with respect to an application
6 for a permit submitted under paragraph (1) not
7 later than 90 days after the date the notice of the
8 application is published under paragraph (1).
9 "(4) EXTENSION.—The decision of the Sec-
10 retary with respect to an application for a permit
11 under paragraph (1) may be made after the date
12 specified in paragraph (3), only if—
13 "(A) with respect to issuance of the per-
14 mit, the Secretary is required under the Na-
15 tional Environmental Policy Act of 1969 (42
16 U.S.C. 4321 et seq.) to issue an environmental
17 impact statement, in which case the decision
18 shall be made not later than 30 days after the
19 date on which the requirements of such Act are
20 met;
21 "(B) the permit application involves an ac-
22 tivity that may affect any species that is listed
23 or proposed for listing or any critical habitat
24 that is designated or proposed for designation
25 under the Endangered Species Act of 1973 (16

1 U.S.C. 1531 et seq.), in which case the decision
2 shall be made not later than 30 days after the
3 date on which the requirements of such Act are
4 met, as determined by the Secretary of the In-
5 terior or the Secretary of Commerce, whomever
6 is appropriate;
7 "(C) the Administrator, the Secretary of
8 Agriculture, the Secretary of the Interior, the
9 Secretary of Commerce, or the Secretary of
10 Transportation, the head of any other appro-
11 priate Federal agency, or the Governor of the
12 State in which the activity occurs requests that
13 the decision be made after the date specified in
14 paragraph (3), in which case the decision shall
15 be made not later than 150 days after the ap-
16 plication is published under paragraph (1);
17 "(D) the Secretary and the applicant for
18 the permit determine that additional time is
19 needed to evaluate the application; or
20 "(E) the decision is precluded as a matter
21 of law or procedures required by law.
22 "(5) CONSEQUENCES OF FAILURE BY THE SEC-
23 RETARY TO MAKE A DECISION.—If the Secretary
24 fails to make a decision by the date specified in
25 paragraph (3), the applicant for the permit may—

1 "(A) treat the lack of a decision as a de-
2 nial of the permit and appeal the denial pursu-
3 ant to paragraph (6); or
4 "(B) pursue any other remedy authorized
5 by law.".
6 (b) DEADLINES ON PROHIBITION OR RESTRICTION
7 OF ACTIVITIES BY ADMINISTRATOR.—Section 404(c) (33
8 U.S.C. 1344(c)) is amended by adding at the end the fol-
9 lowing new sentence: "The Administrator shall make any
10 determination under this subsection to prohibit or restrict
11 any discharge into navigable waters resulting from an ac-
12 tivity for which a permit may be issued under subsection
13 (a) not later than 180 days after the date of decision with
14 respect to an application for a permit under subsection
15 (a).".
16 (c) ADMINISTRATIVE APPEAL OF PERMIT DECI-
17 SIONS.—Section 404(a) (33 U.S.C. 1344(a)), as amended
18 by subsection (a), is further amended by adding at the
19 end the following new paragraph:
20 "(6) REGULATIONS.—
21 "(A) IN GENERAL.—Not later than 180
22 days after the date of enactment of this para-
23 graph, the Secretary shall, after providing no-
24 tice and an opportunity for public comment,

1 issue regulations establishing procedures pursu-
2 ant to which—
3 "(i) a landowner may appeal a deter-
4 mination of regulatory jurisdiction under
5 this section with respect to a parcel of
6 property;
7 "(ii) a landowner or any other person
8 against whom an administrative penalty
9 has been imposed pursuant to this section
10 may appeal the imposition or the amount
11 of the penalty; and
12 "(iii) an applicant for a permit sub-
13 mitted under paragraph (1) or any other
14 person who participated in a public com-
15 ment process concerning the application
16 for the permit, may appeal a decision made
17 pursuant to this section to grant, deny, or
18 condition the permit.
19 "(B) FILING.—An appeal brought pursu-
20 ant to this paragraph shall be filed not later
21 than 30 days after the date on which the deci-
22 sion or action on which the appeal is based oc-
23 curs.
24 "(C) OFFICIAL DECIDING APPEAL.—An
25 appeal brought pursuant to this subsection

1 shall, to the extent allowable by law, be heard
2 and decided by an appropriate official of the
3 Federal Government, other than the official
4 who made the determination or carried out the
5 action that is the subject of the appeal.".

6 **SEC. 705. GENERAL PERMIT IMPROVEMENTS.**

7 Subsection (e) of section 404 (33 U.S.C. 1344(e)) is
8 amended to read as follows:

9 "(e) GENERAL PERMITS.—

10 "(1) IN GENERAL.—In carrying out the func-
11 tions of the Secretary under this section relating to
12 the discharge of dredged or fill material, the Sec-
13 retary may, after notice and opportunity for a public
14 hearing, and with the concurrence of the Adminis-
15 trator, issue general permits.

16 "(2) CATEGORIES OF ACTIVITIES.—The general
17 permits may be issued on a State, regional, or na-
18 tionwide basis for any category of activities involving
19 discharges of dredged or fill material if the Sec-
20 retary determines that—

21 "(A) the activities in the category are simi-
22 lar in nature and will cause only minimal ad-
23 verse environmental effects when performed
24 separately; and

1 "(B) will have only a minimal cumulative
2 adverse effect on the environment.
3 "(3) STATE PROGRAMS.—A general permit may
4 be issued by the Secretary for a then existing State
5 regulatory program to avoid unnecessary duplication
6 of requirements by Federal and State programs if
7 the general permit—
8 "(A) requires that the State regulatory
9 program has jurisdiction over the activities and
10 waters within the scope of the general permit:
11 "(B) provides adequate safeguards to en-
12 sure that the State regulatory program will
13 have no more than minimal cumulative impacts
14 on the environment and will provide at least the
15 same degree of protection for the navigable wa-
16 ters as the protection provided by this section:
17 "(C) provides at least the same oppor-
18 tunity for public review, comment, and hearings
19 as the opportunity provided by this section; and
20 "(D) includes provisions to provide an op-
21 portunity for the Secretary, in cooperation the
22 Administrator, the Secretary of the Interior
23 (acting through the Director of the United
24 States Fish and Wildlife Service), and the Sec-
25 retary of Commerce (acting through the Admin-

1 istrator of the National Oceanic and Atmos-
2 pheric Administration) to, in accordance with
3 paragraph (5), conduct periodic reviews of per-
4 mit decisions made by the State in order to en-
5 sure that the requirements of this subsection
6 are met.

7 "(4) CONSISTENCY WITH SWAMPBUSTER.—A
8 general permit may be issued for discharges of
9 dredged or fill material associated with activities
10 found by the Secretary of Agriculture, in consulta-
11 tion with the Secretary of the Interior acting
12 through the Director of the United States Fish and
13 Wildlife Service, to be exempted from the ineligibility
14 provisions of section 1221 of the Food Security Act
15 of 1985 (16 U.S.C. 3821) pursuant to subsections
16 (f) and (h) of section 1222 of such Act (16 U.S.C.
17 3822) if the general permit—

18 "(A) provides adequate safeguards to en-
19 sure that the activities exempted will have no
20 more than minimal individual and cumulative
21 impacts on the environment; and

22 "(B) includes provisions to provide an op-
23 portunity for the Secretary and the Adminis-
24 trator to review determinations by the Secretary
25 of Agriculture to ensure that the terms and

1 conditions of the general permit and the re-
2 quirements of this subsection are met.
3 "(5) REQUIREMENTS APPLICABLE TO GENERAL
4 PERMITS.—
5 "(A) PERIOD; REVOCATION OR MODIFICA-
6 TION.—No general permit issued under this
7 subsection shall be for a period of more than 5
8 years after the date of issuance of the permit.
9 The general permit shall be revoked or modified
10 by the Secretary if, after providing notice and
11 opportunity to request a public hearing, the
12 Secretary determines that—
13 "(i) the activities authorized by the
14 general permit—
15 "(I) have more than a minimal
16 adverse impact on the environment
17 (individually or cumulatively); or
18 "(II) are more appropriately au-
19 thorized by individual permits; or
20 "(ii) a State has failed to adequately
21 monitor and control the individual and cu-
22 mulative adverse effects of activities au-
23 thorized by a State program general per-
24 mit issued under paragraph (3).

1 "(B) REQUIREMENTS.—Each general per-
2 mit issued under this subsection shall—
3 "(i) be based on the guidelines devel-
4 oped pursuant to subsection (b)(1); and
5 "(ii) set forth requirements and
6 standards that shall apply to any activity
7 authorized by the permit, including specific
8 enforceable requirements and standards for
9 the mitigation of adverse impacts to wet-
10 lands and other navigable waters.
11 "(6) GRANTS FOR STATE PROGRAMS.—
12 "(A) IN GENERAL.—The Secretary and the
13 Administrator may make a grant to a State for
14 the operation of a regulatory program with re-
15 spect to which a general permit has been issued
16 pursuant to this subsection.
17 "(B) AMOUNT OF GRANT.—The amount of
18 a grant awarded to a State by the Secretary or
19 the Administrator may not exceed an amount
20 equal to the amount that is made available by
21 appropriations to the Secretary or the Adminis-
22 trator to carry out this section with respect to
23 the State.".

1 **SEC. 706. COORDINATION AND CLARIFICATION OF PRO-**
2 **GRAM CONCERNING AGRICULTURAL ACTIVI-**
3 **TIES.**
4 (a) COORDINATION WITH AGRICULTURAL PRO-
5 GRAMS.—Section 404(q) (33 U.S.C. 1344(q)) is
6 amended—
7 (1) by striking "(q) Not" and inserting the fol-
8 lowing:
9 "(q) AGREEMENTS.—
10 "(1) IN GENERAL.—Not"; and
11 (2) by adding at the end the following new
12 paragraph:
13 "(2) TECHNICAL DETERMINATIONS.—In mak-
14 ing technical determinations concerning waters of
15 the United States located on agricultural lands, in-
16 cluding the delineation of prior converted croplands,
17 the Secretary, the Administrator, the Secretary of
18 the Interior, and the Secretary of Agriculture
19 shall—
20 "(A) use consistent criteria and proce-
21 dures, in accordance with the memorandum of
22 agreement dated January 6, 1994, concerning
23 the delineation of wetlands for the purposes of
24 this section and subtitle C of title XII of the
25 Food Security Act of 1985 (16 U.S.C. 3821 et
26 seq.) entered into by the Secretary of Agri-

1 culture, the Administrator of the Environmental
2 Protection Agency, the Secretary of the Inte-
3 rior, and the Secretary of the Army; and
4 "(B) provide information and education to
5 the public concerning the criteria and proce-
6 dures referred to in subparagraph (A).".
7 (b) EXEMPTION FOR PRIOR CONVERTED CROP-
8 LAND.—Section 404(f) (33 U.S.C. 1344(f)) is amended by
9 adding at the end the following new paragraph:
10 "(3) PRIOR CONVERTED CROPLAND.—
11 "(A) IN GENERAL.—An area determined
12 (in accordance with the memorandum described
13 in subparagraph (B)) to be prior converted
14 cropland and that no longer meets the defini-
15 tion of "wetland" under section 1201(a)(16) of
16 the Food Security Act of 1985 (16 U.S.C.
17 3801(16) shall not be considered to be navi-
18 gable waters.
19 "(B) MEMORANDUM.—The memorandum
20 described in this subparagraph is the memoran-
21 dum of agreement dated January 6, 1994, con-
22 cerning the delineation of wetlands for the pur-
23 poses of this section and subtitle C of title XII
24 of the Food Security Act of 1985 (16 U.S.C.
25 3821 et seq.) entered into by the Secretary of

1 Agriculture, the Administrator of the Environ-
2 mental Protection Agency, the Secretary of the
3 Interior, and the Secretary of the Army.".
4 (c) OTHER EXEMPT WATERS AND AREAS.—Section
5 404(f) (33 U.S.C. 1344(f)), as amended by subsection (b),
6 is further amended by adding at the end the following new
7 paragraph:
8 "(4) EXCLUSION FROM NAVIGABLE WATERS.—
9 For purposes of this section, the following shall not
10 be considered to be navigable waters:
11 "(A) Nontidal drainage and irrigation
12 ditches excavated in uplands.
13 "(B) Artificially irrigated areas that would
14 revert to uplands if the irrigation ceased.
15 "(C) Artificial lakes or ponds created by
16 excavating or diking uplands to collect and re-
17 tain water, and that are used primarily for
18 stock watering, irrigation, settling ponds, fire
19 control, or rice growing.
20 "(D) Artificial reflecting or swimming
21 pools or other small ornamental bodies of water
22 created by excavating or diking uplands to re-
23 tain water for primarily aesthetic reasons.
24 "(E) Water-filled depressions created in
25 uplands incidental to construction activity and

1 pits excavated in uplands for the purpose of ob-
2 taining fill, sand, or gravel, unless and until the
3 construction or excavation operation is aban-
4 doned and the resulting body of water meets
5 the definition of navigable waters under section
6 502(7).
7 "(F) Artificial stormwater detention areas
8 and artificial sewage treatment areas that are
9 not modifications of navigable waters.".
10 (d) EXEMPTED ACTIVITIES.—Section 404(f) (33
11 U.S.C. 1344(f)) is amended—
12 (1) by striking "(f)(1) Except as provided" and
13 inserting the following:
14 "(f) AGRICULTURAL ACTIVITIES.—
15 "(1) IN GENERAL.—Except as provided"; and
16 (2) in paragraph (1), by striking subparagraph
17 (A) and all that follows through the end of the para-
18 graph and inserting the following:
19 "(A) from normal farming, silviculture,
20 and ranching activities, including haying, graz-
21 ing, plowing, seeding, cultivating, minor drain-
22 age, harvesting for the production of food, fiber,
23 and forest products, or upland soil and water
24 conservation practices:

1 "(B) for the purpose of the maintenance,
2 including emergency reconstruction of recently
3 damaged parts, of currently serviceable struc-
4 tures such as dikes, dams, levees, groins,
5 riprap, breakwaters, causeways, bridge abut-
6 ments or approaches, and transportation struc-
7 tures;
8 "(C) for the purpose of the construction or
9 maintenance of farm or stock ponds or irriga-
10 tion ditches, or the maintenance of drainage
11 ditches;
12 "(D) for the purpose of the construction of
13 temporary sedimentation basins on a construc-
14 tion site that does not involve a discharge of fill
15 into navigable waters;
16 "(E) for the purpose of the construction or
17 maintenance of farm roads or forest roads, or
18 temporary roads for moving mining equipment,
19 if the roads are constructed and maintained, in
20 accordance with best management practices, to
21 ensure that—
22 "(i) flow and circulation patterns and
23 chemical and biological characteristics of
24 the navigable waters are not impaired;

1 "(ii) the reach of the navigable waters
2 is not reduced; and
3 "(iii) any adverse effect on the aquat-
4 ic environment will otherwise be mini-
5 mized; or
6 "(F) resulting from any activity with re-
7 spect to which a State has a program approved
8 by the Administrator under section 208(b)(4)
9 that meets the requirements of subparagraphs
10 (B) and (C),
11 shall not be prohibited by, or otherwise subject to,
12 regulation under this section or section 301(a) or
13 402 (except for effluent standards or prohibitions
14 under section 307).".
15 (e) COOPERATION WITH SECRETARY OF AGRI-
16 CULTURE.—Section 404(f) (33 U.S.C. 1344(f)) is amend-
17 ed by adding at the end the following new paragraph:
18 "(3) COORDINATION OF EFFORTS.—In carrying
19 out this subsection, the Secretary and the Adminis-
20 trator shall coordinate efforts of the Secretary and
21 the Administrator with the efforts of the Secretary
22 of Agriculture.".

1 **SEC. 707. MITIGATION BANKS.**

2 Section 404 (33 U.S.C. 1344) (as amended by section
3 701(b)) is further amended by adding at the end the fol-
4 lowing new subsection:

5 "(v) MITIGATION BANKS.—

6 "(1) ESTABLISHMENT.—

7 "(A) IN GENERAL.—Not later than 1 year
8 after the date of the enactment of this sub-
9 section, after providing notice and opportunity
10 for public review and comment, the Secretary
11 and the Administrator shall jointly issue regula-
12 tions for the establishment, use, maintenance
13 and oversight of mitigation banks.

14 "(B) PROVISIONS AND REQUIREMENTS.—
15 The regulations issued pursuant to subpara-
16 graph (A) shall ensure that mitigation banks—

17 "(i) comply with the guidelines estab-
18 lished under subsection (b)(1);

19 "(ii) to the extent practicable and en-
20 vironmentally desirable, provide in-kind re-
21 placement of lost wetlands functions and
22 be located on or in proximity to the same
23 watershed as impacted wetlands;

24 "(iii) provide for the long-term secu-
25 rity of ownership interests of wetlands and
26 uplands on which projects are conducted to

1 protect the wetlands values associated with
2 the mitigation banks;
3 "(iv) employ consistent and scientif-
4 ically-sound methods to determine debits
5 by evaluating wetlands functions and
6 project impacts at the sites of proposed
7 permits for discharges of dredged or fill
8 material pursuant to this section, and
9 methods to be used to determine credits
10 based on wetlands functions, values, and
11 acreages at the sites of mitigation banks;
12 "(v) base fee charges for participation
13 in each mitigation bank that reflect the full
14 costs of replacing lost wetlands functions
15 and acreage, including the costs of land ac-
16 quisition, wetlands establishment, manage-
17 ment measures, long-term maintenance,
18 monitoring, and protection, potential reme-
19 diation of project failure, and other rel-
20 evant factors;
21 "(vi) specify responsibilities for long-
22 term monitoring, maintenance, and protec-
23 tion; and
24 "(vii) provide opportunity for public
25 review of proposals for mitigation banks

1 through 1 or more opportunities for public
2 notice and comment.
3 "(2) MITIGATION BANK DEFINED.—As used in
4 this subsection, the term 'mitigation bank' means a
5 wetlands restoration project undertaken by 1 or
6 more parties, including a private or public entity, ex-
7 pressly for the purpose of providing, in advance,
8 mitigation compensation credits to fully offset rea-
9 sonably foreseeable wetlands losses from future dis-
10 charges of dredged or fill material into the navigable
11 waters, if compensatory mitigation at the project site
12 is not practicable or environmentally desirable.".
13 **SEC. 708. GRANT AUTHORITY FOR RESEARCH, INVESTIGA-**
14 **TION, AND TRAINING.**
15 Section 104 (33 U.S.C. 1254) is amended by adding
16 at the end the following new subsection:
17 "(v) The Secretary of the Army, acting through the
18 Chief of Engineers, is authorized to make grants to and
19 enter into cooperative agreements with State agencies,
20 interstate agencies, other public or nonprofit agencies, in-
21 stitutions, organizations, and individuals for the purposes
22 described in subsection (a)(1).".
23 **SEC. 709. REPORTS AND ANALYSIS.**
24 (a) EFFECTS OF PROGRAM ON WETLANDS.—Section
25 404(a) (33 U.S.C. 1344(a)), as amended by section

1 704(c), is further amended by adding at the end the fol-
2 lowing new paragraph:
3 "(7) INFORMATION.—
4 "(A) IN GENERAL.—Not later than 3 years
5 after the date of enactment of this paragraph
6 and every 3 years after the date of completion
7 of the reviews required under subsections (e)(5)
8 and (i)(1), the Secretary, the Administrator,
9 and each State that has a permit program ap-
10 proved by the Administrator under subsection
11 (h)(2) shall collect and make available to Con-
12 gress and the public information regarding the
13 effects on navigable waters of activities con-
14 ducted under permits (including general per-
15 mits) issued pursuant to this section,
16 including—
17 "(i) the number of permit applications
18 that were granted, withdrawn, or denied;
19 "(ii) estimates of the total acreage,
20 prior to any mitigation, of navigable waters
21 affected adversely by issuance of individual
22 permits;
23 "(iii) estimates of the acreage of navi-
24 gable waters affected by each general per-
25 mit, in order to determine whether the in-

1 dividual and cumulative adverse environ-
2 mental effects of activities authorized by
3 each general permit are minimal; and
4 "(iv) estimates of the acreage of navi-
5 gable waters preserved, created, enhanced,
6 and restored through mitigation of per-
7 mitted activities and the rate of compliance
8 with such mitigation requirements.
9 "(B) MONITORING.—For purposes of pre-
10 paring reports under this paragraph, the Sec-
11 retary, the Administrator, and the Secretary of
12 the Interior shall jointly monitor the achieve-
13 ment of the policy stated in section 101(a)(8)
14 under permits issued under this section.
15 "(C) INFORMATION.—To assist the Sec-
16 retary and the Administrator in the preparation
17 of the reports required under this paragraph
18 and in monitoring the impacts of general per-
19 mits, the appropriate official of each State en-
20 tity that has in effect a regulatory program
21 that is authorized by a general permit issued
22 pursuant to subsection (e)(3) shall, not later
23 than 180 days before the issuance of the re-
24 ports required under this paragraph, submit to
25 the Secretary and the Administrator informa-

1 tion concerning the effects of the activities con-
2 ducted under the general permit within the ju-
3 risdiction of the entity, including estimates of—
4 "(i) the number and type of activities
5 authorized under the general permit;
6 "(ii) the acreage of navigable waters
7 affected by the general permit; and
8 "(iii) the acreage of navigable waters
9 preserved or restored through the mitiga-
10 tion of activities conducted under the gen-
11 eral permit and the rate of compliance
12 with the mitigation requirements.".
13 (b) NEEDS ANALYSIS.—
14 (1) IN GENERAL.—Not later than 90 days after
15 the date of the enactment of this Act, the Comptrol-
16 ler General of the United States shall submit to
17 Congress an analysis of the needs of the Department
18 of the Army, the Environmental Protection Agency,
19 the United States Fish and Wildlife Service, and the
20 National Marine Fisheries Service for additional per-
21 sonnel, administrative resources, and funding to—
22 (A) improve implementation of section 404
23 of the Federal Water Pollution Control Act (33
24 U.S.C. 1344); and

1 (B) carry out this Act and the amend-
2 ments made by this Act.
3 (2) CONTENTS.—The needs analysis submitted
4 by the Comptroller General of the United States
5 under this subsection shall—
6 (A) give particular emphasis to the needs
7 of the agencies identified in paragraph (1) with
8 respect to improving and expediting wetlands
9 delineation and the issuance of permits under
10 section 404 of such Act (including advance
11 planning and early consultation);
12 (B) include specific recommendations re-
13 garding additional appropriations and staffing
14 necessary to carry out subparagraph (A); and
15 (C) include specific recommendations con-
16 cerning the allocation of additional appropria-
17 tions and staffing to the regional, district, and
18 field offices of the agencies identified in para-
19 graph (1) according to the workload of the of-
20 fices.
21 **SEC. 710. WETLANDS CONSERVATION, MANAGEMENT, AND**
22 **RESTORATION.**
23 (a) FUNDING FOR STATE WETLANDS CONSERVATION
24 PLANS.—Section 104(b)(3) (33 U.S.C. 1254(b)(3)) is
25 amended by inserting before the semicolon at the end the

1 following: "and for the development and implementation
2 of State wetlands conservation plans under section 322".
3 (b) WETLANDS CONSERVATION, MANAGEMENT AND
4 RESTORATION.—Title III (33 U.S.C. 1311 et seq.), as
5 amended by section 302, is further amended by the adding
6 at the end the following new sections:

7 **"SEC. 322. STATE WETLANDS CONSERVATION PLANS.**

8 "(a) DEVELOPMENT AND IMPLEMENTATION ASSIST-
9 ANCE.—Subject to the requirements established by the
10 Administrator and this section, the Administrator is au-
11 thorized to make grants to States to assist in the develop-
12 ment and implementation of State wetlands conservation
13 plans.

14 "(b) CONTENTS OF PLANS.—To qualify for assist-
15 ance under subsection (a). a State wetlands conservation
16 plan shall generally include—

17 "(1) management strategies and policies for
18 achieving within the State the goal established under
19 section 101(a)(8);

20 "(2) an inventory of wetlands resources in the
21 State;

22 "(3) a description of the major causes of wet-
23 lands loss and degradation in the State, including an
24 estimate of historical wetlands losses:

1 "(4) a description of State and local govern-
2 ment programs applying to wetlands resources in the
3 State;
4 "(5) an identification of sites in the State with
5 wetlands restoration potential;
6 "(6) an identification of riparian areas in the
7 State with restoration potential;
8 "(7) a schedule for implementing the elements
9 of the plan;
10 "(8) a mechanism for monitoring the achieve-
11 ment of the stated goals of the plan;
12 "(9) measures to assist in the development of
13 wetlands and watershed management plans under
14 section 323; and
15 "(10) the involvement of local public and pri-
16 vate agencies and organizations that have expertise
17 in wetlands conservation or land use planning or de-
18 velopment.
19 **"SEC. 323. WETLANDS AND WATERSHED MANAGEMENT**
20 **PLANS.**
21 "(a) DESIGNATION AND APPROVAL OF MANAGEMENT
22 UNITS AND ENTITIES.—
23 "(1) IN GENERAL.—The Governor of a State
24 may at any time designate wetlands and associated
25 land areas within the State as a wetlands and water-

1 shed management unit. A wetlands and watershed
2 management unit designated pursuant to this para-
3 graph shall, to the extent practicable, be consistent
4 with watershed management units designated pursu-
5 ant to section 321(b).
6 "(2) UNIT BOUNDARIES.—
7 "(A) IN GENERAL.—The boundaries of
8 each wetlands and watershed management unit
9 shall—
10 "(i) be identified on a map;
11 "(ii) be based on the best available
12 scientific information; and
13 "(iii) to the extent practicable, be con-
14 sistent with the hydrological units identi-
15 fied by the United States Geological Sur-
16 vey of the Department of the Interior as
17 the most appropriate units for planning
18 purposes.
19 "(B) BOUNDARIES.—The boundaries of
20 each wetlands and watershed management unit
21 shall, to the extent practicable, be consistent
22 with the boundaries of watershed management
23 units designated pursuant to section 321(b).
24 "(3) MANAGEMENT ENTITY.—The Governor of
25 a State shall determine the entity responsible for de-

1 veloping and implementing a plan for each wetlands
2 and watershed management unit designated under
3 this section. The management entity may be an
4 agency of State government, a local government
5 agency, a substate regional planning organization, a
6 conservation district or other natural resource man-
7 agement district, or any other public or nonprofit
8 entity that has adequate powers to carry out the re-
9 sponsibilities authorized by this section. The man-
10 agement entity for each wetlands and watershed
11 management unit shall, to the extent practicable, be
12 the entity designated pursuant to section 321(c) to
13 manage the watershed management unit.
14 "(4) APPROVAL.—Each designation of a wet-
15 lands and watershed management unit and a cor-
16 responding management entity under this subsection
17 shall be submitted to the Administrator and the Sec-
18 retary of the Army, acting through the Chief of En-
19 gineers (referred to in this section as the 'Sec-
20 retary'), for approval. The Administrator and the
21 Secretary shall approve the designation of a manage-
22 ment unit and entity not later than 180 days after
23 the date of submittal, if the designation meets the
24 requirements of this section. If the Administrator
25 and the Secretary disapprove the designation, the

1 Administrator and the Secretary shall notify the
2 State in writing of the reasons for the disapproval.
3 The State may resubmit a revised designation to
4 meet the objections of the Administrator and the
5 Secretary.
6 "(b) DEVELOPMENT AND APPROVAL OF A WET-
7 LANDS AND WATERSHED MANAGEMENT PLAN.—
8 "(1) PLAN DEVELOPMENT.—An approved man-
9 agement entity shall be eligible to receive funding
10 pursuant to section 106(h), 205(j), 319(e), or
11 604(b) (or any combination thereof) for the follow-
12 ing activities in the development of a wetlands and
13 watershed management plan:
14 "(A) An inventory and mapping of—
15 "(i) all navigable waters within the
16 proposed wetlands and watershed manage-
17 ment unit; and
18 "(ii) potential wetlands restoration
19 sites.
20 "(B) An assessment of the functions and
21 relative value of wetlands within the wetlands
22 and watershed management unit.
23 "(C) The categorization of activities ac-
24 cording to the degree to which the activities
25 have an adverse effect on navigable waters

1 within the wetlands and watershed management
2 unit.
3 "(D) The identification and adoption of
4 programs, policies, and measures to achieve
5 within the wetlands and watershed management
6 unit the goal established under section
7 101(a)(8).
8 "(E) The identification of potential mitiga-
9 tion banks.
10 "(F) The identification and adoption of
11 measures to integrate wetlands planning and
12 management with broader water resource and
13 land use planning and management, including
14 floodplain management, water supply,
15 stormwater management, and the control of
16 point and nonpoint source pollution.
17 "(G) The identification and adoption of
18 measures to increase the level of consistency be-
19 tween Federal, State, and local wetlands defini-
20 tions, delineation methodologies, and permitting
21 approaches.
22 "(H) The identification and establishment
23 of management strategies for preserving and re-
24 storing wetlands on a watershed basis.

1 "(I) The consideration of, and coordination
2 with, water resource and land use planning ef-
3 forts in adjacent States within the region or
4 basin in which the wetlands and watershed
5 management unit is located.
6 "(2) PUBLIC PARTICIPATION.—Each State shall
7 establish procedures, including the establishment of
8 scientific and citizens' advisory committees, to en-
9 courage the public to participate in developing wet-
10 lands and watershed management plans under this
11 section.
12 "(3) APPROVAL OF PLANS.—
13 "(A) SUBMISSION OF PLAN.—The Gov-
14 ernor of a State may submit to the Adminis-
15 trator for approval by the Administrator and
16 the Secretary a wetlands and watershed man-
17 agement plan developed pursuant to this sec-
18 tion.
19 "(B) DECISION ON PLAN.—The Adminis-
20 trator and the Secretary shall, in consultation
21 with the Secretaries of the Interior, Agriculture,
22 and Commerce, and after notice and oppor-
23 tunity for public comment, approve or dis-
24 approve a wetlands and watershed management
25 plan not later than 180 days after the date the

1 plan is submitted by a Governor pursuant to
2 this paragraph.
3 "(C) PLAN REQUIREMENTS.—The Admin-
4 istrator and the Secretary shall approve a wet-
5 lands and watershed management plan submit-
6 ted pursuant to this paragraph if the Adminis-
7 trator and the Secretary determine that the
8 plan satisfies the requirements of section
9 321(g)(1) and each of the following conditions:
10 "(i) The plan has been developed for
11 a wetlands and watershed management
12 unit designated and approved pursuant to
13 subsection (a).
14 "(ii) The management entity with re-
15 sponsibility to carry out the plan has been
16 designated and approved pursuant to sub-
17 section (a) and has the legal authority and
18 financial resources to carry out the plan.
19 "(iii) The plan contains an inventory
20 and mapping of—
21 "(I) all navigable waters within
22 the proposed wetlands and watershed
23 management unit; and
24 "(II) potential wetlands restora-
25 tion sites with a description of the in-

1 tended functions of the sites upon
2 completion and the time required for
3 completion.
4 "(iv) The management entity has
5 adopted programs, policies, and measures
6 that will ensure achievement within the
7 watershed of the goal established under
8 section 101(a)(8).
9 "(v) The plan provides that the man-
10 agement entity will report to the Adminis-
11 trator, the Secretary, and the public not
12 later than 2 years after the date of imple-
13 mentation of the plan, and every 2 years
14 thereafter, on the implementation of the
15 plan and on the losses and gains in func-
16 tions and acres of wetlands within the wet-
17 lands and watershed management unit.
18 "(e) PLAN IMPLEMENTATION AND REVISION.—
19 "(1) PLANNING AND IMPLEMENTATION SCHED-
20 ULE.—Each wetlands and watershed management
21 plan submitted and approved under subsection (b)
22 shall include a planning and implementation sched-
23 ule for a period of at least 10 years.

1 "(2) DURATION OF APPROVAL.—The approval
2 of a plan by the Administrator and the Secretary
3 shall apply for a period not to exceed 10 years.
4 "(3) PLAN REVISIONS.—Prior to the expiration
5 of the period specified in paragraph (2), the Gov-
6 ernor of a State may submit a revised plan to the
7 Administrator for approval by the Administrator and
8 the Secretary pursuant to the same conditions and
9 requirements that apply to any initial plan for a wet-
10 lands and watershed management unit that is ap-
11 proved pursuant to subsection (b).
12 "(d) INCENTIVES FOR WETLANDS AND WATERSHED
13 MANAGEMENT PLANNING.—
14 "(1) FUNDING OF PROJECTS AND ACTIVI-
15 TIES.—The projects and activities identified in a
16 plan approved by the Administrator and the Sec-
17 retary as necessary for the achievement, within the
18 wetlands and watershed management unit, of the
19 goal established under section 101(a)(8), and not
20 otherwise required under this Act or any other Fed-
21 eral law, shall—
22 "(A) be eligible for funding under section
23 603(c)(1)(F);
24 "(B) be included in any needs assessment
25 conducted pursuant to section 516; and

1 "(C) be eligible for funding under section
2 604(a)(2)(C).
3 "(2) EXPEDITED PERMIT REVIEW.—Notwith-
4 standing section 404(a), a decision under such sec-
5 tion with respect to a completed application for a
6 permit for discharge of dredged or fill material into
7 navigable waters within a designated wetlands and
8 watershed unit and subject to an approved wetlands
9 and watershed management plan shall be made not
10 later than 60 days after the date the notice of the
11 application is published under section 404(a)(1),
12 unless—
13 "(A) with respect to issuance of the per-
14 mit, the Secretary is required under the Na-
15 tional Environmental Policy Act of 1969 (42
16 U.S.C. 4321 et seq.) to issue an environmental
17 impact statement;
18 "(B) the permit application involves an ac-
19 tivity that may affect any species that is listed
20 or proposed for listing or an area that is des-
21 ignated or proposed for designation as a critical
22 habitat under the Endangered Species Act of
23 1973 (15 U.S.C. 1531 et seq.);
24 "(C) the Administrator, the Secretaries of
25 the Departments of Agriculture, the Interior,

1 Commerce, or Transportation, the head of any
2 other appropriate Federal agency, or the Gov-
3 ernor of the State in which the activity occurs
4 requests that the decision be made after the
5 date, in which case the decision shall be made
6 not later than 90 days after the date on which
7 the notice of application is published under sec-
8 tion 404(a)(1);
9 "(D) the Secretary and the permit appli-
10 cant determine that additional time is needed to
11 evaluate the application; or
12 "(E) the decision is precluded as a matter
13 of law or procedures required by law.
14 "(3) MITIGATION BANKS.—
15 "(A) IN GENERAL.—At the request of an
16 approved management entity, the Secretary and
17 the Administrator shall provide assistance in es-
18 tablishment of mitigation banks under this sec-
19 tion and section 404(v) by the approved man-
20 agement entity to achieve the goal established
21 under section 101(a)(8) within an approved
22 wetlands and watershed management unit and
23 in accordance with an approved wetlands and
24 watershed management plan.

1 "(B) FUNDING.—The establishment and
2 oversight of mitigation banks within an ap-
3 proved wetlands and watershed management
4 unit and in accordance with an approved wet-
5 lands and watershed management plan shall be
6 considered a project eligible for funding under
7 paragraph (1).
8 "(e) RESEARCH PROGRAM.—The Administrator, in
9 cooperation with the Secretary, the Secretary of the Inte-
10 rior, and the heads of other appropriate Federal, State,
11 and local government entities. shall initiate a research pro-
12 gram on wetlands and watershed management. The re-
13 search program shall include—
14 "(1) study of the functions, values, and man-
15 agement needs of altered, artificial, and managed
16 wetlands systems;
17 "(2) study and development of techniques and
18 methods for determining and analyzing the functions
19 and values of different types of wetlands;
20 "(3) study and development of techniques for
21 managing and restoring wetlands within a watershed
22 context;
23 "(4) study and development of techniques for
24 better coordinating and integrating wetlands protec-
25 tion, floodplain management, stormwater manage-

1 ment, point and nonpoint source pollution controls,
2 and water supply planning on a watershed basis;
3 "(5) development of criteria for identifying wet-
4 lands restoration sites on a watershed basis; and
5 "(6) recommendation of procedures and ecologi-
6 cal criteria for wetlands restoration.
7 "(f) STATUTORY CONSTRUCTION.—Nothing in this
8 section is intended to affect the rights or obligations of
9 an agency (as defined in section 551 of title 5, United
10 States Code) of the Federal Government under any other
11 provision of Federal law.
12 **"SEC. 324. INTERGOVERNMENTAL WETLANDS COORDINAT-**
13 **ING COMMITTEE.**
14 "(a) ESTABLISHMENT.—Not later than 90 days after
15 the date of the enactment of this section, the Adminis-
16 trator shall establish a committee to coordinate Federal,
17 State, and local government wetlands policies (referred to
18 in this section as the 'Coordinating Committee').
19 "(b) FUNCTIONS.—The Coordinating Committee
20 shall—
21 "(1) assist in coordinating Federal, State, and
22 local wetlands policies;
23 "(2) make comments available to the Secretary
24 of the Army, acting through the Chief of Engineers,
25 or to the Administrator regarding existing or pro-

1 posed regulatory programs, policies, or technical
2 guidance affecting wetlands systems;
3 "(3) in cooperation with the Secretary of the
4 Army, acting through the Chief of Engineers, and
5 the Administrator, assist in the review and field-test-
6 ing of technical and scientific methods utilized in
7 wetlands regulatory and nonregulatory programs;
8 "(4) encourage the development and implemen-
9 tation of State wetlands conservation plans pursuant
10 to section 322;
11 "(5) encourage the development and implemen-
12 tation of wetlands and watershed management plans
13 pursuant to section 323; and
14 "(6) assist in the development of a national
15 strategy for the restoration of wetlands ecosystems
16 pursuant to section 324.
17 "(c) MEMBERSHIP.—The Committee shall be com-
18 posed of 19 members and shall include the following:
19 "(1) The Administrator.
20 "(2) The Secretary of the Army, acting through
21 the Chief of Engineers.
22 "(3) The Secretary of the Interior, acting
23 through the Director of the United States Fish and
24 Wildlife Service.

1 "(4) The Secretary of Agriculture, acting
2 through the Chief of the Soil Conservation Service.
3 "(5) The Under Secretary of Commerce for
4 Oceans and Atmosphere.
5 "(6) 1 individual appointed by the Adminis-
6 trator, who shall represent the National Governors
7 Association.
8 "(7) 1 individual appointed by the Adminis-
9 trator, who shall represent the National Association
10 of Counties.
11 "(8) 1 individual appointed by the Adminis-
12 trator, who shall represent the National League of
13 Cities.
14 "(9) 10 State wetlands experts selected and ap-
15 pointed by the Administrator from among nomina-
16 tions submitted by each Governor of a State.
17 "(10) 1 individual appointed by the Adminis-
18 trator, who shall represent tribes that exercise gov-
19 ernmental authority over wetlands.
20 "(d) TERMS.—Each member appointed pursuant to
21 paragraph (6), (7), (8), or (9) of subsection (c) shall be
22 appointed for a term of 2 years.
23 "(e) VACANCIES.—A vacancy in the Coordinating
24 Committee shall be filled, on or before the date that is

1 30 days after the vacancy occurs, in the manner in which
2 the original appointment was made.
3 "(f) PAY.—A member of the Coordinating Committee
4 who is not a Federal employee shall serve without com-
5 pensation and a member of the Coordinating Committee
6 who is a Federal employee shall receive no additional com-
7 pensation for participation on the Coordinating Committee,
8 except that each member may receive travel expenses
9 (including per diem in lieu of subsistence) in accordance
10 with sections 5702 and 5703 of title 5, United States
11 Code.
12 "(g) COCHAIRPERSONS.—The Administrator and 1
13 member appointed pursuant to paragraph (6), (7), or (8)
14 of subsection (c) who shall be selected from among the
15 members of the Coordinating Committee shall serve as co-
16 chairpersons of the Coordinating Committee.
17 **"SEC. 325. NATIONAL COOPERATIVE WETLANDS RESTORA-**
18 **TION STRATEGY.**
19 "(a) DEVELOPMENT.—Not later than 1 year after
20 the date of enactment of this section, the Administrator
21 and the Secretary of the Army, acting through the Chief
22 of Engineers, in cooperation with the Coordinating Com-
23 mittee established under section 324, and with oppor-
24 tunity for public comment and participation, shall develop

1 a National Cooperative Wetlands Restoration Strategy
2 (referred to in this section as the 'Restoration Strategy').
3 "(b) GOALS.—The goal of the Restoration Strategy
4 shall be to restore damaged and degraded wetlands and
5 riparian ecosystems in a manner that is consistent with
6 the goals of this Act and the recommendations of the Na-
7 tional Academy of Sciences with regard to the restoration
8 of aquatic ecosystems.
9 "(c) FUNCTIONS.—The Restoration Strategy shall—
10 "(1) be designed to help coordinate and pro-
11 mote restoration efforts by Federal, State, regional,
12 and local governments, and the private sector;
13 "(2) inventory and evaluate then existing res-
14 toration efforts and make suggestions for the estab-
15 lishment of additional efforts and funding mecha-
16 nisms for such efforts consistent with existing Fed-
17 eral, State, and local programs and plans;
18 "(3) evaluate the role played by, and success of,
19 wetlands restoration efforts in both regulatory and
20 nonregulatory contexts;
21 "(4) evaluate then current efforts to monitor
22 restoration efforts;
23 "(5) periodically report on the status of wet-
24 lands restoration efforts; and

1 "(6) identify regulatory and nonregulatory ob-
2 stacles to wetlands ecosystem restoration and rec-
3 ommend methods to remove the obstacles.".

4 **SEC. 711. FEDERAL OVERSIGHT OF STATE PROGRAMS.**

5 (a) IN GENERAL.—Subsection (i) of section 404 (33
6 U.S.C. 1344(i)) is amended to read as follows:

7 "(i) FEDERAL OVERSIGHT OF STATE PROGRAMS.—

8 "(1) PERIODIC REVIEWS.—Not later than 5
9 years after the date of the approval of a State pro-
10 gram, and every 5 years thereafter, in order to en-
11 sure that the requirements of this section are met,
12 the Administrator, in cooperation with the Secretary
13 and the Secretary of the Interior (acting through the
14 Director of the United States Fish and Wildlife
15 Service), shall conduct a periodic review of permit
16 decisions made by a State that carries out a pro-
17 gram that is approved by the Administrator under
18 subsection (h)(2).

19 "(2) CORRECTIVE ACTION.—

20 "(A) IN GENERAL.—

21 "(i) NOTIFICATION—Whenever the
22 Administrator determines, after holding a
23 public hearing, that a State is not adminis-
24 trating a program approved under sub-
25 section (h)(2)(A) in accordance with this

1 section (including the guidelines estab-
2 lished under subsection (b)(1)), the Admin-
3 istrator shall notify the State of the deter-
4 mination.
5 "(ii) FAILURE TO TAKE CORRECTIVE
6 ACTION.—If the State does not take appro-
7 priate corrective action within a reasonable
8 period of time, but not to exceed 90 days
9 after the date of receipt of the notification,
10 the Administrator shall—
11 "(I) withdraw the approval of the
12 program until such time as the Ad-
13 ministrator determines the corrective
14 action has been taken; and
15 "(II) notify the Secretary that—
16 "(aa) the Secretary shall re-
17 sume the program for the issu-
18 ance of permits under sub-
19 sections (a) and (e) for activities
20 with respect to which the State
21 issued permits; and
22 "(bb) the authority of the
23 Secretary referred to in item (aa)
24 shall continue in effect until such
25 time as the Administrator makes

1 a determination pursuant to
2 subclause (I) that corrective ac-
3 tion has been taken and the Ad-
4 ministrator reapproves the pro-
5 gram of the State.
6 "(3) GRANTS FOR STATE PROGRAMS.—
7 "(A) IN GENERAL.—The Secretary and the
8 Administrator may make a grant to a State for
9 the operation of a program that is approved by
10 the Administrator pursuant to subsection
11 (h)(2).
12 "(B) AMOUNT OF GRANT.—The amount of
13 a grant awarded to a State by the Secretary or
14 the Administrator may not exceed an amount
15 equal to the amount that is made available by
16 appropriations to the Secretary or the Adminis-
17 trator to carry out this section with respect to
18 the State.".
19 (b) WRITTEN COMMENTS.—Section 404(j)(33 U.S.C.
20 1344(j)) is amended by striking the fifth sentence and all
21 that follows through the end of the subsection and insert-
22 ing the following new sentence: "Before issuing a proposed
23 permit, a State shall consider any written comments re-
24 ceived from the Administrator, the Secretary, or the Sec-

1 retary of the Interior, acting through the Director of the
2 United States Fish and Wildlife Service.".

4/7/94

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COMBINED SEWER OVERFLOW CONTROLS

Objective

Current law does not allow for the development of effective and affordable Combined Sewer Overflow (CSO) controls that can be implemented by communities in a flexible manner. This amendment improves current law by codifying the CSO "reg/neg" agreement developed under the leadership of States, the environmental community, EPA, and municipalities to cost-effectively control long-term pollution from CSOs. The policy has been proposed as regulation by the Agency and will be appropriately reinforced by codifying it in the Act.

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the protection of designated uses of navigable waters of the State, adopt revised water quality criteria; and

"(ii) on completion of the review and any necessary revision, submit the water quality standards of the State referred to in clause (i) to the Administrator for approval.

"(B) FAILURE TO REVIEW – If- a State fails to carry out the requirements of subparagraph (A) (i); or the Administrator disapproves the revised water quality standards submitted to the Administrator pursuant to subparagraph (A)(ii), the Adminstrator shall promulgate the criterion pursuant to section 303 to protect the designated uses."

4/7/94

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POLLUTION PREVENTION

Objective

The current law provides some opportunities to encourage pollution prevention under limited circumstances within a relatively short period of time. In order to promote demonstration technologies that can lead to new developments in reducing pollution at its source, it is necessary to allow a degree of flexibility in pollution prevention opportunities under specific programs. This amendment enhances the opportunity for States to encourage pollution prevention practices in meeting effluent standards with an innovative technology that may achieve a greater discharge reduction than traditional controls.

Proposed Amendment

Encourages EPA to consider pollution prevention in developing effluent guidelines and pretreatment standards when the pollution reductions will be comparable or greater than traditional controls would achieve.

Allows facilities, with EPA or State approval, to use pollution prevention practices/innovative technologies in lieu of complying with updated guidelines/pretreatment standards where a significant opportunity exists to prevent pollution and attain water quality standards. Authorizes States to make appropriate trade-offs between traditional and pollution prevention mechanisms.

Encourages facilities to explore pollution prevention opportunities through plan development.

1 **POLLUTION PREVENTION**

2 **Section 301 (k) is amended to read as follows:**

3 (k) In promulgating effluent guidelines under this section or pretreatment standards
4 under section 307(b), the Administrator shall encourage pollution prevention and source
5 reduction that can potentially result in net aggregate reductions in releases to the
6 environment that are significant compared to that achievable with best available technology
7 economically achievable or a revised pretreatment standard. The Administrator shall
8 consider the particular circumstances of small businesses and shall promulgate, as part of the
9 effluent guideline or pretreatment standard, the following-

10 (1) COMPLIANCE EXTENSIONS –For facilities demonstrating to the Administrator
11 or the State (in the case of a permit program approved under section 402 of this Act)
12 that a significant opportunity exists for pollution prevention, compliance with
13 applicable water quality standards and any pre-existing effluent guidelines or
14 pretreatment standards shall be deemed compliance with the applicable effluent
15 limitation or pretreatment standard for up three years after the otherwise effective date
16 of such revised effluent guideline or pretreatment standard.

17 (2) CONDITIONS– Provisions for the Administrator or state to ensure in
18 authorizing such extensions that:

19 A) the facility has explored pollution prevention opportunities identified under
20 this Act or the Pollution Prevention Act of 1990 and has identified the measures the
21 facility will implement,

22 (B) verifiable milestones and implementation schedules are included, and

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1 (C) if the Administrator or state determines that a facility will be unable to
2 achieve the necessary net reduction in pollutants or releases, USEPA or the state
3 may terminate the extension upon one year's notice to the facility.
4 (3) ALTERNATE STANDARD–Where a facility successfully demonstrates, during
5 the extension period, that pollution prevention will result in net aggregate reductions
6 in releases to the environment, compared to reductions achievable with best available
7 technology economically achievable or a revised pretreatment standard,
8 implementation of such measures shall be deemed compliance with this section and
9 section 307(b), provided that the facility complies with any pre-existing effluent
10 guideline or pretreatment standard and applicable water quality standard.

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STATE CONSULTATION IN DEVELOPING REGULATIONS

Objective

Under EPA's interpretation of current law, States cannot assist the agency as co-regulators during the development of formal regulations. This amendment clarifies the law by allowing active participation by States and other government entities that are co-regulators to assist EPA in developing Clean Water Act regulations.

Proposed Amendment

Section 501 is amended by adding the following new section:

> "(g) The Administrator shall consult with and substantially involve State governments and their representative organizations, and to the extent that they function as co-regulators, tribal and local governments, in the Agency's decision making process regarding rulemaking, priority setting, policy and guidance development and implementation under this statute and such activities shall be deemed consistent with the Federal Advisory Committee Act. The Administrator shall strive to enhance the capacity of state, tribal, and local governments to fulfill their respective roles under this Act."

Section 101 is amended by adding the following new section:

> "It is the policy of Congress to recognize and enhance the role of state, tribal and local governments and their representative organizations in the administration of this Act by assuring that their advice and counsel is available to the Administrator in decisions on promulgating regulations, program implementation, priority setting, policy development, guidance adoption and future reauthorizations. It is further the policy of Congress that the Administrator shall strive to enhance the capacity of state, tribal, and local governments to fulfill their respective roles under this Act."

4/7/94

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STATE CERTIFICATION

Objective

To clarify and expand States' section 401 certification authority to issue or deny water quality certification for federally licensed activities that result in discharge of pollutants to state waters. The revision provides that a State may apply its certification authority to achieve protection of designated uses established as part of water quality standards and may impose any other requirement consistent with the Act.

Proposed Amendment

The first sentence of section 401 (a) (33 U.S.C.1341(a)(1)) is amended to read as follows:

> "Any applicant for a federal license or permit to conduct any activity including but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which, OR NEAREST TO THE POINT AT WHICH, the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point, OR NEAREST TO THE POINT, where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act, AND THAT ANY SUCH ACTIVITY WILL COMPLY WITH WATER QUALITY STANDARDS ADOPTED UNDER SECTION 303 AND ALLOW FOR (I) THE PROTECTION, ATTAINMENT, AND MAINTENANCE OF DESIGNATED AND EXISTING USES INCLUDED IN THE STANDARDS AND (II) OTHER WATER QUALITY REQUIREMENTS IMPOSED TO CARRY OUT THE PURPOSE OF THIS CHAPTER."

4/7/94

STATE MANAGEMENT ASSISTANCE

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Objective

The section 106 funding authorization level of $75 million under current law is based on pre-1972 Clean Water Act levels adjusted for inflation. Existing resources are substantially overextended in efforts to implement the requirements of the 1987 Clean Water Act amendments. This amendment improves existing law by increasing the authorization to offset the impact of inflation and better reflect a fair federal share of the costs of existing and future mandates. Conservatively, State implementation of the "spirit of the current law" totals over $700 million annually.

Additionally, under current law there is no easy method for States to co-fund interstate activities and avoid duplicative substantive, administrative, and managerial requirements for the more than 30-50 separate EPA grants administered in States. This amendment will authorize EPA to overcome existing barriers for States to co-fund interstate efforts (e.g. involving watersheds or the need for sophisticated and cost effective resource targeting).

Proposed Amendments

Section 106 (a) is amended by striking "through 1990;" and inserting:

"through 1990, and $250,000,000 per fiscal year for each of the fiscal years 1995 - 2000. States or interstate agencies receiving grants under this section may use such funds to co-fund with other States or interstate agencies studies and projects on interstate watershed issues;"

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STATE WATER RIGHTS

Objective

Historically, States have always maintained jurisdiction over water quantity issues and the allocation of water rights. This amendment clarifies the existing Clean Water Act to defer to State laws relating to water allocation and to protect rights established under those laws.

Proposed Amendment

The amendment proposes to amend Section 510 (2), as follows:

> Except as necessary to meet the express requirements of this Act, nothing in this Act is intended to amend, supersede, or abrogate any right to a quantity of water that has been established by any interstate water compact. Supreme Count decision, state water law, or any requirement imposed, or right provided under, any state environmental or public health law. Further, nothing in this Act is intended to supersede, abrogate, or otherwise impair the right of any state to allocate quantities of water within its jurisdiction.

LEON E. PANETTA
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET
TESTIMONY BEFORE HOUSE COMMITTEE
ON PUBLIC WORKS AND TRANSPORTATION
MAY 26, 1994

Mr. Chairman and Members of the Committee, thank you for inviting me here today to discuss a number of critical issues which have a direct impact on the Federal government, on State and local governments, on private industry, and on families and individuals.

I also want to indicate the Administration's support for the reauthorization of the Clean Water Act. This reauthorization will help deal with some of the concerns I will be discussing, and it extends an important funding program in the form of the State Revolving Funds.

The specific issues the Committee has asked me to address today -- unfunded mandates, takings, and risk analysis -- are very important to the Administration and, in particular, to the President. As a former Governor, he is well aware of the impact these matters have outside the Beltway. He has spoken about them both publicly and privately, and he has already acted to make the Executive Branch more sensitive to the legitimate concerns that have been raised.

As a former Member, I personally witnessed these concerns in my own District -- local governments burdened with mandates and few resources, citizens and businesses worried about costs.

There is plenty of rhetoric surrounding these matters. The challenge for all of us is to look beyond the rhetoric and find real, workable solutions that recognize the legitimate concerns on all sides, and to balance those concerns.

Unfortunately, the rhetoric too often seeks to pit important values, such as State and local sovereignty, private property, and rational decision-making, against the need for legislative and regulatory actions that oftentimes play a crucial part in improving the lives of our citizens in terms of health and safety, protection of workers, and the environment. As we seek to improve the process to deal with these concerns, we must be sure not to adopt legislation that would increase the gridlock that the American people have been determined to eliminate. We must not make it impossible for Congress and the President to do the work of the nation. The country needs and deserves a balanced approach to this issue that does not prevent us from fulfilling our responsibility to serve the public interest.

In achieving that balance, there is one thing that is clear for each of these issues: there is no one-size-fits-all solution to any of them. There is no silver bullet that will respond completely to everybody's concerns; each issue requires that we seek the proper balance of interests and concerns. These are matters that will take a lot of work, a lot of consultation, a lot of cooperation to resolve. The good news is that this is starting to occur. We have made significant, real progress in each of these areas. And we can -- and will -- do more.

UNFUNDED MANDATES

With respect to unfunded mandates, we are well aware of and are listening to the deep-felt concerns raised by State, local, and tribal governments about complying with Federal unfunded mandates. The reality is that many Governors and other government heads are working with increasingly limited resources, so it is more difficult for them to meet competing concerns. This Administration is sympathetic, and we want to respond to the legitimate complaints about federal legislative and regulatory requirements that are imposed on other levels of government without sufficient resources.

This issue is not new; it dates back in one form or another to the beginnings of our Republic. Over the years, the Federal government has taken a primary role in establishing national policies in certain areas affecting all of our citizens, while State, local, and tribal governments have retained a fundamental role through the exercise of basic police powers. Where the Federal government has provided direction or imposed requirements, the States -- as well as the local and tribal governments -- are the entities that, in most cases, should tailor the implementation of federal programs to serve local needs and priorities. Like the debate over so many issues today in this era of severe fiscal constraints, this has now become a debate over costs and resources.

The President believes that to solve these problems, there must be a partnership that fosters cooperation among all the levels of government. Within the Executive Branch, the President has taken several significant steps to fulfill his commitment to address the issue of unfunded mandates. Two of the most important are his Executive Orders on Regulatory Planning and Review and on Enhancing the Intergovernmental Partnership.

The Executive Order on Regulatory Planning and Review, E.O. 12866, was signed by the President on September 30, 1993. It states that the American people are entitled to regulatory approaches that respect the role of State, local and tribal governments. It requires that whenever feasible, agencies are to seek the views of appropriate State, local and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those government entities.

Perhaps even more important, in developing regulations, agencies are expressly instructed to assess the effects of Federal regulations on State, local and tribal governments, including specifically the availability of resources to carry out Federal mandates. As appropriate, agencies are to seek harmonization between Federal regulatory actions and related State, local and tribal governmental functions. And finally, agencies are to strive to minimize burdens that uniquely or significantly affect those other levels of government.

In addition, the Executive Order calls for quarterly meetings with representatives from OMB's Office of Information and Regulatory Affairs (OIRA) and representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect them.

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The second step taken by the President is the Executive Order on Enhancing the Intergovernmental Partnership, E.O. 12875, signed on October 26, 1993. This order asserts that the cumulative effect of unfunded mandates has strained State, local and tribal budgets, and that complex waiver processes have hindered flexibility.

The President states that, to the extent feasible and permitted by law, no regulation should impose a mandate on a State, local, or tribal government that is not required by statute unless either (1) funds are provided by the Federal government to pay the direct costs of compliance, or (2) the promulgating agency describes for OMB: the extent of prior consultation with State, local, and tribal representatives; the nature of their concerns; any written communications received from other governmental entities; and the agency position in support of the mandate notwithstanding those expressed concerns.

The Executive Order also instructed each agency to develop an effective process of meaningful and timely communication with State, local and tribal officials when developing regulatory proposals that contain significant non-statutory unfunded mandates.

Also, to increase local flexibility in achieving Federal policy objectives, E.O. 12875 orders agencies to develop a streamlined process for receipt and review of applications for waivers from statutory or regulatory requirements, and it requires agencies to render decisions on a waiver application within 120 days of their receipt.

The Administration has taken a number of steps to implement these orders. On January 11 of this year, I issued a memo to the heads of departments and agencies suggesting that the consultation required in the Executive Order on Enhancing the Intergovernmental Partnership occur as early as feasible, and involve not only local program officials involved in administering the Federal program, but also those more directly responsible for the funding of compliance with the Federal mandate. During the consultative process, agencies are asked to provide as much detail as possible with respect to the expected method of compliance, as well as estimates of the direct costs to be incurred by the State, local, or tribal governments in complying with the mandate. We believe these consultations will provide meaningful opportunities to show Federal agencies how to achieve their regulatory objectives in less burdensome ways.

We have already begun to see positive results from these efforts. Key regulatory proposals have increased State and local flexibility, including a proposal by the Department of Health and Human Services related to tracking of children in foster care, a Department of Education proposal to provide more flexible regulatory standards in assessing children who receive certain services, and an Environmental Protection Agency policy that provides flexibility to municipalities in the control of certain sewer overflows. We will insist on providing such flexibility when it is appropriate in future regulatory proposals.

All of the above relates to *non-statutory* unfunded mandates -- the area where the Executive Branch can unilaterally make a difference. However, most of the unfunded

mandates are required by law. We are reviewing proposals for reauthorization of such statutes and screening new legislative proposals with the goal of minimizing built-in unfunded mandates.

For example, the Administration's Clean Water Act Reauthorization Initiative for the control of storm water runoff from larger cities incorporates a great deal of flexibility for storm water management programs. And our safe drinking water initiative provides both greater funding and more flexibility, including a major new financing system to help municipalities pay for safe drinking water; ending the requirement to automatically regulate 25 additional contaminants every three years and instead regulate contaminants based on risks to health; authorizing new treatment technologies that are specifically affordable for small systems; and providing communities greater flexibility in monitoring and treatment of water for contamination. There are other examples as well in the Superfund and community enterprise measures.

While we have made progress, there is more to be done. Many in Congress have proposed or cosponsored across-the-board, rather than specific reauthorization, legislation, which falls into three general approaches. The first requires the Federal government to fund some or all of the costs to State, local, and tribal governments for compliance with Federal mandates. Another approach is to require estimation of the costs of implementing a mandate before the decision is made to implement that mandate. The third approach blends one or both of the first two approaches with administrative planning and/or some form of notification or consultation with State, local, and tribal governments.

The Administration is sympathetic to the concerns motivating these bills, but it is important that any legislation go to the heart of the problem and not have the kind of adverse unintended consequences that would further undermine trust in government.

We have therefore been meeting with some of the authors of these bills to explore areas of agreement and try to resolve areas of disagreement. Our objective with respect to the Legislative Branch is to ensure that we address the problems in a meaningful way, that we enhance the legislative process to give Members complete information about a bill's consequences, but that we not create one bureaucratic maze in order to solve another.

We support having information available before decisions are made so that Members are held accountable for their decisions. Accordingly, we think that those bills that would require that information with respect to the extent of unfunded mandates be provided to Members before they vote represent a useful step. It is important, however, that the data provided is useful and that the process by which it is made available does not create gridlock. Not every bill requires an elaborate analysis. Indeed, if CBO or any other entity were required to perform an analysis for every bill introduced or even every bill reported by committee, the work would never get done, and if it did, the quality of work would not be what we would want or need. The information, therefore, should be generated only for bills

with annual effects on the economy of over $100 million -- a threshold consistent with Executive Order 12866.

The information should also focus on the State and local fiscal impact of the mandates. The issue of private sector costs -- while important -- would overburden a process aimed at the legitimate concerns of State and local officials. It is also important that the data provide a balanced picture, and for this reason we would include not just the costs of the mandate but also the benefits, insuring that the ensuing floor debate is balanced.

We also believe that it is necessary to better define what is meant by mandate and what work must be done to establish protocols and databases so that CBO can carry out the multiple responsibilities it is being given. To provide time to resolve these issues we propose that the effective date of any legislation be the beginning of the next Congress.

With respect to the Executive Branch, we think the efforts undertaken by the President, and described above, are working well and the most that should be done at this point is to codify the existing requirements for consultation with State and local officials and for including information regarding the cost of mandates with the submission to OMB that would otherwise be required for significant regulations -- that is, regulations having an annual effect on the economy of $100 million or more, which provides parity with what we are proposing for the Legislative Branch.

Again, the subject of unfunded mandates is very complex, and we want to give it the attention and deliberation it deserves. We do not want bumper sticker slogans; we want a real-world solution. We are making progress. The discussions have been productive, and there is increasing reason for optimism that we can work together to solve this problem without causing gridlock. My understanding is that the Senate Governmental Affairs Committee will mark-up legislation in mid-June. We hope to have a consensus bill at that time.

TAKINGS

With respect to takings, the Administration firmly believes that private ownership and use of property is a cornerstone of this country's constitutional heritage and historical tradition, as well as our economic strength. First and foremost, the "takings" requirements of the Just Compensation Clause of the Constitution must be recognized and fulfilled by the Federal government at all times. Furthermore, we believe that the Federal government has a fundamental responsibility to aggressively protect property owners from government action that imposes unwarranted burdens on private property, whether or not such action would result in a taking under the Constitution.

This responsibility cannot be fulfilled through a single action or piece of legislation. It requires constant vigilance by both the Congress and the Administration to ensure that laws

and regulations properly protect public health, safety and welfare concerns and the rights of private property owners.

Before the Committee takes up legislative proposals on this subject that are pending before it, I urge you to step back and examine the broader context. Allow me a few brief observations.

First, virtually everything the government does affects the value of things as it tries to navigate a careful course in balancing the rights of private individuals and the public good. Whether it is managing access to the airwaves or ruling on patents and trademarks, whether it is ensuring the safety of our foods and drugs or constructing and maintaining our interstate transportation network or protecting the integrity of our financial and banking systems, the daily decisions of government affect the economic value of almost everything we touch in our daily lives. The question is not whether our activities affect value, but whether the activities in question properly protect both private rights and public obligations.

Secondly, several of the legislative propositions before you are attractive in their simplicity but could raise serious fiscal and constitutional problems. Some establish compensation schemes far beyond what is required by the Constitution in that they would require greater compensation than currently provided by the law. Not only does this go beyond the Constitution but it would be an unnecessary and unwise use of taxpayer dollars. Gone is any notion of balance, which is essential. I urge the Committee to be very cautious before choosing to embark on such a course, for the implications are enormous and far-reaching, not only for the Federal system, but for State and local governments as well.

For example, should we pay citizens if the value of their property diminishes because a military base closes, or a highway constructed nearby destroys their view, or an adjacent property is designated a Superfund site? What if a Federally-licensed activity diminishes a person's livelihood, as fishermen have argued water policies have done? The potential cost implications of such policies are enormous and virtually impossible to meet given our current and future budget constraints.

On the specific subject of the wetlands program, which is the focus of so much of the takings debate, I will defer to the expertise of Administrator Browner and other witnesses. I would offer the basic observation that the Administration is working hard to implement a set of constructive, fair, and flexible improvements to the operation of the permitting program that were developed in close consultation with the States and other stakeholders on the wetlands issue. I would invite this Committee to join with the Administration in implementing this initiative. We stand ready to work with the Committee on it, and we welcome your counsel and assistance.

Likewise, we consulted with the Senate in the course of its work on the Safe Drinking Water Act last week. These discussions were useful. Among other things, the Senate limited the requirement for a takings impact analysis to only those actions which are likely to

result in a taking under the Constitution, rather than any action that might lead to a diminution of property value as had originally been proposed. The Administration still has serious concerns with some of the provisions ultimately adopted by the Senate, but it is my hope that we can continue to consult with Members who are interested in this issue.

As with the unfunded mandates issue, there are no simple "silver bullet" answers to how we provide for protection of private property rights. In addition, in protecting those rights, we must be careful not to adopt policies that establish dangerous precedents and have the potential to inhibit the ability of the Federal, State, and local governments to effectively protect the health and safety of our citizens. This Administration has been working to ensure that our polices and regulations provide proper protection for all parties and we will continue to do so. The Congress faces the same responsibility and we must work together to meet this challenge.

RISK ANALYSIS

Finally, regarding risk analysis, the Administration is committed to a sound, effective regulatory policy that responsibly reduces risk to the public.

The Executive Order on Regulatory Planning and Review speaks to risk analysis in a number of areas. In the section on regulatory principles, it begins by requiring agencies to identify the problem that they intend to address as well as assess the significance of that problem. Of particular relevance here, the Order states, "in setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risk posed by various substances or activities within its jurisdiction." In the section on planning, the Executive Order states that Federal agencies are to consider "how the action [it proposes] will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency."

The Executive Order also emphasizes the importance of good data: "each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation."

The Administration has a number of efforts under way to develop and implement risk policy throughout the Executive Branch. For example, there is a Subcommittee on Risk Assessment under the National Science and Technology Council, which is working on the more technical aspects of the issue. There is also a committee on risk analysis under the Regulatory Working Group established under Executive Order 12866 that will be exploring the methods, efficacy, and utility of comparative risk assessment.

The question of timing is an important one. While there has been a lot of discussion and attention focused on risk analysis, particularly in the last two years, there is no agreement as to what role it should play in public policy decision-making, and specifically

when it is appropriate for use. It is important that we develop a broad-based consensus, and we are working to consult extensively with all the relevant stakeholders, including Congress, State and local government officials, and representatives from businesses, public interest groups, and the public at large.

Again, we have had productive discussions with many Members interested in this issue. In the course of consideration of the Safe Drinking Water Act, we consulted with various interested Senators. We believe those discussions were useful, and we were able to resolve several of the areas of disagreement. Among other things, a $100 million threshold was incorporated for regulations, thereby preserving the integrity of the Executive Order. And the language calling for cost-benefit analysis also tracked the Executive Order.

We were pleased that we were able to work with these Members. We made good progress. While we did not object to the final product, we believe more can be done to find the fairness and balance essential to responsible government.

There are obviously still areas where Members may have different views, and we think it is important to continue to have discussions with all of the Members who have been active on this issue.

Again, Mr. Chairman, I want to thank the Committee for this opportunity to testify. These are difficult issues and interests that need to be balanced. We cannot be satisfied with the status quo. At the same time, we cannot be panicked into a solution that creates even greater problems. I am convinced that we can find the appropriate balance if we work together. This is a common challenge that we must both face and resolve.

We need to keep working, and I want to assure you that the Administration will do so. I will be happy to respond to any questions.

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CLEAN WATER ACT REAUTHORIZATION RECOMMENDATIONS

Presented By

Jim Park, Chair of the ASIWPCA Standards and Monitoring Task Force
and
Roberta Haley Savage, Executive Director

before the

U.S. House of Representatives

Water Resources and Environment Subcommittee

May 26, 1994

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CLEAN WATER ACT REAUTHORIZATION RECOMMENDATIONS

Mr. Chairman, members of the Subcommittee, I am James Park, Chief of the Bureau of Water for the State of Illinois. With me today to testify on behalf of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) is Roberta (Robbi) Savage, Executive Director.

ASIWPCA is, as you know, the national organization of State officials who implement the Clean Water Act on a daily basis. The Association is committed to the environmental objectives set forth in the law. We applaud the Committee's efforts to reauthorize the Clean Water Act and urge action in this Congress. A great deal has been accomplished under the Act since 1972 and we encourage the Committee to assure the momentum can continue. H.R. 3948 provides a meaningful framework upon which negotiations and ultimately consensus can be attained. We urge the Committee to keep an open mind in perfecting the Bill. On key issues, the bipartisan alternative offered by members of the Committee embodies concepts strongly supported by the States that are critical to a strong and effective program and need to be incorporated into H.R. 3948.

ASIWPCA comes before you to present the States' Clean Water perspective and to convey the message that we professionals are receiving from our State legislatures, local governments and the public at large. There are several clear signals that deserve your attention:

1. **Reauthorization of the Clean Water Act in this Congress is important to the States.**

2. **Environmental management is no longer business as usual.** The public is losing its confidence in government's ability to deliver environmental protection in a fair, scientifically defensible and cost effective manner, support is waning and State budgets and staff are being cut. Our collective credibility is at stake and we are concerned that the Committee not add fuel to the fire.

3. **The Clean Water Act is fundamentally sound.** The most serious issues that Congress needs to address are the:

   - **Lack of adequate funding and State flexibility to carry out existing law as well as new provisions contained in this Bill.** The resources envisioned in H.R. 3948 will be a significant increase over existing levels, but are not adequate to even bring the existing program up to a base level of services. Therefore, any new Federal mandates must be accompanied by increased flexibility and funding. States must be able to administer the program more efficiently and effectively in order to achieve environmental results that the public demands.

   - **Need for adequate time to fully implement the 1987 Water Quality Act,** With inadequate funding, limited technical resources and problems exacerbated by delayed USEPA policy -- States find themselves significantly behind in meeting the 1987 Act's requirements.

   - **Essential need for States to maintain their lead role in program development, management and implementation,** It is appropriate and desirable for Congress to set national goals and objectives for environmental protection and to hold States accountable for accomplishing them.

States are, however, strongly opposed to prescribing in law how those milestones are to be achieved.

ASIWPCA'S SPECIFIC COMMENTS ON H.R. 3948

ASIWPCA applauds the Committee for its efforts to address the States' concerns relative to the following:

State Revolving Loan Program:

- Continuation and expansion of SRF funding
- Maintenance of existing broad eligibilities and expansion to cover land and easements
- Attention to the needs of small hardship communities
- Creation of processes to streamline SRF requirements
- Minimization of setasides which detract from the States ability to focus on priority problems
- Allowance to negotiate a budget to close out Title II projects

Nonpoint Source Controls:

- Creation of an ambitious meaningful long term goal driven program under which States can be measured and held accountable
- Expansion of funding to better address the needs of this complex problem

Watershed Management:

- Development of a flexible approach for States to manage watershed protection programs, with attention being given to the severity of the problems, the cost effective remediation or protection and the achievement of long term goals of the statute

Permit and Enforcement Programs:

- Reform of the stormwater program
- Clarification of local government officials' ability to serve on permit boards
- Expanded flexibility to determine whether to join States as parties to suits

Federal Agency Activities:

- Requirement of compliance to the same extent as the public and private sector

In the interests of time, I would like to focus the remainder of this testimony on several major areas of H. R. 3948 that State Water Administrators believe are in need of clarification, refinement or modification because the:

1. **States are very concerned about the fundamental changes to the State/Federal relationship which are unwarranted, highly costly and in our judgment unworkable.**

2. **Overly prescriptive requirements set forth in many provisions are also unnecessary, very expensive to implement and constitute unfunded mandates.**

3. **Expanded provisions to address groundwater are made without a justification of need or commensurate coordination with existing statutory authorities and acceptable funding levels.**

4. **Funds are inadequate to successfully implement the mandates envisioned.**

State Management

There appears to be no provision in H.R. 3948 for increased funding to States to carry out the baseline monitoring, planning, permit and enforcement programs, in the form of an increased 106 authorization or permit fees. Given that Section 106, considering inflation, is funded at pre-1972 Act levels and there is a $200-400 Million funding gap in carrying out existing requirements (as documented in recent ASIWPCA surveys), this critical issue needs to be fully and adequately addressed in H.R. 3948. The Bipartisan Alternative makes progress in this regard, by raising the authorization level for Section 106 to $250 Million.

Nonpoint Sources (NPS)

The States have made significant efforts to develop and administer nonpoint source control programs, with the very limited financial resources and technical and institutional capacity that have been available. Frameworks have been established and the experience of States which have been involved for many years indicates that the program goals will take many years to accomplish. The problems that we face are many and vary significantly from State to State. The Association strongly supports increased 319 funding and H.R. 3948's goal to attain water quality standards by the year 2009 and assure reasonable interim progress. However, the Bill needs to be modified to eliminate prescriptions on how States can accomplish that objective.

It is absolutely essential that Federal law provide States with the wide flexibility needed to tailor NPS programs to individual needs and to take maximum advantage of existing relationships with other governmental agencies as well as the regulated community. Changes are needed in H.R. 3948 that are embodied in the Bipartisan Alternative:

- **NPS programs and management measures should, at this juncture, be phased and allow voluntary programs to continue building results. Federal mandates for enforceability at this time are premature and inappropriate.** States experience indicates that this approach will be the most successful. In many cases, the most implementable alternatives involve cooperative working arrangements that would be damaged or destroyed by insistence on early commitment to specific enforcement requirements.

- **Guidance should be just that – States should not be required to conform to "one size fits all" Federally defined management measures.** The best management measures required for the Coastal Zone Program are not always appropriate and are inconsistent with the States' need to target in order to maximize environmental results. While guidance is a valuable reference in the development of control plans, requirements to implement USEPA defined practices will significantly reduce both the implementability and the cost effectiveness of individual plans -- especially when State developed measures are more effectively tailored to address local water quality matters and will build much broader public support for implementation.

- **States must be supported in targeting priority watersheds and significant nonpoint source problems, focusing on impaired waters.** States are not, at this time, in a position to address all sources and waters. To dictate such an approach is unreasonable and unnecessary. It represents a significant expansion of the Act's goals and imposes additional Federal burdens at the local level in terms of activities and adverse economic impacts. Although the Bill includes very limited provisions for exempting watersheds from requirements, these do not provide the needed latitude to the States for cost-effective watershed prioritization.

- **Existing Federal programs should not be exempt where the problems are well known and additional measures are practical.** If a State concludes that sources subject to such programs must be addressed in a different manner in order to insure that progress will be made in achieving water quality goals, the State must have the authority to include alternative provisions in individual watershed plans.

- **If States do not develop approvable programs, USEPA should be given clear authority and a mandate to develop and implement such programs.** This is the most appropriate way to address any Congress concerns that a few States will lag behind -- rather than take a prescriptive approach at the outset that all 50 States must meet. It is very important for sources to know that if the States do not take action the Federal government must.

- **Finally, the 1987 Act established a demonstration program. H.R. 3948 must recognize that that phase is over and that a combination of approaches is needed involving in addition regulatory and voluntary approaches, technical and financial assistance, education, etc. in an implementation mode.** Funds appropriated under the proposed NPS grant assistance program should be allotted directly to the States to build the necessary programs and carry out NPS management plans.

In summary, it is appropriate for Congress to set a clear target to achieve water quality, be results oriented, and provide support. The process or mechanics should be left to the States. If the States are given sufficient flexibility to develop nonpoint source programs that are targeted to our specific needs and adequate funding to carry them out, we can support requirements that hold us accountable for demonstrable and continuing progress toward water quality goals.

Water Quality Standards (WQS)

The Association is very concerned about the impact of H.R. 3948 on the States' primary authority to establish water quality standards that are appropriate for their waters. The Association in these important areas urges that H.R. 3948 be revised to reflect the bipartisan alternative.

Our major concern is that H.R. 3948 would impose, by default, Federal water quality criteria if the State has not adopted that criteria as a standard within 3 years of criteria issuance. This provision eliminates all flexibility of the State to take into consideration local or regional conditions that were not considered in the development of national criteria. Further, it imposes unrealistic time frames for standard adoption, circumvents due process provisions that are built into State adoption procedures, perpetuates existing USEPA criteria that are not scientifically sound and constitutes an unfunded compliance mandate. The States' position is that the primary authority for adoption of WQS must rest with the State. This is based on both programmatic and legal issues:

- **States strongly oppose H.R. 3948's presumptive applicability of any USEPA criteria -- the States are in the best position to define the standards and other regulatory controls that are needed to carry out the goals and mandates of the Federal statute.** That concept was established in the 1972 Clean Water Act and must be maintained. The States have generated the vast majority of the monitoring data, stream surveys and other information needed to translate the literature data on toxic effects, that forms the basis of Federal criteria documents, into appropriate WQS. There is no substitute for a well designed and highly participatory State standards setting process. We are very concerned that the approach promoted by H.R. 3948 --

criteria by USEPA regulation -- will turn a process that seeks good science into a full employment act for lawyers. That precludes, by law, most States from being more stringent.

- **Criteria documents that have been prepared by USEPA require, careful analysis for their applicability to conditions unique to individual States.** Criteria documents are developed around very broad assumptions on such factors as aquatic communities to be protected, consumption rates of fish and drinking water, representative stream conditions (e.g., temperature, hardness, pH,. etc.) and potential for wildlife impacts. Such factors will vary significantly from State to State and, in some cases, from watershed to watershed. The States must retain the ability to utilize their formal WQS adoption process to tailor nationally developed criteria to the specific needs of their waters.

- **Each State has somewhat different requirements and procedures for WQS development and adoption.** The standards setting authority may be part of the agency administering the Federal program, an independent board or even a function of the State legislature. The time needed to adopt WQS and the adoption procedure requirements, to insure that the resulting standards can be enforced, also varies from State to State. Any presumptive applicability process that provides for automatic adoption of Federal criteria and mandatory adoption of only the numeric limit proposed in the Federal criteria document -- without a clearly defined process for considering factors that are unique to individual State's waters or required in the State standards adoption requirements -- would raise serious legal questions about the use of such WQS in NPDES permits and other enforceable control requirements administered by the State.

- **The States oppose any expansion of the current authorities for USEPA to intervene in or supersede State authorities to propose and adopt appropriate WQS for their waters.** If USEPA believes that a State has not taken appropriate action in response to adoption of Federal criteria, they have full authority to initiate promulgation proceedings provided for under current statute. This process provides a forum to identify issues that would support adjustments to Federal criteria before they are applied as State standards. Promulgation also provides at least a minimal amount of due process before the USEPA is allowed to bypass State standards adoption procedures. This is particularly important, since there is no appeal from compliance in the permit process. Finally, the promulgation process imposes no greater burden on USEPA than the requirement imposed on the States to respond to Federal criteria documents.

H.R. 3948 needs to place higher priority on the major issue -- inadequate USEPA 304(a) criteria -- rather than penalize States with overly prescriptive requirements that will, in truth, inhibit progress toward attainment. The States support requiring USEPA to prepare a plan for criteria development and consult with States in carrying it out. This will allow the States to give USEPA the benefit of their implementation experience and to anticipate the adoption of Federal criteria documents in order to incorporate necessary resources and data collection into their normal WQS review cycles. Each criterion issues or revised should address implementation issues. States also support the concept of:

- **Allowing a specific amount of time for States to consider Federal criteria documents** in their standards adoption process before USEPA is allowed to intervene. A minimum of 5 years from the date of criteria issuance should be provided for the States to consider Federal criteria before USEPA is allowed to initiate promulgation proceedings. This time period would be consistent with the actual workings of the WQS review cycle and would allow States to incorporate standards

considerations into the watershed planning process more effectively. Again, any USEPA intervention should be in the form of promulgation proceedings set forth in current statute.

- **A five year cycle for review of WQS** (rather than the current 3 years which is not enough time to produce comprehensive and scientifically defensible standards) is essential in order to allow meaningful review of new data and adequate public involvement in the standards setting process. For consistency with the WQS review cycle, the 305(b) water quality report should also be placed on a five year cycle.

- **Mixing zone policy, but the law should not set requirements.** Mixing zones are one of the important issues H.R. 3948 should require USEPA to address in implementation guidance that needs to accompany all 304(a) criteria.

Antidegradation

The Bill provides unnecessary and potentially confusing statutory language concerning antidegradation policy that has already been developed by USEPA. All States have such policies. In most cases, they have or are in the process of adopting State regulations and implementation procedures that are intended to address those requirements. We believe that the USEPA policy is consistent with the intent of the Bill. However, new statutory language may result in challenges to existing policy, unnecessary revisions to State regulations and delays in the implementation of sound antidegradation requirements. Reopening hard fought issues could, for example, weaken programs.

Further, the States oppose <u>any</u> Federal prescription concerning what must be designated as an Outstanding National Resource Water (ONRWs). This designation carries with it many prescriptive limitations on growth, development and increases in pollutant loadings. Compliance is an unfunded mandate for which costs at the local level will be enormous and without commensurate improvement in water quality. While we believe that certain waters should be designated as ONRWs, the determination must be made with a complete understanding of the impacts of the designation and the benefits to be gained. With our knowledge of local conditions and familiarity with water quality, biological and other data -- the States are in the best position to make ONRW designations.

Groundwater Permitting Requirements

Clean Water Act jurisdiction over groundwater discharges for permitting and effluent guidelines <u>should not</u> be expanded. Discharges of pollutants to groundwater should be regulated through appropriate State programs directed at specific groundwater issues identified by the State. Under the proposal in H.R. 3948, these dischargers and many others would also be potentially subject to regulation under the NPDES program. States do not support such action. In order to determine demonstrable hydrologic connection of groundwater to surface water, both the discharger and the State would have to expend substantial additional resources:

- Permit applications would have to contain detailed characterization of soils and subsurface materials.

- Groundwater monitoring wells and stream flow information would also have to be provided along with hydrographs and water table maps.

- The States would need complex groundwater flow and transport models to determine where interconnection between ground and surface waters exist and if pollution is possible in greater than *de minimus* amounts.

- Because the Bill requires that a determination of potential for hydrologic connection to surface water be made for any discharge of pollutants onto the ground or into the groundwater, permit applications would be required for a wide variety of discharges including septic tanks, land application, and even lawn fertilizer operations.

The resources needed to run a program such as this are extraordinary and the potential benefits to the environment are highly questionable. Existing Federal and State legislative, regulatory and programmatic authorities are extensive, more than adequate and already overly burdensome. In Illinois, for example, our extensive ambient surface water monitoring system does not indicate any significant link between the type of discharges to groundwater that would be covered by this provision and surface water quality problems. While there are instances of surface water impacts from major groundwater pollution sources, they are generally regulated by land pollution control regulations (RCRA, CERCLA, etc.). These statutes along with appropriate groundwater regulations that have been developed to address State needs will provide an adequate basis for protection of both ground and surface waters from pollution from discharges onto the ground and into the groundwater.

Summary

Mr. Chairman and members of the Committee, we at ASIWPCA appreciate your willingness to consider the professional perspective of those who are held accountable to you for the successful implementation of this statute. We encourage you to do whatever is necessary to move a Bill forward to assure successful reauthorization of the Clean Water Act in this Congress.

The goal of clean water for every man, woman and child as well as the ecosystem is shared among us all. The path selected to attain that goal may differ, but to coalesce diverse view points into a sound workable program is the challenge that now lies ahead for this Committee. The States will support your efforts to bring all parties together in the spirit of environmental cooperation with the expectation that reauthorization can indeed be achieved in 1994.

Thank you, Mr. Chairman. We appreciate your leadership in this regard and the opportunity to provide testimony on this critical piece of legislation. We will be happy to answer any questions.

OTHER ISSUES OF MAJOR CONCERN TO STATE WATER ADMINISTRATORS

Goals

ASIWPCA does not support **H.R. 3948's expansion of the Act's goals to include:**

- **Achieving water quality appropriate, after treatment, for human consumption** -- that decision needs to be made by States, depending upon local circumstances.

- **Groundwater protection** -- as outlined already, this is a significant and inappropriate expansion of Federal jurisdiction which is grossly intrusive of State authority.

Infrastructure:

- **The Association opposes the resurrection of a grant program for the construction of wastewater treatment facilities. The SRF was created to replace grants to municipalities as the cost effective use of very limited Federal funds available. To reestablish a "give away" program undermines the SRF and delays national compliance with the requirements of the Act.**

- **H.R. 3948's provisions on land/easement eligibility for treatment works should not be interpreted as narrowing the current broad eligibility allowed for nonpoint sources and estuaries,** since they are critical to habitat restoration and stream corridor management.

- **Requirements should not be expanded that SRF projects must meet under Section 201(g)(2). Water use efficiency** can be important but should not take the form of an additional "equivalency requirement".

- **The reference to proportionality** in Section 204(b)(1)(B) is deleted, but the same reference in (A) is maintained which appears inconsistent.

- For small hardship communities:

  - **Greater flexibility is needed for States to define hardship.** 1.25% of median household income is too lax, allowing "country club" communities to qualify. No single cutoff can be adequate or appropriate for 50 States. In this regard, the Association supports the Bipartisan Alternative.

  - **States should be able to extend the loan repayment period up to 40 years. The application of Title II and crosscutting requirements should be deleted.** This is the only meaningful way to streamline the program.

  - **The Bill needs to be revised to more adequately provide for State administration.**

Monitoring

- **H.R. 3948 should be expanded to require that the multitude of Federal activities be coordinated** to effectively use limited resources and support State environmental programs.

- **As indicated above, the 305(b) report should be required on 5 year basis** to allow adequate opportunity to produce a quality document for review by Congress. In this regard, the Association supports the Bipartisan Alternative.

Watershed Management

- **Additional flexibllity is needed for States to designate "responsible parties".** Appropriate agencies and entities will vary State to State, as will their appropriate jurisdiction and scope of responsibility.

- The following modifications to H.R. 3948's provisions on incentives are urged by the States:

    - **The provisions on trading need more careful consideration.** It is not clear what more is needed in statute, as there is a great deal that can be accomplished under the revised USEPA policy. The role of the States and USEPA is unclear under the Bill and enforceability by private parties is questionable. At the very least, this must be a voluntary or demonstration project program

    - **Approved State 319 programs should be deemed in compliance with Coastal Zone Management Act** nonpoint source management control requirements under Section 6217.

    - **State should have flexibillty to achieve a better balance between regulatory and nonpoint source management approaches to stormwater control.** Certain activities are better handled using watershed approaches rather than permit program requirements.

Point Source and Enforcement Requirements

The existing Clean Water Act authorities are more than adequate to address the concerns of the Congress. Therefore, H.R. 3948 should not increase permit and enforcement requirements. In this regard, the Association supports the bipartisan alternative. What needs to be addressed, instead, is the inadequacy of funding to carry out current law. Given the current situation in the House and Senate Appropriation Subcommittees, some alternative funding authority appears unavoidable.

- **Section 305(b) on conflict of interest** may need to be broadened.

- **The Bill must not undermine State ability to enforce the law** by eliminating provisions that State enforcement action is a bar to Federal or citizen action.

- **States should not be required to have penalties comparable to those at the Federal level.** Compliance with the requirements of the law should, instead, be the measure of program adequacy.

- **While permits should implement State antidegradation policy, the policy should not be revisited permit by permit.** This is an administrative nightmare, yielding little in the way of environmental protection

- **Existing law is appropriate and there is no need to expand Section 307(a) requirements on toxics.**

- **Any new permit program for mining should be delegable to the States.**
- **Standing for citizen suits and past violations is adequate and should not be expanded.**

Stormwater

H.R. 3948 expands rather than focuses the existing stormwater program. The Association supports the Bipartisan Alternative on stormwater.

Combined Sewers

Clarification is needed so that H.R. 3948 does not expand the recently promulgated USEPA regulations. Because these regulations are the product of delicate negotiations between States, cities, USEPA and the environmental community, changes in direction and requirements would be counterproductive.

Wetlands

H.R. 3948 should embody the recommendations of the National Governors' Association.

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May 25, 1994

Honorable Norman Mineta
Chairman
House Public Works and Transportation Committee
2165 Rayburn Office Building
Washington D.C., 20515

Dear Chairman Mineta:

On behalf of the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), I urge that the Clean Water Act be reauthorized in this Congress. ASIWPCA supports your efforts and H.R. 3948 represents major progress. You have clearly provided a solid framework with which to begin negotiation toward the successful reauthorization in the Congress. But, we call your attention to major State concerns which need to be addressed in order to maintain an effective and credible program. Our issues are highlighted below and described in detail in the attached testimony.

State/Federal Relationship: **H.R. 3948, in its present form, would fundamentally alter and significantly expand the Federal role in water quality standards setting, mixing zone policy, and enforcement as well as other areas outlined below.** The Association believes that the existing State/Federal relationship must be maintained if the nation is to continue to assure sound science, workable approaches, affordable requirements and environmental results.

State Management: **Funding for State management of the national program needs to be addressed** with an increased Section 106 authorization and/or permit fees. The existing funding gap must be closed in order to fulfill Congressional expectations.

Antidegradation Policy: **H.R. 3948 provisions would inhibit constructive pollution prevention and will impose a "no growth" requirement.** As we interpret H.R. 3948, the States could not approve changes to the receiving waters without assuring that all point and nonpoint sources are subject to all applicable and enforceable requirements of the Act. Voluntary initiatives and community growth strategies essentially would be prohibited by the lack of site specific flexibility and overly prescriptive limitations imposed on States. The existing policy must be maintained.

Nonpoint Sources: **The nonpoint source provisions of H.R. 3948 are applied too broadly and prescriptively**, invoking mandates and enforceable policies for all watersheds and all landowners. This is not necessary. States should strive to attain water quality goals within reasonable time frames, but should not be required to saddle landowners with mandatory and USEPA defined nonpoint source management measures.

<u>Groundwater:</u> **Groundwater provisions of H.R. 3948 should be deleted.** Regulation of known or suspected groundwater discharges is covered in a host of other statutes and is not the province of the Clean Water Act. There is no demonstrated need for another Federal law on groundwater, especially where the major resources that would be needed simply duplicate existing State and Federal programs. H.R. 3948's permit requirements are unclear and ill-defined, further they overlook jurisdictional issues and omit groundwater from watershed planning. The already overburdened court system would be called upon to determine which of the Act's many provisions pertain to groundwater.

Mr. Chairman, we appreciate your leadership and willingness to work cooperatively with the effected constituencies to resolve concerns and successfully reauthorize the Clean Water Act. We urge you to consider seriously the concerns outlined herein and ask that you make every effort to incorporate into the Committee's markup those aspects of the Bipartisan Alternative that are consistent with the State concerns.

Respectfully,

Robbi

Roberta (Robbi) Savage
Executive Director

cc; ASIWPCA Membership
Carol Browner
Governor Miller, NGA
Governor Symington, NGA

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ASIWPCA

CLEAN WATER ACT REAUTHORIZATION PRIORITIES

ASIWPCA recognizes the importance of and supports reauthorization of the Clean Water Act. The Association also reaffirms its belief that the Act is fundamentally sound and that extensive revisions to the basic foundation of the Act are not only unnecessary but potentially counter productive. On the other hand, the Association supports certain enhancements to the Act which will improve the ability of the States, as primary implementation agents, and the regulated community to meet the nation's water quality protection and enhancement needs in more effective and efficient ways. The Association has identified the following key program issues which it agrees need to be addressed in the reauthorization of the Act:

State Capacity: Recognition of the need for increased State capacity or authority to tailor programs to effectively implement provisions of the Act and the need to balance new initiatives and existing obligations with available implementation resources;

SRF: Enhanced funding for and improvements to implementation of the State Revolving Loan Fund (SRF) Program;

Partnership: A reaffirmed and strengthened State/EPA partnership in protecting the nation's waters by removing barriers to the consultative process in development of Federal regulations, policy and program guidance;

Watershed Management: Provision of a flexible framework for State establishment of programs which address the improvement of impaired waters on the basis of manageable hydrologic units;

Nonpoint Sources: Strengthened nonpoint source pollution control provisions;

Stormwater: Establishment of a more efficient and effective process for preventing water quality standards violations or use impairments from stormwater runoff;

CSOs: Endorsement of the process for effectively managing combined sewer overflows (CSOs) described in USEPA's published combined sewer overflows policy;

Better Science and Standards: Higher priority for and a more expeditious process for establishing and updating USEPA effluent guidelines and 304(a) criteria;

Wetlands: Definition of a balanced and rational approach for effective protection of the nation's important wetlands;

Monitoring: Establishment of guidelines for and improvements to the process for coordinating water quality monitoring activities, especially among Federal agencies; and

Fish Advisories: Establishment of consistent guidelines for the issuance of fish consumption advisories.

American Association of
State Highway and
Transportation Officials

Howard Yerusalim, President
Secretary of the
Pennsylvania Department
of Transportation

Francis B. Francois
Executive Director

STATEMENT BEFORE THE

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

OF THE

HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

Relating to the

WATER QUALITY ACT OF 1994 (H.R. 3948),
AND ISSUES RELATED TO CLEAN WATER ACT REAUTHORIZATION

by

CHARLES THOMPSON

Vice Chairman, AASHTO Standing Committee on the Environment
and
Secretary of Transportation for the State of Wisconsin

May 26, 1994

Founded in 1914, AASHTO represents the departments concerned with transportation and highways in the fifty States, the District of Columbia and Puerto Rico, to foster the development, operation and maintenance of an integrated national transportation system. The active members of AASHTO are the duly constituted heads and other chief directing officials of the member transportation and highway agencies.

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Working To Connect America

Mr. Chairman, my name is Charles Thompson. I am Secretary of Transportation for the State of Wisconsin, and Vice Chairman of the Standing Committee on the Environment for the American Association of State Highway and Transportation Officials (AASHTO). On behalf of AASHTO, I am pleased to accept your invitation to testify on the Water Quality Act of 1994 (H.R. 3948) and issues related to the reauthorization of the Clean Water Act.

We believe that our ability to provide high-quality, efficient, safe, and environmentally sound transportation in Wisconsin...and across the nation...depends strongly on opportunities like this to talk with you and other leaders in Congress in the early stages of legislative development.

Too often, this kind of dialogue does not take place until the rulemaking process is in full swing.

Certainly, many of you would probably agree with me that the Clean Air Act Amendments of 1990 could have benefited from a closer look by states at the potential implications of the Act before we forged ahead toward implementation. States are only now beginning to draw conclusions from years of study on the Clean Air Act Amendments. Many very valid questions are now being raised about whether this law can effectively and equitable do the job of cleaning our nation's air. And we're realizing only now that the requirements of the act will impose massive costs on states, local governments and businesses.

Today, we have an outstanding opportunity to make sure that the Clean Water Act works well for states and offers the mechanisms needed to achieve our clean water goals.

AASHTO and the Wisconsin Department of Transportation have several concerns about H.R. 3948 and its substitute amendment, which I will outline briefly today. We also have several constructive suggestions for addressing these concerns.

Concerns re original version of H.R. 3948

We have several concerns with H.R. 3948 in its original form.

This bill is teeming with murky language that effectively prevents anyone from truly understanding the implications of the bill for states. For example, we are not sure of the relationship between the non-point program and the watershed management program. If we can implement measures based on water quality, it obviously will cost less than across-the-board implementation. Moreover, it is not clear how much flexibility will be allowed states in developing approaches to achieve water quality standards.

It is particularly important for us to have this information because we want to provide you with the best possible data on the potentially massive costs of these mandates.

At this point, we're making several assumptions about what this legislation will require:

- Based on the Coastal Zone Reauthorization Act (CZARA) requirements, we believe we will have to install two one-acre sediment/detention ponds for *every* project in the 1996 state highway program. In addition, Wisconsin DOT will install devices such as grassed waterways and vegetative filter strips on all projects that do not require an urban cross-section.

- We believe we will have to reduce roadway salt use statewide, which is of significant concern to the cold weather states. We considered using non-salt deicers only in coastal areas, but we concluded that it would be cost prohibitive to send out two separate fleets of deicing trucks -- one fleet with salt, and another that would only place non-salt deicers on roads and bridges adjacent to sensitive areas. As a result of this reduction in salt use, Wisconsin will increase its deicing costs substantially -- from some $30 per ton for salt to about $100 per ton on average for non-salt deicers.

- We're assuming that CZARA storm water permitting will be required statewide in all urban areas serving populations of 50,000 or greater. Non-point requirements will be required statewide, but it remains unclear whether there will be any targeting of impaired or threatened waters.

We have made NO ATTEMPT to calculate costs of retrofitting existing facilities, because we have absolutely no information at this time about where and what measures would have to be installed. Without retrofit costs included, our estimated costs of compliance are probably quite conservative.

Using these assumptions, then, here are the conservative estimates we have on how much it will cost over and above the $49 million we spend now to comply with the Clean Water Act and CZARA:

- For Wisconsin DOT, we estimate that the CZARA requirements *alone* will total approximately $43 million. If the CZARA management measures are required statewide under the Clean Water Act, then the costs may triple. In comparison, the EPA has been claiming that the CZARA requirements will cost $27 million per year nationally.

- The non-point source pollution and stormwater management sections together may cost our agency up to $100 million per year if CZARA management measures are required statewide.

- Michigan DOT estimates of compliance costs for <u>CZARA alone</u> are around $90 million per year.

- And these figures do not include *any* of the costs that will be incurred by communities and counties, which also promise to be significant.

We are also concerned that H.R. 3948 does not supersede the Coastal Zone Reathorization Act of 1990 requirements. This could force states to implement two separate non-point source pollution control programs -- one in coastal areas, and one in the rest of the state. Roads would be treated inconsistently across the state, and the state would face much higher administrative costs and greater complexity under the dual systems.

Our final concern about this bill is that it includes no effort to target actual pollution problems. It appears to us that non-point source pollution control measures will be required for ALL non-point sources of pollution, in all watersheds, regardless of water quality.

Concerns re substitute to H.R. 3948

Unfortunately, the proposed substitute to H.R. 3948 fails to address any of the concerns I've just discussed.

The substitute does not supersede CZARA requirements. Its language remains unclear on where non-point source pollution control measures will apply. It does not appear to reduce implementation costs or unfunded mandates of the original bill for our agency. And it still appears that non-point source control measures will be required for ALL non-point sources.

The substitute amendment does go in the right direction related to stormwater regulations. It requires the EPA regulations regarding management measures [described in section 402(5)(B)] to take into account the "severity of the water quality impairment, the effectiveness of alternative approaches, and the costs of the measures."

However, it is still unclear whether CZARA management measures will be required in municipalities where stormwater permits are required. If CZARA management measures are required in these municipalities, it will be inconsistent with CZARA. CZARA specifically excludes municipalities that are regulated under a NPDES stormwater discharge permit from implementing the CZARA management measures.

Solutions

In Wisconsin, we are already doing an excellent job on erosion control. We strongly believe that a Clean Water Act can be crafted that can lead to significant water quality gains without harming other public and private activities.

We have five general suggestions for improving H.R. 3948 that will allow Wisconsin and other state DOTs to make the best possible use of funds invested in Clean Water efforts.

First, the Act needs to be clarified regarding its requirements and their applicability.

Right now we are relying on over-the-phone interpretations, but this just isn't good enough. Recently, EPA told us that retention ponds were not required, but at the same time we were told that the reduction of total suspended solids can be "designed into" projects. We are not sure what this means.

These kinds of shaky interpretations and misunderstandings will continue to dog this legislation until unequivocal language is provided. Until this is done, EPA will not have the information needed to understand what will need to be implemented. And states and localities will not be able to calculate the costs and other impacts you need to understand before this legislation moves forward.

As I will explain below, we recommend that the more specific language in H.R. 3948 clarify that water quality-based management measures will be required only in threatened and impaired waters, and that CZARA management measures will not specifically be required in order to comply with either the non-point source or stormwater management sections.

Second, the Clean Water Act should take a targeted "water quality based" approach, instead of mandating across-the-board requirements.

Section 319 (Nonpoint) should clearly target state efforts to control nonpoint source pollution in areas draining to *impaired* or *threatened waters*.

Currently, the bill is unclear, but it appears to require management measures on ALL sources of nonpoint source pollution in the state, in all watersheds. The Senate version, S.1114, now only requires management measures in threatened and impaired waters. We recommend targeting as the most cost-effective use of limited resources.

The bill, [Section 319(1)(b)(2)(K)] should be amended to clearly state this concept of targeting efforts.

Guidance issued under Section 319, Nonpoint Source Management Programs, should include water quality based management practices...in addition to the technology based management measures [identified through section 6217(g) of CZARA 1990].

Third, the Act should give states more flexibility in designing their compliance methods.

Proposed amendments appear to call for each state to pass laws -- within a very short period of time -- to create "enforceable policies" for control of all nonpoint sources.

We recommend that states first be allowed to adopt voluntary approaches. If these approaches do not provide adequate compliance, then the state should be required to have enforceable policies.

Fourth, tha Clean Water Act should supersede CZARA 1990

At this time, we believe it is premature to extend the CZARA measures statewide. Remember, the measures are not required to be implemented *anywhere* until 1996. Before we extend these requirements, we ought to see if they are effective in coastal areas first. Moreover, it appears that many states are not ready to implement these measures even in coastal areas. In a survey of 17 other state DOTs, we learned that nearly half were not even *familiar* with the CZARA requirements.

We recommend that H.R. 3948 be amended to clarify that states will have flexibility in choosing their approaches to achieve water quality goals, and it should make it clear that the CZARA management measures will not be required.

This flexibility should also be available within the coastal area. At this time, it is not [under section 6217 of CZARA 1990]. As I noted earlier, this could force many states to have two different nonpoint source management programs. We recommend that a state management program under section 319 of the CWA that is approved by EPA be deemed to satisfy the requirements of CZARA.

Fifth, we need more reasonable and clear timelines for compliance.

We strongly support an emphasis on achieving water quality standards by December 31, 2009, using "progress towards achieving this goal" as the primary criterion for management program approval. However, the schedules and milestones for achieving the goal are unclear [sections 319(1)(b)(2)(C), (K) and (L)].

We recommend that H.R. 3948 require projects to be initiated within the first five-year period (starting with the approval of the updated state management program). These projects should then be completed by the end of the second five-year period.

Conclusion

More specific statutory language that promotes improved flexibility for states and an emphasis on water quality based approaches promises to give states much better tools for improving water quality across the nation. But before we forge ahead with this critical initiative, we need to take a step back and look at the potential implications -- particularly the costs-- for states and local governments.

States and localities already are straining to provide mobility to citizens with existing road resources. This unfunded mandate could jeopardize transportation projects across the nation.

Once this legislation is clarified, I urge you to work with state and local officials regarding the impacts of this proposal.

In April, 1994, the AASHTO Board of Directors passed a resolution regarding the Clean Water Act reauthorization which expressed AASHTO's desire for legislation that is adequately funded, provides a targeted approach to improving water quality, provides flexibility for state program development, and provides reasonable timelines.

This resolution indicates that AASHTO is ready to provide technical assistance to help in the development of legislation that is cost-effective and that addresses the water quality problems associated with transportation. The resolution also calls for full deliberation of these important issues related to reauthorization of the Clean Water Act. A copy of this resolution is attached to this testimony.

Let's work together to develop a Clean Water Act that uses scarce financial and human resources in the best way possible...to protect our precious water resources across the nation.

Mr. Chairman, this concludes my testimony. I am available to answer any questions now, as well as to provide any additional information needed in a written response. Thank you for the opportunity to provide our views on the Water Quality Act of 1994 and related issues.

As approved by the AASHTO Board of Directors on April 11, 1994

POLICY RESOLUTION PR-3-94

TITLE: CLEAN WATER ACT REAUTHORIZATION

WHEREAS, the 103rd Congress is considering reauthorizing the Federal Clean Water Act to address point and nonpoint sources of contamination to the nation's waters; and

WHEREAS, the Act can significantly improve surface water quality if properly crafted to address critical sites and major sources of pollution in a cost effective manner; and

WHEREAS, the nonpoint and stormwater provisions of the Act could impose multi-billion dollar compliance costs nationwide on the agricultural and transportation sectors, municipalities, and taxpayers, and

WHEREAS, the legislation is moving through Congress so rapidly that AASHTO member departments have not had adequate time to review, analyze, and comment on the direct impacts of the provisions; and

WHEREAS, the current legislation is inadequately funded, lacks a targeted water quality approach, provides little flexibility for state program development, and imposes unreasonable timelines; and

WHEREAS, AASHTO supports the goals included in the 1994 Clean Water Act Reauthorization.

NOW THEREFORE BE IT RESOLVED THAT:

AASHTO is ready to provide technical assistance to Congressional Committees in crafting a cost-effective approach that addresses the water quality problems associated with transportation.

AASHTO urges Congress to assure full deliberation by extending the legislative process to allow state transportation agencies in cooperation with U.S. DOT an opportunity to fully participate in the debate over efforts to control nonpoint pollution.

AASHTO commits itself to quickly assess and communicate the impacts of the current versions and offer constructive alternatives to advance water quality improvements.

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Statement of the
Association of Metropolitan Sewerage Agencies
before the
Subcommittee on
Water Resources & the Environment
of the
House Public Works & Transportation Committee
on
Reauthorization of the Clean Water Act

May 26,1994

Testimony provided by
Edward O. Wagner
Member, AMSA Board of Directors
Chair, AMSA Legislative Policy Committee
Deputy Commissioner
New York City Department of Environmental Protection
Director, Bureau of Clean Water
New York, New York

Dedicated to Environmental Improvement for Over 20 Years

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Mr. Chairman and members of the Subcommittee, I am Edward Wagner, Deputy Commissioner of the New York City Department of Environmental Protection and Director of the City's Bureau of Clean Water. I appear before you representing the Association of Metropolitan Sewerage Agencies (AMSA). AMSA's members represent over 150 of the nation's largest wastewater treatment agencies. We serve well over 90 million of the 176 million total sewered population in the United States, and collectively treat over 14 billion gallons of wastewater each day.

My appearance before you today takes place at the conclusion of AMSA's National Environmental Policy Forum and 24th Annual Meeting. For the past three days, over 200 local government officials have met in Washington to hear from the nation's environmental leaders and make AMSA's voice heard on reauthorization of the Clean Water Act. We have heard from Chairman Norm Mineta, Chairman Max Baucus of the Senate Environment & Public Works Committee and EPA Administrator Carol Browner, among others. We wrapped up our forum with a series of visits to Congressional offices and a briefing this morning, just down the hall in the Gold Room, for Members of Congress and their staffs on the Clean Water Act.

I hope that many of you had the opportunity to meet with our member agencies from your districts this week. During our Hill visits and at this hearing, we greatly appreciate the opportunity to share our thoughts and recommendations as environmental practitioners dedicated to improving the quality of the nation's waters.

Support for Clean Water Act Reauthorization

First and foremost, AMSA supports reauthorization of the Clean Water Act during the 103rd Congress. It's a tall order, but one I believe can be realized if the clean water community works together toward this common goal.

You will hear differing views among those of us who testify before you today. And I know there are differing views among the membership of this Subcommittee. But as long as thoughtful individuals -- who truly care about the environment and our nation's waters -- are willing to put pen to paper and craft legislative proposals, healthy debate can continue and compromise can be sought. AMSA commends each of you for your leadership and looks forward to working with all members of the Subcommittee, and full Public Works & Transportation Committee, toward the realization of a reauthorized Clean Water Act in 1994.

"Just two years ago the nation celebrated the 20th anniversary of the passage of P.L. 92-500. The Federal Water Pollution Control Act was landmark clean water legislation, passed by Congress in 1972 over a Presidential veto. It was a deliberate response to mounting environmental problems and a demonstration of true federal leadership to protect the nation's waters.

Today, as Congress prepares to reauthorize the legislation, now known as the Clean Water Act, the nation's clean water program is once again at a critical juncture. This time the trigger is not the environmental calamities of the early 1970's, it is instead the undeniable reality of financial constraints experienced at all levels of government.

While public support for our national clean water program remains steadfast, the rallying cry of " no unfunded mandates" has whipped up strong emotions regarding the future direction of the program and who should pay "The Cost of Clean". The message is clear, and the call is for a bold, new direction for our future clean water efforts.

As the nation considers which road to take, we should call upon what we already know. We know that since passage of the landmark 1972 law, we have made enormous progress towards achieving the Nation's clean water goals. Today, as a result of the collective efforts of cities, states and the federal government, it's difficult to find a city in America where the harbor, riverfront or waterway isn't the showcase of the community. The implementation of the Clean Water Act has, indeed, brought enormous water quality progress.

Times, however, have changed. New variables are impacting the future protection of our clean water environment. We have moved beyond the control of easily identified point sources. Today's challenges to water quality -- nonpoint source pollution, combined sewer overflows and stormwater management -- are vastly more diverse, complex and costly to control.

Early in our national clean water program, federal and state government contributed more than 90% of the funds needed to assist local communities in their efforts to clean their lakes and streams. Today, local governments shoulder more than 90% of the funding burden, and operation & maintenance costs and sewer rates are escalating rapidly throughout the country.

In the face of costly and complex problems and dwindling resources at all levels of government, it is no wonder that the debate over unfunded mandates has moved to center stage. But, as this important issue is debated, we must ask ourselves two critical questions -- Are we willing to turn our backs on a clean water program that has achieved so much? Are we willing to tell our citizens that there is no need for further protection or progress? Of course not. We must, instead, maintain the progress we have made and chart a future course that recognizes both the contributions made, and constraints faced, by our nation's cities in protecting water quality.

In the context of ongoing efforts to reauthorize the Clean Water Act, we must focus our energy on two critical goals, a national program of comprehensive watershed management and a strong federal commitment to clean water funding. Addressing

water quality challenges through watershed management will ultimately result in considerable cost savings to local government and improved ability to protect and improve the environment. And, continued federal funding -- to both fully capitalize the state revolving loan programs and bolster our efforts through grants -- will allow us to target high priority water pollution problems and realize real progress.

Most importantly, we need to redirect the inertia behind the unfunded mandates debate, away from inevitable legislative and environmental gridlock, and toward a coalition in support of increased federal funding and flexibility within our nation's clean water program. The solution that we seek can be found in a reauthorized Clean Water Act."

Excerpted Text from *The Cost of Clean - 1994*

This text from AMSA's *Cost of Clean - 1994* (attached to your testimony) in our view frames the Clean Water Act reauthorization debate before us. Some say the Clean Water Act is not broken -- so why fix it? AMSA would argue instead that we can no longer rely on the command and control practices of the past to achieve the improvements we seek. The Clean Water Act is broken and in need of a bold new direction. The bottom line, from AMSA's perspective, is increased federal funding and a national program of comprehensive watershed management.

There are two bills, currently introduced in Congress, that offer comprehensive reauthorization of the Clean Water Act. And there is much in them that is good for municipalities. Both bills, H.R. 3948, the Water Quality Act of 1994 and S. 2093, the Water Pollution Prevention & Control Act of 1994, provide essential benefits to local governments through key provisions addressing comprehensive watershed management, nonpoint source control, funding, codification of the U.S. Environmental Protection Agency's (EPA) National Combined Sewer Overflow (CSO) Control Policy, and water quality standards and criteria in arid ecosystems.

I would like to commend Chairman Mineta, Ranking Minority Member Boehlert, Chairman Applegate, and the Subcommittee, for the improvements to our national clean water program that would be made through passage of H.R. 3948. The legislation offers a balanced approach to addressing outstanding water quality priorities.

As you proceed with deliberation on this legislation, we encourage you to consider the following:

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Funding

Reauthorization legislation currently before Congress either continues (as in S. 2093) or significantly increases (as in Chairman Mineta's legislation, H.R. 3948) federal support of the Clean Water program through both grants and loans. Such an approach is essential to ensure future clean water progress.

As noted, attached to your testimony is our report titled *The Cost of Clean - 1994*. The report documents the fact that our water pollution control needs, as a nation, are considerable. Emerging needs associated with combined sewer overflows, stormwater management, nutrient control, and nonpoint source control will clearly require additional funds.

As reported in *The Cost of Clean* the capital needs from 1993-1998 for 99 of AMSA's member agencies totals $32.4 billion. This number represents the needs of just under 100 local wastewater treatment agencies for the near term.

Operation and maintenance (O & M) expenses traditionally make up a higher percentage of a local agency's budget than capital costs and are paid for totally by local communities. Projected operation and maintenance expenses for 1994 among AMSA's members will total $6.72 billion annually. Based upon past surveys, we can project that O & M expenses will double every eight years, with increases between 9% and 11% per year. AMSA's projections of debt service and operation and maintenance needs for the 1990-2010 period indicate that high costs will not diminish in the future.

The increasing needs reported in *The Cost of Clean* translate directly into increasing burdens for local ratepayers. Through its research, AMSA has found that annual household user fees are now doubling every six years. Consequently, an average annual household user fee that was $150 in 1990 can be expected to skyrocket to over $1,600 in the year 2010. Clearly, this is not a problem faced only by Boston and a few other communities. Many other communities are now facing, or will soon face, the same fiscal challenge.

An additional perspective on this issue is provided by an analysis of service charge increases as compared to inflation (*AMSA's 1993 Service Charge Index*, attached). *AMSA's Service Charge Index* reflects an increasing spread between annual increases in service charges (rates) and the rate of inflation reported by the Consumer Price Index. An analysis of the rates reported for the early years of the index and those reported recently reflects the shift in federal policy from the Construction Grants Program to the State Revolving Loan Fund Program. The resulting service charge index for 1993, as an example, exceeds the Consumer Price Index by a factor of 2.7.

The need for clean water investment to be a national priority is, I'm certain, nothing I need to convince you of Mr. Chairman. However, we must together ensure that the Administration, the Congress, and the nation as a whole, share this critical perspective.

In March of 1992 the National Utility Contractors Association (NUCA), in their report "Clean Water Investment and Jobs Creation," analyzed prior studies to identify direct, indirect and induced jobs associated with water and wastewater investment. They found that for every $1 billion dollars spent, a minimum of 34,200 jobs are created -- and possibly as many as 57,400. Additionally, the NUCA report found that the number of jobs generated directly by wastewater and water infrastructure projects is somewhat greater than the number generated by highway construction. When evaluating investment in clean water infrastructure we must not forget the long and short term environmental benefits that enhance ecosystem health and our quality of life, while at the same time stimulating the economy.

U.S Environmental Protection Agency (EPA) research has reflected similar results. The Agency cites a total of 58,500 jobs for every $1 billion spent. A July 1992 Forbes article titled "You Can't Get There From Here," also looked at the impact of the EPA on the U.S. economy. The article cites EPA's estimated 20 year design needs for public-owned treatment works as $111.5 billion, with a corresponding jobs creation estimate of 3,814,468 to 6,402,060 jobs.

AMSA believes that the nation must address both its short and long term infrastructure funding needs, and the need for resulting economic stimulus and growth.

A Funded Mandates Amendment

To respond to the need for increased federal funding, AMSA has crafted a proposed a Clean Water Act reauthorization funded mandates amendment. The amendment would fully capitalize the State Revolving Loan Fund (SRF) program within ten years and provide grant funding to correct high priority water quality impairments.

The Administration's Clean Water Initiative estimates that a total authorization of $14.45 billion is necessary to fully capitalize the SRF program and to assure that the program fully revolves at $2 billion per year. The combination of loans and grants contained in this proposed amendment will achieve that milestone, accelerate compliance with Clean Water Act (CWA) mandated requirements, reduce unmet needs, and retain the revolving nature of the SRF by maintaining the corpus of state funds.

The conceptual framework of AMSA's proposed funded mandates amendment includes the following:

- Of the total dollar amount appropriated for the clean water program in any fiscal year, up to $1.5 billion annually would be authorized to capitalize the SRF program (over the 10 year authorization for a total of $15 billion for the mandated requirements of the CWA).

- Any amounts appropriated above $1.5 billion/fiscal year would be authorized for grants to be allocated at the discretion of the State to address priority water quality problems. The eligibilities for grant monies would be the same as those for SRF loans.

As a nation, we need continued federal funding to both fully capitalize the state revolving loan programs and bolster our efforts through grants. The AMSA funded mandates amendment offers the impetus to encourage all stakeholders in our water quality future to voice persuasive support for action by Congress to increase appropriations for the national clean water program. The attached legislative language has been drafted to take this positive new direction in the context of H.R. 3948, the Water Quality Act of 1994.

Recognizing the funding constraints at all levels of government, we urge Congress to look at alternative ways to alleviate the burden on local government. In our view, that worthy goal can be achieved through a reauthorized Clean Water Act that includes the following key elements:

A National Program of Comprehensive Watershed Management

Reauthorization of the Clean Water Act must establish watershed management as both a viable and appropriate means through which to address water quality concerns and priorities. While measures currently proposed are voluntary, they go a long way toward shifting the direction of our national clean water program – away from command and control – and toward a bottom-up, stakeholder driven process. Ideally, AMSA believes that comprehensive watershed management should be required, nationally, under the Clean Water Act.

AMSA feels strongly that while the 20 years since the 1972 Clean Water Act have produced significant benefits, the future application of technology-based standards will not result in the same level of water quality improvements. Achieving tomorrow's water quality successes will be far more challenging and a change in our national "mind set" is essential.

We must look at the next 20 years of water quality improvements from a new perspective. While watershed management is ongoing in some areas of the country, and certainly possible in many others, it is only a national shift in our approach to addressing water quality issues that will provide the information and tools we need to truly make a difference in our nation's water quality over the next 20 years.

Currently, our national clean water program enjoys widespread public support. We cannot afford to lose this support through water quality investments that fail to result in measurable improvements. Addressing water quality challenges through watershed management will ultimately result in improved ability to protect the environment and considerable cost savings to local government.

Nonpoint Source Controls

No one questions the fact that nonpoint source pollution contributes well over half, if not two-thirds or three-quarters, of the pollutant loadings to our nations waters. Reauthorization of the Clean Water Act must significantly strengthen controls on nonpoint sources of pollution. This is not a view held by AMSA alone, Water Quality 2000, a coalition of over 70 diverse organizations, lists nonpoint source pollution control among the nation's highest water quality priorities.

Stronger nonpoint controls will considerably reduce pollutant loading to our nation's waters and improve compliance with existing water quality standards. More importantly, strengthened nonpoint source controls must be fully integrated within the watershed management concept. The message we want to convey is not, "stop regulating point sources and start regulating nonpoint sources" -- it is instead that all impairments to water quality should be examined and corrected in the context of the watershed in which they occur. We need a level playing field before trading among sources can occur.

Codification of the CSO Policy

AMSA was a key stakeholder in the two years of regulatory negotiations that resulted in an Administration-approved National Combined Sewer Overflow Policy. The Policy affords municipalities both the clear direction and the flexibility they have long needed. These key components of the Policy translate into significant cost savings as well (from $160 billion under previous proposals to $41 billion long-term investment under the Policy). The codification of the Policy into law would put the force of the Clean Water Act behind its essential components. Action by Congress will ensure that the Policy cannot be arbitrarily amended or altered without significant review, and ensure municipalities the consistency they need to pursue appropriate control strategies. AMSA provided legislative language to the Committee in its comments on H.R. 3948 (March 1994) that would accomplish this important task. We urge the Committee to replace CSO language currently in the legislation with that provided by AMSA.

Arid Lands Provisions

For the first time, the reauthorized Clean Water Act must acknowledge the unique ecosystems that exist in the arid west. The legislation being considered makes great strides in recognizing the relevance of site-specific conditions to the development of criteria and standards. AMSA, however, believes a more aggressive approach is appropriate to ultimately address the unique conditions in existence in arid areas. We have recommended legislative language which would strengthen and improve current provisions in H.R. 3948.

Our testimony today touches upon what we consider to be key provisions of the ongoing reauthorization of the Clean Water Act. In its comments to the Public Works & Transportation Committee on H.R. 3948, AMSA also made recommendations regarding other provisions of the legislation. It is our hope that we can continue to work cooperatively with the Subcommittee and full Committee, between this hearing and markup of H.R. 3948, to improve and strengthen this important legislation.

Like the buttons you've seen on many an AMSA member this week, we believe it's time for *CLEAN WATER NOW!* Let's work together toward that laudable goal.

This concludes my testimony. Again, thank you for this opportunity to appear before you. I will be happy to answer any questions you may have.

Attachments

AUTHORIZATION FOR CLEAN WATER PROGRAM FUNDING

1. Title VI of H.R. 3948 is amended by adding at the end thereof a new section 606 as follows:

SEC. 606. GRANTS

Section 601 (33 U.S.C. 1381) is amended by adding a new subsection (b), and by redesignating subsequent subsections accordingly, as follows:

"(b) Grants. Of the amounts authorized to be appropriated in each fiscal year under section 607 of this title, an amount of $1,500,000,000 in each fiscal year shall be made available to carry out subsection (a) of this section, and the remaining amount appropriated in each fiscal year shall be made available to carry out high priority water quality projects and activities, identified by the state, and eligible for assistance under Title II."

2. Section 201 of H.R. 3948 is amended to add at the end thereof the following:

(c) Section 205(m)(1) (33 U.S.C. 1285(m)(1)) is amended by inserting after "September 30, 1986" and ahead of the ",", the following "and ending with the fiscal year beginning after September 30, 1992".

The Cost *of* Clean

A National Survey of Municipal Wastewater Management Needs

Association
of Metropolitan
Sewerage Agencies

the message is clear...

The message is clear, and the call is for a bold, new direction for our future clean water efforts.

Just two years ago the nation celebrated the 20th anniversary of the passage of P.L. 92-500. The Federal Water Pollution Control Act was landmark clean water legislation, passed by Congress in 1972 over a Presidential veto. It was a deliberate response to mounting environmental problems and a demonstration of true federal leadership to protect the nation's waters.

Today, as Congress prepares to reauthorize the legislation, now known as the Clean Water Act, the nation's clean water program is once again at a critical juncture. This time the trigger is not the environmental calamities of the early 1970s, it is instead the undeniable reality of financial constraints experienced at all levels of government.

While public support for our national clean water program remains steadfast, the rallying cry of "no unfunded mandates" has whipped up strong emotions regarding the future direction of the program and who should pay "The Cost of Clean". The message is clear, and the call is for a bold, new direction for our future clean water efforts.

As the nation considers which road to take, we should call upon what we already know. We know that since passage of the landmark 1972 law, we have made enormous progress towards achieving the nation's clean water goals. Today, as a result of the collective efforts of cities, states and the federal government, it's difficult to find a city in America where the harbor, riverfront or waterway isn't the showcase of the community. The implementation of the Clean Water Act has, indeed, brought enormous water quality progress.

Times, however, have changed. New variables are impacting the future protection of our clean water environment. We have moved beyond the control of easily identified point sources. Today's challenges to water quality — non-point source pollution, combined sewer overflows and stormwater management — are vastly more diverse, complex and costly to control.

Early in our national clean water program, federal and state goverment contributed more than 90% of the funds needed to assist local communities in their efforts to clean their lakes and streams. Today, local governments shoulder more than 90% of the funding burden, and operation & maintenance costs and sewer rates are escalating rapidly throughout the country.

AMSA

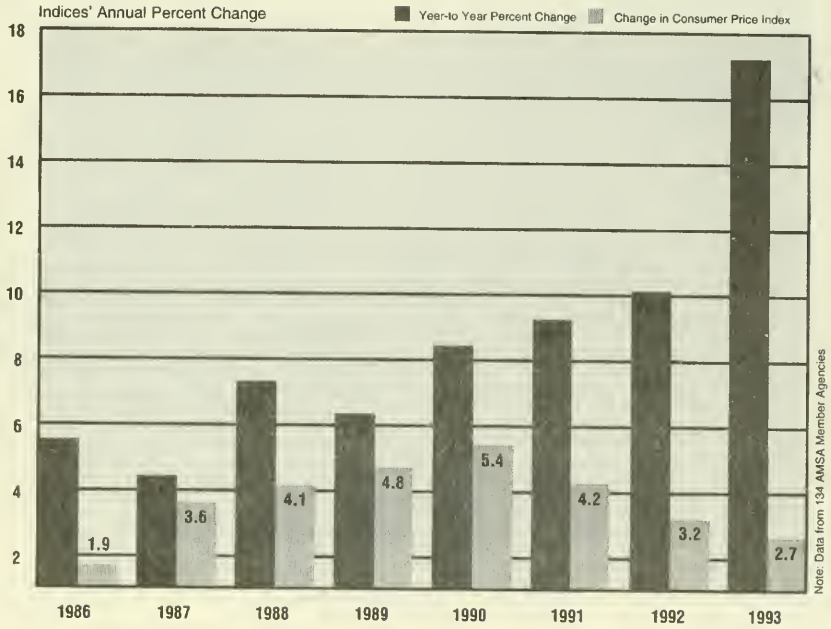
1993 Service Charge Index

AMSA Service Charge Index (Base Year 1985 = 100)

EPA Region	Number of AMSA Agencies	1992 Population Served	1985	1986	1987	1988	1989	1990	1991	1992	1993	Percent Change
1	7	3,733,000	67.1	80.7	95.8	106.2	145.2	168.7	197.7	238.5	276.2	**15.8**
2	8	12,079,000	90.0	92.9	95.7	108.0	113.1	136.3	161.1	185.1	234.2	**26.5**
3	16	11,863,000	102.3	113.8	115.7	119.4	128.0	129.7	143.4	149.2	219.8	**47.3**
4	21	7,050,000	143.7	150.3	158.8	165.1	174.0	182.3	190.4	195.8	222.4	**13.6**
5	24	17,348,000	147.6	146.5	143.2	145.5	138.9	140.9	148.6	174.9	177.7	**1.6**
6	14	8,880,000	105.9	122.3	143.9	156.9	165.7	176.9	169.5	172.2	196.3	**14.0**
7	7	3,454,000	62.1	66.6	69.2	70.6	72.5	71.8	78.3	96.5	159.1	**64.8**
8	4	2,064,000	101.8	101.8	101.8	108.8	105.1	116.2	121.9	128.2	139.0	**8.4**
9	21	22,420,000	59.7	64.6	69.9	81.4	96.1	110.4	127.0	145.4	160.3	**10.2**
10	12	3,060,000	117.1	125.9	130.6	139.3	150.6	159.0	175.7	197.3	201.0	**1.9**
Total	**134**	**91,951,000**	100.0	105.6	110.4	118.6	126.0	136.8	149.3	164.4	192.8	**17.2**
Year-to-Year Percent Change				5.6	4.6	7.4	6.2	8.5	9.2	10.1	17.2	
Change in Consumer Price Index				1.9	3.6	4.1	4.8	5.4	4.2	3.2	2.7	

1993 Index and increase over the 1992 Index is based on the 123 responses to the 1992 survey and the 101 responses to the 1993 survey. Ninety egencies responded in both 1992 and 1993.

Service Charge Increases vs Inflation



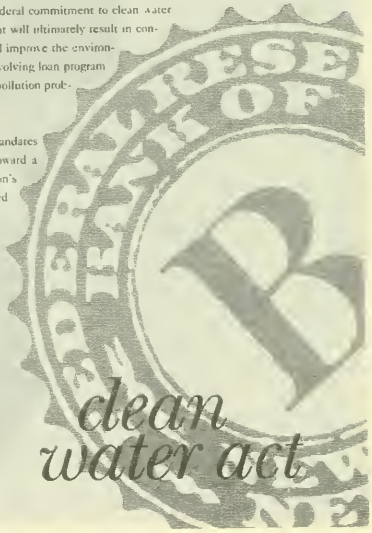
Association *of* Metropolitan Sewerage Agencies 1000 Connecticut Avenue, N.W., Suite 410 Washington, DC 20036, 202/833-AMSA

... we must focus our energy on two critical goals, a national program of comprehensive watershed management and a strong commitment to clean water funding.

In the face of costly and complex problems, and dwindling resources at all levels of government, it is no wonder that the debate over unfunded mandates has moved to center stage. But, as this important issue is debated, we must ask ourselves two critical questions — Are we willing to turn out backs on a clean water program that has achieved so much? — Are we willing to tell our citizens that there is no need for further protection or progress? Of course not. We must, instead, maintain the progress we have made and chart a future course that recognizes both the contributions made, and constraints faced, by our nation's cities in protecting water quality.

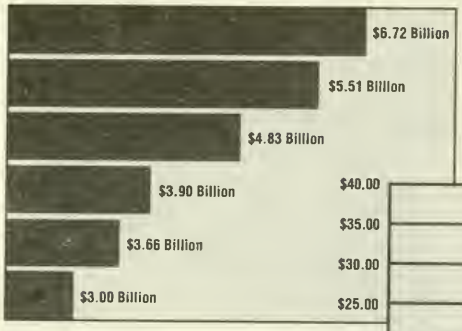
In the context of ongoing efforts to reauthorize the Clean Water Act, we must focus our energy on two critical goals, a national program of comprehensive watershed management and a strong federal commitment to clean water funding. Addressing water quality challenges through watershed management will ultimately result in considerable cost savings to local government and enhanced ability to protect and improve the environment. And, continued federal funding — to both fully capitalize the state revolving loan program and bolster our efforts with grants — will allow us to target high priority water pollution problems and realize real progress.

Most importantly, we need to redirect the inertia behind the unfunded mandates debate, away from inevitable legislative and environmental gridlock, and toward a coalition in support of increased federal funding and flexibility within our nation's clean water program. The solution that we seek can be found in a reauthorized Clean Water Act.



Annual Operation & Maintenance Expenses*

For 153 AMSA Member Agencies



*1987, 1990, and 1993 AMSA Financial Surveys

Operation & Maintenance (O&M) costs traditionally make up a higher percentage of a local agency's budget than capital costs. As new technologies are applied to meet more stringent requirements the costs will double every 8 years, with increases between 9% and 11% per year. These costs are paid for totally by local communities.

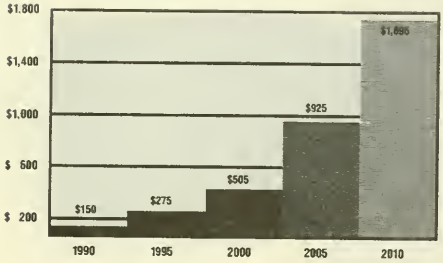
Projected Needs to 2010

Projected Revenue Required (in Billions)

1990	O&M	$ 4.83
	Debt Service*	$ 1.74
	Total	$ 6.57
1995	O&M	$ 7.86
	Debt Service*	$ 4.20
	Total	$12.06
2000	O&M	$12.78
	Total	$19.14
2005	O&M	$20.77
	Debt Service*	$ 6.59
	Total	$27.36
2010	O&M	$33.75
	Debt Service*	$ 6.59
	Total	$39.22

*Based on a 20-year bond at 7% annual interest rate

Projections of debt service and operation & maintenance needs for the 1990-2010 period indicate that high costs will not diminish in the future. The data collected for "The Cost of Clean" focuses only on costs associated with compliance with existing requirements. As communities face new environmental mandates, the rate burden will continue to escalate.



Projected Annual Household User Fees

Annual household user fees are now doubling every six years. They are projected to rise at an even greater rate in the future due to increased local funding of capital projects, increased operation & maintenance costs associated with higher levels of treatment and newly mandated environmental programs. The issue of increasing user fees heightens political pressures as rate increases impact the users, especially those on fixed or limited incomes.

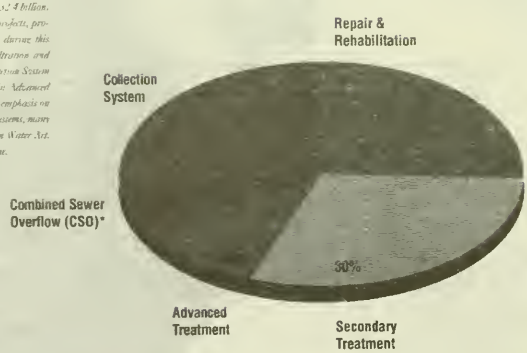
Funding Capital Needs: Who Pays?

[illegible] 1998 capital need [illegible] that amount only $2.5 billion or 7.9% [illegible] expected to be financed by federal assistance, [illegible] governments through rates and taxes carry [illegible] of the capital burden [illegible] addition to 100% of [illegible] operation, maintenance and replacement [illegible] The [illegible] projected state funding includes State Revolving Loans which are ultimately repaid with local funds, [illegible] the total [illegible] over 90% of the total [illegible] capital needs.

Capital Needs 1993-1998 $32.4 Billion

For 99 AMSA Member Agencies

Capital needs for the 1993-1998 period totaled $32.4 billion. The total documented needs represent committed projects, projects underway, and projects scheduled to begin during this period. Needs in the areas of inflow and infiltration and stormwater management are included in the Collection System category, while air quality needs are reflected in Advanced Treatment. Rehabilitation costs reflect a growing emphasis on the repair and replacement of existing treatment systems, many of which were built in the early years of the Clean Water Act. This trend is expected to continue for years to come.



*28 of 99 agencies responding reported CSO needs. 1100 communities nationwide have CSO's.

Association
***of* Metropolitan**
Sewerage Agencies

1000 Connecticut Avenue, N.W.
Suite 410
Washington, DC 20036
202/833-AMSA

AMSA represents the nation's largest publicly-owned wastewater treatment agencies. Our members serve the majority of the sewered population in the United States, and collectively treat and reclaim over 14 billion gallons of wastewater each day. AMSA's members are true environmental practitioners dedicated to protecting and improving the quality of the nation's waters. To request additional copies of this report or order The AMSA Financial Survey, 1993: A National Survey of Municipal Wastewater Management Financing, please contact AMSA.

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ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES
1000 CONNECTICUT AVENUE, N.W. SUITE 410 WASHINGTON, DC 20036-5302
(202) 833-AMSA FAX (202) 833-4657

RESOLUTION IN SUPPORT OF
THE REAUTHORIZATION OF THE CLEAN WATER ACT

Whereas, the Clean Water Act is the most successful environmental statute of our time, and

Whereas, the Clean Water Act legislation currently pending before Congress provides significant benefit to this nation's cities including:

Increased federal funding;

A national program of comprehensive watershed management,

Stronger nonpoint source controls;

Codification of EPA's national combined sewer overflow control policy;

Relief for local governments through revisions to stormwater management program;

Acknowledgment of the unique ecosystems that exist in the arid west and elsewhere; and

Whereas, AMSA's members are true environmental practitioners, dedicated to protecting and improving the quality of the nation's waters.

◆

Therefore, be it resolved that AMSA urges the 103rd Congress to reauthorize the Clean Water Act.

Signed the 23rd day of May, 1994 by AMSA's leadership and members,

J. Wayne Sylvester, President
County Sanitation Districts of Orange County, CA

Jon L. Olson, Treasurer
Rock River Water Reclamation District, IL

James H. Tarpy, Vice President
Metropolitan Government of Nashville & Davidson County, TN

Edward O. Wagner, Secretary
New York City Department of Environmental Protection, NY

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AMSA Resolution in Support
of Clean Water Act Reauthorization
May 23, 1993
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Name	Agency	State
Kevin J. Ajello	Middlesex Co. Util. Auth	N.J.
D. Cucinella	P.V. Sewerage Comm	
Michael D. Lucas	Pine Bluff	AR
[illegible]	NORTHEAST OHIO REGIONAL SEWER DISTRICT	OHIO
Daniel J. Becht	Passaic Valley Sewerage Comm Chairman	N.J.
[illegible]	Colorado Springs Utilities	Co.
Beverly [illegible]	[illegible] Water & Sewage	Mo.

CONTINUED NEXT PAGE. . . . . .

Name	Agency	State

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of Clean Water Act Reauthorization
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Name	Agency	State
John A. Hoffman	Middlesex Cty Utilities Auth	New Jersey
John R O'Donnell	National Center for Municipal Development	Washington D.C.
Thomas R Moyer	Montgomery Water Works & Sewer Board	Alabama
Ralph L. Metcalfe	City of Tampa Sewer Dept.	Florida
David Clarke	Inside EPA	
[illegible]	Metro. Water Reclamation/Chicago	Illinois
James M. Tarpey	Metro Water Services, Nashville Tennessee	
Harlan Agnew	Pima County	Arizona
Arthur A Chapa	Linden, Chapa & Fields (Rep: Pima County, AZ)	Arizona
Cathryn Collis	Bureau of Environmental Services - Portland	Oregon

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Name	Agency	State
Sam Cheng	City of Los Angeles	CA
Charles Kasin	St Louis Mo	MO
[illegible]	Seattle	WA
[illegible]	HCUA	N.J.
Florence A. Holland	OCUA	NJ.
[illegible]	WASA	DC
Doris Lindstrom	City of Phoenix	AZ
[illegible]	GAC	D.C.
Phyllis Robinson	Business Publisher	DC MD
Robert F. Tucker	Lynn Water & Sewer Commission	MA

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Name	Agency	State
Paul Thormodsgard	Green Bay Metropolitan Sewerage District	Wis
Robert P Miele	Los Angeles County Sanitation Districts	California
E Jodeal	N. E. Ohio Reg Sewer Dist	Ohio
G. Willi[illegible]	John Carollo Engineers	California
Christopher M. Westhoff	City of Los Angeles	California
Peter Ruffier	City of Eugene WWD	Oregon
GLENN B. HARVEY	ALEXANDRIA SANITATION AUTHORITY	VA
KAREN L PALLANSCH	ALEXANDRIA SANIT. AUTHORITY	VA
Dayl Gupty	[illegible]	WA
Allen H. Higgs	Fairfax County Integrated Sewer System	VA.

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Name	Agency	State
Billy G. Turner	Columbus Water Works	Georgia
Peter Archuleta	Eastern Municipal Water Dist	Calif
Ronald L. Garner	City of San Jose	CA
James R. Borberg	Hampton Roads Sanitation District	VA
[illegible]	Metropolitan Sewerage District	WI
[illegible]	Hampton Roads Sanitation District	VA
[illegible]	[illegible] District	CA
[illegible]	City of Phoenix	Ag
Robert A. Hollander	City of Phoenix	Az
[illegible]	City of [illegible]	Ohio

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Name	Agency	State
[illegible]	310 Spgs NW	CO
[illegible]	FBST	Md
[illegible]	ORANGE CSD	CA
Robert W. Hite	Denver Metro Wastewater District	CO
Michael Rardon	Metropolitan Dist. Hartford	CT
[illegible]	NFCRSD	CT
Otto James	DC-DPW	DC.
Len Benson	DC-DPW	D.C
J. Shahan	Seattle KC Metro	Wash
[illegible]	Tulsa MWA	OK

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Name	Agency	State
B L Cunningham	Anchorage Water & Wastewater	Alaska
Wm N. Brown	Trinity River Authority of	Texas
J. W. Schedgeffer	Madison MSD	WI
Ralph G. Hollmon	MILWAUKEE METRO SEWERAGE DIST.	WIS.
Susan C. Hamilton	City of San Diego	CA.
Andrew H Sunst Jr	South Essex Sewerage District	MA
Michael McCabe	Milwaukee Metro Sewerage Dist.	WIS
[illegible]	City of San Jose	CA
Ellen D. Ryan	City of San Jose	CA
Paul Gply	Seattle/King County Metro	WA

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Name	Agency	State
[illegible]	Cincinnati MSD	OH
Robert S Holland	Ocean Co. Util Auth	NJ
[illegible]	Passaic Valley Sewerage Com	NJ
[illegible]	City of Trenton	NJ
[illegible]	Independence	Mo.
George D Barnes	Atlanta	Ga
[illegible]	KC Metro	MO
[illegible]	Rockaway Valley Sewerage Auth	NJ
Laura Conrad	Upper Occoquan Sewage Auth	Va
Robert [illegible]	Gwinnett Co, Ga.	

AMSA Resolution in Support
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Name	Agency	State
[illegible]	City & Co of San Francisco	Calif.
Cheryl Crenn	Sacramento Regional County San District	CA
Stephen T. Hayash	Union Sanitary Dist	Ca
[illegible]	American Bottoms Regional Treatment Facility	IL
Tom Carpenter	City of Okla City	OK
[illegible]	C+C Honolulu	HI
Brian Mindley	City of Kalamazoo	HI
Patricia Young	Metro Water Reclamation District of Greater Chicago	Illinois
[illegible]	[illegible]	[illegible]
Cortez Ann White	Washington Suburban Sanitary Comm.	MD

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Name	Agency	State
[illegible]	NEORSD	OHIO
[illegible]	CENTRAL VALLEY WATER	UTAH
Victor P. Medina	CITY OF CORPUS CHRISTI	Tx.
[illegible] Hall	CHERRY HILL	Colorado
Harold E. Smith	Des Moines Metropolitan Sewer Operating Agency	Iowa
Don F. Hamilton	Little Rock Wastewater Utility	Arkansas
[illegible]	Rock River Water Reclamation Dist.	Ill.
Patricia Young	Metro Water Reclamation of Greater Chicago	Illinois
Mark C. Bay	Engineering Science Atl.	Georgia
Robert Burger	East Bay Municipal Utility District Oakland	CA

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Name	Agency	State
Caryl Stanell	Madison Metropolitan Sewerage District	Wis.
[illegible]	City of Houston	Texas
Paul R Gy	Metro Water Reclamation District of Grt. Chicago	IL
Penny Barclay	Dallas Water Utilities Dallas, Tx	Texas
Paul Thormodsgard	Green Bay Metropolitan Sewerage District	Wisc
[illegible]	Metropolitan Waste Control Commission	MN
[illegible]	Kellogg Peterson Denver Co	CO
[illegible]	Hanlin Associates, Inc.	MD
Larry Snowhite	Semmes, Bowen & Semmes	WASH DC
David Clarke	Inside EPA	

National League of Cities

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STATEMENT OF

THE HONORABLE JEFFREY N. WENNBERG

MAYOR OF RUTLAND, VERMONT

CHAIR

NLC ENERGY, ENVIRONMENT AND NATURAL RESOURCES COMMITTEE

on behalf of

THE NATIONAL LEAGUE OF CITIES

before the

PUBLIC WORKS AND TRANSPORTATION COMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

on

THE CLEAN WATER ACT

MAY 26, 1994

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Mr. Chairman, members of the Committee: I am Jeff Wennberg, Mayor of Rutland, Vermont and chair of the National League of Cities Energy, Environment and Natural Resources Committee. I am here today to testify on behalf of NLC and the 16,000 cities and towns we represent on reauthorization of the Clean Water Act.

For years, the nation's cities and towns have been your allies in securing enactment of national standards to protect our environment. But our perception now is that federal requirements are moving beyond protection and into the esoteric realm of seeking and mandating perfection, always and everywhere.

For too long now, the ability and capacity of local governments to absorb and implement unfunded mandates has been dismissed and ignored by both the federal and state governments. There are many municipalities that want you to rescind the overload of federal dictates. What that tells you in part, is that municipal officials feel sufficiently impacted by the federal deficit that we are no longer sure it is in our best interest to ask you to pay for what you mandate; the preference is that you just stop mandating.

But, what you must also understand, is that these same municipalities have reached the point where they are confronted with Hobson's choices: having to choose whether to provide safe drinking water to their citizens *or* public access to all handicapped individuals; whether to upgrade their sanitary landfills to meet new federal requirements *or* implement a federal mandate to control pollution from stormwater run-off; whether to provide lead-free public housing *or* finance clean-up of toxic waste sites -- all of which, however worthy, are unfunded requirements imposed on municipalities by the federal government. Yet in your state, Mr. Chairman, and in state after state, either by referendum or state action, tax and spending limitations have imposed severe constraints on municipal leaders. At a time when the number one concern and priority of our citizens is crime and violence, we are forced to divert ever-increasing portions of our own capped budgets to meet federal environmental requirements. Quite simply, local governments do not have the resources to pay for it all.

Our financial constraints are different from yours not only in magnitude, but in the very limited access local governments have to sources of revenue. We are constrained by state law in what we can tax, when we can tax, and how much we can tax. We are, in fact, even restricted by federal law -- the Clean Water Act, for example -- in determining how to finance the operation and maintenance of some of our public facilities. Most cities have access to only limited portions of the most regressive taxes; few municipalities share in revenues generated by income taxes and even fewer are permitted to impose such a tax. And, unlike the federal government, we are prohibited from deficit spending.

The issues I would like to highlight in my testimony today are the priority concerns of cities and towns in any Clean Water Act reauthorization. They include:

- Revisions to the municipal stormwater management program: NLC believes this program most appropriately belongs in the non-point source provisions of the Clean Water Act.
- Codification of EPA's recently promulgated Combined Sewer Overflow Guidance: NLC participated in the development of the Guidance and we support enacting it into law.
- Enhancement of the current non-point source program: NLC supports broader participation in attaining the goals and objectives of the Clean Water Act and believes it is time for all sources of pollution to participate in the program.
- Enactment of a watershed management program: NLC supports initiatives that encompass significant flexibility, to address the nation's water pollution problems more holistically.
- Renewal of the federal financial commitment to municipalities to assist in compliance with the Nation's clean water goals and objectives: Repayable loans must be combined with grant assistance to municipalities to facilitate our compliance with Clean Water Act requirements.

STORMWATER MANAGEMENT

Urban stormwater run-off is a non-point source in the ordinary meaning of that term. NLC believe stormwater should be regulated under the non-point provisions of the Clean Water Act and not under the NPDES provisions. In addition, it is essential that investments be made in research to determine whether and how to achieve water quality objectives for stormwater run-off.

As many members of this committee are aware, the stormwater management program has been a major issue for the National League of Cities for over ten years. We have been to the Congress three times in the past several years and in succession, the Senate, the Senate Environment and Public Works Committee, and this committee have taken the initiative to delay implementation of the program for the nation's smaller cities and towns. It has been, and continues to be unacceptable to local officials for the federal government to hold municipalities responsible to accomplish what no one knows how to do at a price no one can afford while simultaneously making absolutely no federal investment in determining whether the Act's stormwater objectives are even feasible. For those of us in the nation's smaller communities not yet enmeshed in the stormwater dragnet, this argument assumes even more validity as we see our colleagues in the larger cities spending millions of dollars simply to file permit applications -- and losing elections for having imposed a "rain tax."

What we believe has been poorly understood at the federal level is that no one -- not EPA, not the Congress, not the environmental community -- has ever made a credible case to municipal officials that urban stormwater run-off is:

- a priority problem of a magnitude deserving the investment of millions, if not billions, of scarce local dollars;
- an issue we can address effectively regardless of the resources invested; or
- the major contributor of what, in effect, is a non-point problem to ongoing pollution in our rivers and streams.

Urban stormwater run-off is a non-point source in the ordinary meaning of that term, legislative or judicial determinations to the contrary notwithstanding. It consists of storm run-off that may be contaminated with pollutants picked up as it flows across the ground surface to a channel.

The channel for urban stormwater is generally a pipe rather than an open stream or ditch. That fact may have some relevance in evaluating alternatives for reducing pollution from this source, but it should not be deemed to convert run-off into a point source. Agricultural drainage is commonly accomplished by means of subsurface pipes. Discharges from these drains are not classified as point sources.

Neither of the proposals pending before you adequately address our concerns about a rational, cost-effective stormwater program.

First and foremost, NLC's bottom line is that we oppose end-of-pipe limits for stormwater discharges. The insertion of a distant future date for the imposition of such limits, as incorporated in both proposals pending before you, does not make this concept acceptable.

Second, the constructs developed in both proposals make it virtually impossible for the large (250,000 and over population) and medium (100,000 and over) size cities ever to come into compliance. Neither H.R. 3948, nor the bi-partisan alternative, incorporate suburban areas surrounding those cities already required to implement a stormwater program into the program.

Rainwater run-off does not respect political boundaries. The nation's larger cities, and their taxpayers, will therefore finance clean-up not only of any pollution from stormwater within their cities, but will also have to pay to clean-up what runs into their cities from outside their boundaries. (We do not believe the additional authority for special designation is likely to be used to bring every suburb into the stormwater management program, particularly as costs escalate into millions of dollars, as we fully expect they will).

In addition, H.R. 3948, while exempting suburban cities in urbanized areas of over 100,000 population, nevertheless, requires cities in urbanized areas with populations between 50,000 and 100,000 to implement a stormwater program. From our perspective there is no justification for mandating expensive stormwater management programs across the board for an additional 4,000 to 5,000 cities. It makes no sense to extend a program with so little certainty of achieving any objective and great potential for significant cost for little, if any result. And, the rationale for omitting cities in urbanized areas over 100,000 population, where at least their participation can be justified on the basis of their contribution to the central city's stormwater run-off problems, is very perplexing.

Existing methods for setting water quality standards do not adequately address the episodic nature of storm events. EPA should deal with the issue of establishing wet weather water quality standards before considering the imposition of numerical effluent limits or any other performance standard on stormwater discharges.

Urban stormwater can best be dealt with in the context of non-point source programs and watershed management plans. The only obvious rationale for imposing different requirements on urban run-off from agricultural run-off is that cities are already regulated by EPA through the NPDES program so it is relatively simple to saddle cities with another set of requirements. We think that both urban and agricultural run-off should be addressed through programs driven by water quality objectives, not by administrative convenience.

Third, the bi-partisan alternative recognizes the need for investment in research to determine whether, what, and how pollution from stormwater run-off can be addressed. We, at the local level, do not have the resources to invest in demonstrations that may or may not work. And right now, we have no idea whether Best Management Practices (BMPs) or any other strategies will have any significant impact on the receiving streams. Certainly, neither municipalities, nor states, nor the federal government has information on whether numerical effluent limits are achievable, or what, if anything, will get us to water quality standards. It is unfair to ask the citizens of a given municipality to finance the research for what some perceive to be a national problem. Nor can we risk local resources on a program that may provide no benefit. We cannot justify expenditures for experimentation to our local citizenry. The federal government must take an active role in researching and proving new technologies for addressing urban run-off. We appreciate the inclusion of $20 million annually to finance such research in the bi-partisan alternative.

We accept the philosophy expressed in the Green Book (President Clinton's Clean Water Initiative) of relying on a mix of voluntary and regulatory approaches to reduce non-point pollution. But, this should apply equally to all sources of non-point pollution. What we seem to be facing is a regulatory approach to urban run-off and a voluntary approach to agricultural run-off.

Combined Sewer Overflows

NLC strongly supports the committee's ratification of EPA's recently promulgated CSO Guidance and the provision authorizing the issuance of "long term" permits. There is no avoiding the fact that CSO control facilities can be enormously expensive and most of these costs will be borne locally. But several key provisions in the Guidance are very positive. Chief among these are inclusion of the Demonstration approach as a co-equal option to the Presumption approach; linkage of the policy to review of water quality standards; and language dealing with affordability and small cities.

Enhancement of Non-Point Source Programs

As municipalities face increasing requirements in both the Safe Drinking Water Act as well as in the Clean Water Act, the need to look for pollution controls beyond municipal boundaries becomes increasingly clear. NLC supports an enhanced non-point source program and believes such efforts should also be focused on protection of sources of drinking water.

We are pleased to see the expanded efforts to address more fully non-point sources of pollution in both proposals. However, while we appreciate and recognize the jurisdictional constraints you face, we are disappointed that there is no serious attempt to protect sources of drinking water.

I am sure many of you noted in a recent *Washington Post* Federal Page article highlighting the actions taken by one municipality to reduce pollutant loadings by an additional thirty percent. (To avoid the costs of tertiary treatment -- the only option to reduce pollutant loadings by the required amount -- the city of Anchorage sought and obtained additional discharges to their system for removal to meet the 30 percent requirement.) Ever more stringent requirements have driven cities to unproductive, and to be perfectly frank, ridiculous extremes in their attempt to find ways to comply with these pollutant reductions from point sources in ways that are both cost effective and affordable.

Other cities are seriously considering or already implementing pollution control programs outside of their jurisdictions -- and at local municipal taxpayer expense -- because it is the most cost effective way to obtain reductions in pollutant loadings. While, for now, these cities are content to finance the costs of reducing pollution from agricultural or mining activities because the costs are substantially less than the alternative of squeezing the last fractional reductions from the local economic base, there is an inherent inequity in requiring municipal taxpayers to finance the control of pollution from activities outside of their jurisdiction. We applaud your recognition of the "trading" concept and support these initiatives as appropriate, innovative and cost-effective methods for furthering our mutual clean water objectives.

Another critical issue for municipalities involves our ability to address "toxics" in the context of secondary treatment. Publicly-owned treatment works (POTWs) were designed to remove "conventional," not "toxic," pollutants from municipal waste water. Pollution prevention initiatives will clearly help in reducing the number and amount of toxics that end up in our wastewater treatment plants and should be encouraged, and, where necessary, mandated. But, unless Congress is prepared to make a substantial new investment in wastewater treatment technology and/or to finance tertiary treatment, other initiatives (such as more stringent regulation of mining run-off, reductions in or control of the use of pesticides and fertilizer, standards for the manufacture of automobiles and other machines that contribute to pollution in the nation's rivers and streams) must bear the burden of assuring removal or reductions of toxic pollutants.

Enactment of a Watershed Management Program

Rising capital costs and increasingly limited resources dictate that cost effective alternatives for controlling and preventing pollution be developed. While we support a comprehensive approach to managing all sources of pollution that affect the nation's waters, we can only support legislation which recognizes this as a new, and for the most part untried, concept. Watershed management programs should only be required to the extent any federal legislation recognizes, addresses and allows for adequate flexibility to accommodate the

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significant and substantial diversity across this nation. Watershed management strategies and plans must permit all involved stakeholders to prioritize the allocation of resource to achieve water quality objectives jointly and voluntarily .

Watershed management programs must emphasize establishing priorities, maintaining flexibility, and empowering state, regional and local stakeholders to solve jointly their unique problems. In addition, watershed management plans and programs must assure equity among all sources or categories of sources of pollutants of concern in the area.

We believe, for the most part, that the bi-partisan proposal provides the more adequate options for experimentation and flexibility necessary to develop new and fledgling programs. We would recommend that the legislation include a more definitive role for local governments, especially as watershed management plans effect local land use authorities and water bodies within a given municipality's jurisdiction.

One cautionary note for the future: when states develop creative and workable watershed management plans, please do not select one and codify it in federal law. It is clear to us that what will work well for California, a warm and highly-populated state, will not work in Vermont, a cold and sparsely populated state.

FEDERAL FINANCIAL COMMITMENT

NLC supports a revitalized federal financial commitment to assisting municipalities in meeting Clean Water Act requirements. We believe both grants and loans for the variety of municipal controls necessary to attain compliance with the Clean Water Act should be available. Grants should be available to cities based on such factors as economic distress, ability to pay and the community's track record of success in water pollution control.

While the National League of Cities continues to support the State Revolving Loan Fund (SRF), we do so with reservation. First, we do not consider programs financed with repayable loans a "funded" mandate. The loan program, in our opinion, is only one of several appropriate mechanisms for non-municipal financial participation in funding national environmental mandates. We believe:

- First, a loan program should be a supplement to, not a substitute for, grant assistance.
- Second, repayable loans from federal resources generally mean that federal assistance goes to those least in need and with the best credit rating. The least goes to those with the greater needs.
- And finally, federal assistance comes with "strings," such as Davis-Bacon prevailing wage requirements, that make loans from private sources without those "strings" less expensive and more attractive.

Loans, for many communities, are not a viable funding mechanism. For some communities, repayment is beyond their fiscal capacity. And, we believe it important to note, the inability to repay loans is neither unique nor exclusive to small communities. Many of the

nation's large and medium size cities
face severe financial constraints, declining revenue bases, middle class outmigration, and increased federal intrusion in determinations about local financing priorities through costly, mandatory requirements.

If the federal government expects us to continue to comply with federal requirements it must either provide adequate financial assistance for the mandates; a mechanism for prioritizing requirements to allow a rational approach to the tasks at hand; or the flexibility to address what are truly the problems at the local level.

NLC believes that grant assistance should be restored to assist municipalities in meeting the multiplicity of Clean Water Act goals and objectives. We support the proposed $500 million grant program for "small communities" in the bi-partisan bill but believe it should be available to all cities and towns that need to meet Clean Water Act requirements. We also believe that grants are far more efficient than the negative interest rates authorized in H.R. 3948. While negative interest rates can provide deeper subsidy or higher grant equivalency, it takes more resources to generate with loans what you can do with grants.

I would like to submit NLC's *National Municipal Policy* on Clean Water Act issues for the record. It details our position on issues not specifically addressed in the testimony. And, thank you for the opportunity to present the views of the National League of Cities.

NATIONAL LEAGUE OF CITIES

1994
NATIONAL MUNICIPAL POLICY:

ENERGY, ENVIRONMENT & NATURAL RESOURCES

Revised at the Congress of Cities
December 1993
Orlando, Florida

2.05 Water Quality And Supply

A. Problem

It is becoming increasingly apparent that no section of the country is immune to the problems associated with both natural and man-made water pollutants. Urban stormwater and construction runoff have long been recognized as major contributors to water quality problems, and in many older cities, the existing sewer system with deteriorating pipes may be one of the main causes of water pollution. The growing concern over the introduction of toxic chemicals and pesticides into the environment and their impact on the ground water have added a new dimension to existing problems.

New treatment plants are generating mountains of sludge to be disposed of, and serious questions about land application practices encouraged by federal legislation are being raised as the concern over heavy metals, organic chemicals, and pathogenic organisms grows.

There is increasing evidence of organic contaminants, viruses, and other disease/causing organisms in our nation's public water supplies.

Expanding industrial activity has resulted in the discharge of a wide variety of synthetic organic chemicals into the rivers from which a large number of cities draw their drinking water. In spite of increasingly stringent controls on water pollution, small amounts of these chemicals have still been widely detected in the treated drinking water of many cities. Several of these synthetic organic chemicals are known as possible carcinogens, although the exact extent of the public health hazard posed by quantities of those chemicals present in cities' drinking water is not fully known.

The limited availability of water in all parts of the country also appears to be a growing and difficult problem.

Individual cities and in some cases entire regional water basins are feeling the constraints of limited water supplies. In some places, constraints have become true shortages. New reservoirs or diversion projects can no longer be solely relied upon to solve the problem. The number of possible sites, the environmental disturbances, the financial costs, and the absolute supply of water severely limit these structural solutions. Nor can greater amounts of groundwater be relied upon. In some locales, ground water mining has led to exhaustion of supplies, diminished stream flow, and land subsidence, and salt water intrusion.

Water has not traditionally been subject to price-determined allocation. Instead, it has been distributed according to a complex mix of state laws, federal regulations and charges, and local rates. It is a haphazard system at best, one which nearly defies rational evaluation. For many projects federal funding and water rates are such that taxpayers subsidize projects, the benefits of which go disproportionately to a limited number of agricultural and industrial uses.

B. Goals

The basic principle for dealing with water pollution must be that no one has the right to pollute--that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes. However, the impracticability of immediately eliminating all pollution also must be recognized. A reasonable relationship of economic and social costs and benefits should be a necessary precondition toward achieving a nonpollution goal. The ability of municipalities to comply with any clean water program must be recognized as contingent upon adequate funds for building treatment facilities. In addition, any clean water goal must be applied on a uniform, national basis to prevent movement of industry in search of loosely enforced standards.

The nation's drinking water should be as safe as is technologically feasible at reasonable cost. Most Americans receive their drinking water from public water systems owned and operated by local governments. It is thus imperative for the continued health and welfare of the nation that local governments have the financial resources and technical expertise needed to provide adequate and safe drinking water to their citizens.

C. Clean Water Act Policies

1. Federal Funding

Federal participation in the financing of projects mandated by the Clean Water Act is critical to the ultimate achievement of national water quality goals. The federal government must continue and expand its partnership with states and localities in the funding of Clean Water Act mandates. Federal contributions to the financing of water pollution control needs must be both substantial and a reliable long-term source of capital.

a. State Revolving Loan Fund

NLC continues to support the state revolving loan program (SRF) as a supplement to, not a substitute for, a grants program. The federal government should authorize an annual appropriation of funds which would be distributed to the states according to a specified formula. The states should then establish their own revolving loan programs for the distribution of loans, loan subsidies, or bond subsidies to localities for meeting Clean Water Act mandates. Such a supplementary program would help leverage federal funds, reduce annual local debt payments, and provide localities with added flexibility in structuring their Clean Water Act financing plans.

Congress should prohibit states from using the interest on SRF loans to local governments to meet state matching requirements.

b. Grants

It is estimated that the nation's cities and towns face over $200 billion in unfunded Clean Water Act mandates to comply with secondary treatment requirements and separation of combined sewer overflows. These cost estimates do not include implementation of separate stormwater management or wetlands protection or mitigation programs.

NLC calls on Congress to restore grant funding to assist municipalities in progressing toward meeting the nation's clean water goals and objectives. Without such assistance it is unlikely that municipalities will be able to comply with federal clean water mandates.

c. Use of Funds

Federal funding for Clean Water Act purposes should be available to meet all Clean Water Act mandates imposed on municipalities including construction of wastewater treatment plants, interceptors and major appurtenances, infiltration/inflow correction, major sewer rehabilitations, repair, upgrading, collector sewers, combined sewer overflows, separate stormwater management programs and wetlands mitigation projects.

Cities should be eligible for grant or loan funds or any combination of loans and grants to meet their water pollution control needs. Under no circumstances should any community be permitted to use grant funds for repayment of loans granted under the Clean Water Act.

The use of loans and/or grants should be tailored to the specific needs and capacity of each municipal applicant for federal financial assistance. Allocations of funds to municipalities should take into consideration a community's ability to pay and past local efforts to address the problem.

d. Sources of Funding

The federal government should redirect non-domestic spending priorities to assure adequate resources to meet Clean Water Act mandates. Congress should allocate a portion of these redirected resources to a fund dedicated to implementation of water quality requirements.

Under no circumstances should the federal government look to traditional local sources of revenues (e.g., a federal tax on water and sewer user charges, a federal tax on industrial dischargers to POTWs) to fund increased federal participation in financing Clean Water Act mandates.

e. Tax Code

Congress should remove current restrictions on the availability of federal tax incentives for private financing of wastewater treatment facility needs, since such financing arrangements may reduce capital costs and expedite project construction, upgrading, repair, rehabilitation, etc.

2. Compliance

To enable municipal compliance with federal secondary treatment requirements, Congress should restore adequate grant funding and assure full funding of the SRF. Additionally, state governments should provide increased assistance for construction of wastewater treatment facilities and localities should collect sufficient revenues through assessment of user fees to help pay for the needed construction.

3. Local Financing

Local governments should have the choice between the ad valorem property tax, metered user charges, and any other mechanism for recouping construction and operating costs. Federally mandated sewer user charges should be deductible from federal income tax.

4. Level of Treatment

The statutory requirement of "secondary treatment" should be defined as a desired level of water quality and not restricted to any one particular process. This desired treatment level required of municipalities should be defined to prevent expenditures for unnecessary and expensive facilities. Moreover, the least expensive solution should be favored, such as low flow augmentation, when such a solution is the most economically efficient solution.

5. Needs Survey

Cities should cooperate with their states and the EPA to develop an accurate and equitable needs estimate for the annual survey required by the Act. EPA must assure that project priority lists submitted by states give highest priority to projects in areas of greatest need, and assure the highest return in the amount of pollution controlled for each dollar of federal assistance expended. Attention should also be given to problems of small, rural communities.

6. Areawide Planning

Where wastewater treatment planning is on an areawide basis, local elected officials must have primary responsibility. Management agencies should be designated in response to the

desires of local elected officials, and should assure a fair voice for each participating government on a one-person, one-vote, or weighted vote basis. Preference should be given to existing planning and management agencies where they have demonstrated expertise and capability. Each city should be designated a management agency, if so desired. River basins should continue to be basic units for the development and administration of water resources. River basins should be developed to assure the maximum benefits possible in both water supply and recreation to the communities they serve.

Areawide water quality management programs required under Section 208 must be assured adequate federal funding for implementation and continued planning and management. Funds must be made available for adequate technical assistance to aid in the transition from planning to actual implementation of plans.

7. Watershed Management

Rising capital costs and increasingly limited resources dictate that cost effective alternatives for controlling and preventing pollution be developed. Municipalities are not responsible for pollution from sources outside their jurisdiction and must not be required to absorb the costs of addressing these pollution sources.

Watershed management strategies and plans should be authorized to permit involved stakeholders to jointly and voluntarily prioritize the allocation of resources to achieve water quality objectives. Such an approach must emphasize establishing priorities, maintaining flexibility and empowering local, regional and state governments and the community to solve their unique problems. Implementation of watershed management plans must assure equity among all sources or categories of sources of pollutants of concern in the area. Upon completion of watershed management plans, NPDES terms, conditions and limits should be modified to achieve the objectives of the plan in the most cost-effective way.

8. Discharge Analysis

Any extensions of the deadline for compliance with secondary treatment standards should allow adequate time for individual analysis of current discharge practices. The analysis should focus on all relevant environmental effects including air quality, land use and energy efficiency. When evidence indicates that the technique utilized does not significantly degrade the environment, the facility should be exempted from additional treatment. The practice should continue to be monitored and if an unfavorable change is noted, additional treatment should be required.

9. Desalinization and Recycling

Government policies should encourage expanded use of desalinization processes and recycling of wastewater along with recovery of sludge and other resources material.

10. Beneficial Use of Sludge

Federal regulations on the management of municipal sewage sludge should encourage its beneficial reuse. Reasonably anticipated adverse effects associated with potential sewage sludge exposure and local geographical and climatic conditions must be considered in the safe disposal of sludge. If site specific consideration can be shown by reasonable risk assessment analysis to be environmentally sound, then the management practice should be permitted.

11. Sedimentation and Silting

Sedimentation and silting of lakes, creeks, estuaries, or other streams must be checked and avoided in all future planning. Whenever such silting and erosion has already occurred, research should be continued to find ways of correcting this condition, within an ecologically sound framework.

12. Research

EPA should support research on problems growing out of the management of wastewater treatment facilities such as combined sewer overflows, land application of treatment effluent and sludges, and source reduction.

Innovative and alternative technologies have not been used to their fullest potential. Therefore, federal research, development, and public education of these technologies should expand, but not at the expense of research on management and operational issues.

Source reduction technologies and programs are prohibitively expensive for individual municipalities to develop. For example, to enable municipalities to reduce levels of metals and other toxic pollutants from non-industrial sources, EPA should undertake research to identify products introduced by small business and residential generators and suggest control programs for reducing these pollutants.

13. Pretreatment

EPA should establish national categorical pretreatment standards only for those industries that it has classified as major polluters and only for those classes of toxic pollutants which are known to be widespread and which may be causing human health and aquatic life problems. EPA should be required to publish, by date specific, a listing of categories for which action will be required.

Local governments should be allowed to devise methods to satisfy national standards that not only assure protection of water quality but which are also cost effective under the conditions of their particular jurisdiction. Therefore, as an alternative to federally mandated implementation of the national categorical pretreatment standards, Congress should authorize states to approve local pollutant elimination programs.

To qualify for the alternative local program, a Publicly Owned Treatment Works (POTW) should be required to

demonstrate to an authorized state agency that: 1) the POTW is in compliance with the requirements of its permit under the National Pollutant Discharge Elimination System (NPDES); 2) it has developed and implemented a local pollutant elimination program that in the aggregate is equivalent to implementation of the national categorical pretreatment standards; and 3) it is maintaining a local monitoring and reporting program which is adequate to disclose the quality of the receiving waters.

14. State Water Quality Standards

The current Clean Water Act requires states to designate how each water body is to be used within its jurisdiction and to develop standards for attaining that use. Under no circumstances should a state be allowed to downgrade or revise its water quality standards where the designated uses have already been attained. However, a state may revise its water quality standard if it can demonstrate that: 1) the existing designated use is unattainable because of irretrievable man-induced conditions; or 2) attainment of the designated use would result in substantial and widespread adverse economic and social impact.

Where the water quality of a stream exceeds the level necessary to maintain a designated use, a state should have the option to allow lower water quality for that stream because of necessary and justifiable economic or social development for which there is no feasible alternative. In no case should the degradation of water quality interfere with or become injurious to existing instream use. Before a state exercises such an option, it should be required to hold public hearings and coordinate with all affected governmental agencies.

15. Toxicity Testing

NLC supports the use of Whole Effluent Toxicity Testing (WETT) for the assessment of the potential toxicity of wastewater discharges; however, legislation should be adopted to prohibit the use of such tests as "pass/fail" NPDES permit conditions imposing strict liability on POTWs.

16. Common Law

No municipality injured by a willful or negligent violation of federal or state law should be deprived of a remedy if one exists under the federal Water Pollution Control Act and other appropriate laws. However, EPA must be made a party where the defendant can demonstrate it has acted in good faith.

17. Pollution Prevention

In addition to treatment policies, the federal government should develop, advocate, and institute pollution prevention measures. Prevention strategies are more effective in keeping toxics out of wastewater and far less costly than end-of-pipe technologies. Products containing chemical levels which constitute a significant percentage of the total loading should be restricted as to their composition and/or use.

18. Separate Storm Sewer Requirements

NLC continues to support a more simplified and flexible approach to management of municipal stormwater run-off which would allow for orderly and cost effective development of both information and program design than that which exists under current EPA regulations.

Congress should amend the Clean Water Act to regulate urban stormwater run-off under a newly-enacted provision of the Act separate from the NPDES program. Such regulations should require implementation of Best Management Practices (BMPs) to the Maximum Extent Practicable (MEP) with a legislative prohibition on requirements for end-of-the-pipe treatment. Management of run-off from municipal industrial facilities should be incorporated as part of a system- or jurisdiction-wide stormwater management program. Municipal compliance with stormwater management requirements should be based on implementation of site-specific Best Management Practices required in the permit.

19. Combined Sewer Overflow (CSO)

NLC supports the CSO control policy developed by EPA after a modified negotiation process which involved major stakeholders including NLC if critical issues related to the financial impacts of the proposed EPA policy are addressed. The opportunity to successfully implement the policy and to minimize the policy's financial impacts can be achieved through the use of compliance schedules that reflect reasonable financial capability ("affordability") criteria applied on an annual basis and through the availability of significant federal grants and no interest loans. If the policy's financial impacts are satisfactorily addressed, important components of the policy which would be supported by the League include:

a. Implementation by January 1, 1997, of minimum CSO controls listed in the EPA policy. These controls are not expected to require major construction of CSO facilities;

b. Selection of a long-term CSO control plan that will ultimately result in compliance with the requirements of the Clean Water Act. CSO control plans should give high priority to control of overflows to sensitive areas. Cost/performance analysis of alternative levels of control should be considered. Permittees should have the flexibility to select a long-term CSO control plan using either of the following approaches:

   - The presumption approach: a program meeting technology-based criteria in the EPA policy would be presumed to provide

an adequate level of control to meet Clean Water Act requirements.

- The demonstration approach: a program that does not meet the presumption approach criteria may be selected if the permittee demonstrates that the program is adequate to meet Clean Water Act requirements.

c. An implementation schedule for the selected long-term control plan which may be phased based on the relative importance of adverse CSO impacts and on the permitte's financial capability.

d. A provision to exempt permittees that have constructed CSOs designed to meet water quality standards from planning and construction requirements of the policy.

NLC supports provisions in the EPA policy that encourage states to adapt their water quality standards and implementation procedures to reflect wet weather events and site-specific conditions.

Congress should incorporate the EPA CSO policy by reference into the Clean Water Act. Congress should authorize the issuance of permits for a term up to 15 years for implementation of CSO control plans and authorize extension of compliance deadlines where it is determined that compliance by the scheduled date is not within the economic capability of the permittee.

20. Non-Point Pollution

Congress and the Administration should proceed as expeditiously as possible to expand funding for research and development, technical and managerial assistance, and to fund the efforts of local and state governments in the control of non-point sources of water pollution.

Congress should authorize a new supplemental grant program for the funding of non-point source pollution abatement.

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STATEMENT OF
PETE WENSTRAND
PRESIDENT
NATIONAL CORN GROWERS ASSOCIATION
TO THE SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
MAY 26, 1994

Good afternoon, Mr. Chairman, and thank you for the opportunity to testify today on behalf of the National Corn Growers Association, the American Soybean Association and the National Association of Wheat Growers. Our organizations have a combined membership of more than 100,000 farmers.

I want to stress that our organizations are all for cleaner water. We understand that some farming practices can adversely affect water quality. We recognize that state assessments suggest nonpoint source pollution is our leading water quality challenge. But I must say that our vision of what it takes to get cleaner water -- a perspective based on years of experience in the real world -- is quite different from the approach in Chairman Mineta's bill, HR 3948.

For the next few minutes, my colleagues on this panel and I would like to outline what we in agriculture need to achieve what we all want: more progress toward meeting water quality goals around the nation.

I'm going to concentrate on perhaps the major factor -- time. We didn't get into a situation where nonpoint source pollution became a problem overnight and it is simply not realistic to expect that we can eradicate it overnight. And, like it or not, that will be the case even if Congress adopts a very strict regulatory approach like that in HR 3948.

Let's look first at the time that states will have to develop strategies under the bill. With only eighteen months, many states will simply go to the shelf and pick up the Environmental Protection Agency's Coastal Zone Management Act guidance. While that may be appealing to some, the fact is that CZMA is still an unproven program that does not have to be fully in place until 1999.

Now, for the time that will be needed to implement the "best management practices and measures" called for in HR 3948. The bill gives landowners three years to develop and put in place site-specific management measures, beginning two years after enactment. This would be based on a schedule to phase in new nonpoint source controls over a five year period but it is still extremely ambitious. Consider the case of conservation compliance, part of the 1985 farm act, which requires farmers with highly-erodible land to implement soil-saving measures to remain eligible for federal farm programs. Farmers have nine years to implement these plans with the aid of the Department of Agriculture's Soil Conservation

Service, an agency formed specifically to give direct technical assistance to producers and with offices in almost every county in the continental U.S.

Since HR 3948 could target many more farms than those subject to conservation compliance and has no role for SCS, it is highly questionable whether effective and workable site specific plans could be developed in the time allotted.

Finally, HR 3948 allows far too little time to judge the effectiveness of best management practices. States would have to assess water quality only one year after full implementation of BMPs and would be forced to require additional BMPs in watersheds of water bodies out of attainment. Experience shows this is unrealistic, given the nature of nonpoint source pollution and the BMPs used to manage it. For example, evaluations of the Rural Clean Water Program, which was run between 1980 and 1990, show that there can frequently be a time lag of several years between BMP implementation and water quality improvement. Variations in weather -- over which we have no control -- can also significantly affect BMP performance and skew the monitoring data used to measure their effectiveness.

I said at the outset that agriculture is willing to continue taking steps necessary for cleaner water. We feel it can best be done through cooperative partnerships with states that encourage farmers to adopt more environmentally-friendly practices -- not by punitive programs that risk having them do no more than the minimum necessary to keep from being fined or taken to court.

ADDITIONS TO THE RECORD

AMERICAN ASSOCIATION OF AIRPORT EXECUTIVES
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Statement of

The American Association of Airport Executives (AAAE)

Before

The Subcommittee on Water Resources

Committee on Public Works and Transportation

U. S. House of Representatives

May 1994

Wetlands and Clean Water Act Reauthorization

Statement of
The American Association of Airport Executives (AAAE)
Before The Subcommittee on Water Resources
Committee on Public Works and Transportation
U. S. House of Representatives
May 1994

The American Association of Airport Executives (AAAE) submits this statement on the reauthorization of the "Federal Water Pollution Control Act" -- or "Clean Water Act" (Act). The Association's comments are focused primarily on the section of the Act dealing with the issue of wetlands.

The association supports the federal government's efforts to protect and enhance the nation's environmentally sensitive areas. However, AAAE has concerns about how these efforts sometimes conflict with other federal efforts and mandates. Congress should take the opportunity in reauthorizing the Act to make clear that aviation safety must be protected along with the environment and that in those rare instances where these two goals come in conflict, the protection and safety of the flying public remains paramount.

Introduction Of AAAE

Founded in 1928, AAAE is the largest professional organization in the world for airport management personnel. Representing over 2,300 airport executives at over 800 airports, the association has within its membership executives of large and medium-size airports, as well as hundreds of managers from smaller airports. AAAE's primary goal is to assist airport

executives to perform better their responsibilities to the airports and communities they serve.

AAAE has organized compliance programs for airports in connection with many federal regulatory programs. In particular, AAAE has been active in advising airports on environmental regulations and compliance, such as underground and aboveground storage tank compliance, noise pollution, air pollution and environmental auditing. AAAE has also been in the forefront of storm water compliance efforts, having submitted a group application to EPA on behalf of 605 airports.

Congress Should Address The Wetlands Issue In Reauthorizing the Clean Water Act

Government laws and regulations are intended to serve the interests of the people. In this process there are many varied interests that need representation. This is certainly true in the case of environmental law and regulation, including wetlands.

On the one hand, the Army Corps of Engineers (Corps), the U. S. Environmental Protection Agency (EPA) and other agencies tasked with regulation of wetlands, are under great pressure to protect and preserve environmental areas. On the other hand, the Federal Aviation Administration (FAA) is tasked with the responsibility of ensuring public safety in aviation.

From time to time, airports are caught squarely in the middle of these two laudable goals. Airports are required to abide by environmental regulations that restrict the disturbance of wetlands. At the same time, FAA requirements dictate that airports must engage in activities such as trimming or cutting trees that become an obstruction to the operating area of an airport, and thereby become an airport hazard that poses a threat to public safety. Additionally, other FAA regulations require the modification of terrain in

close proximity to runways to ensure safety areas that eliminate or limit potential hazards. Examples include:

- The term "airport hazard" is used and defined in the Airport and Airway Improvement Act (49 U.S.C. App. 2201 et sequ.) and is defined:

> "Airport Hazard" means any structure or object of natural growth located on or in the vicinity of a public-use airport, or any use of land near such an airport, which obstructs the airspace required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft.

- 14 CRF Part 77—"Objects Affecting Navigable Airspace," is the federal regulation affecting and ensuring the safe and clear areas surrounding airports. Part 77 subpart A (c) provides for aeronautical studies of obstructions to air navigation, to determine their effect on the safe and efficient use of airspace...

  Subpart C (a) establishes standards for determining obstructions to air navigation. It applies to existing and proposed manmade objects, objects of natural growth, and terrain.

- 14 CFR Part 139—"Certification And Operations: Land Airports Serving Certain Air Carriers," is the federal regulation prescribing rules governing the certification and operation of land airports which serve any scheduled or unscheduled passenger operation of an air carrier that is conducted with an aircraft having a seating capacity of more than 30 passengers.

Part 139 defines "Safety Area": a designated area abutting the edges of a runway or taxiway intended to reduce the risk of damage to an aircraft inadvertently leaving the runway or taxiway.

139.309 Safety Areas. (a) To the extent practicable, each certificate holder shall provide and maintain for each runway and taxiway which is available for air carrier use—

(b) Each certificate holder shall maintain its safety areas as follows:

(1) Each safety area shall be cleared and graded, and have no potentially hazardous ruts, humps, depressions, or other surface variations.

(2) Each safety area shall be drained by grading or storm sewers to prevent water accumulation.

With these FAA regulations in mind, the potential for conflict with wetlands regulations is obvious. Due to the nature of the land and terrain in and around most airports, the presence of wetlands areas tends to be likely. While it is not the intention of the airport community to degrade environmentally sensitive areas, it is certainly our intention and responsibility to preserve a safe operating environment. Current wetlands regulations have a tendency to obscure this responsibility.

Governmental agencies can sometimes inadvertently work at cross-purposes. Consider these examples which are illustrative of the problems airports can face:

Airports have reported instances where FAA regulations required actions such as trimming or cutting trees in order to maintain a clear zone (pursuant to FAR Part 77) but because the trees were located in a designated wetlands, a permit was not issued for the tree maintenance, thereby placing the airport out of compliance with FAA regulations as well as

putting the flying community at risk. At the same airport, a runway extension was determined, by FAA, to be necessary for safety reasons due to its inadequate length for the types of aircraft that regularly use the facility. The plans were approved by FAA to extend the runway into an already existing "clear zone." The clear zone is dry most of the year but was found to have a certain type of grass indigenous to wetlands. Because of this finding, the extension was not initially permitted. Seven years later, the extension was finally approved and finished. Construction costs for the extension totaled approximately three million dollars; cost of wetlands analysis, mitigation and legal fees totaled approximately $3.5 million. (Bellingham, WA).

Another report details a situation where a need arose to trim trees that were obscuring the control tower's view of a major taxiway and approach. Some of the trees violated the height requirements for transitional surfaces adjacent to instrument runways as prescribed by FAR Part 77. Because the trees were located in a wetlands, the regulatory agency stated that a permit would not be issued. As an alternative, the agency suggested a new tower be built in a location where visibility would not be a problem. Precisely one day before the airport was scheduled to go into state superior court and seek an injunction allowing the work to proceed, the agency agreed to issue a very limited permit to allow the work to proceed on a restricted scale. Under this limited allowance, the airport was not permitted to "clear cut" the area, but only trim the branches. Many trees had to be left at a height which will allow them to grow back and become obstructions again within a few years. (Morristown, NJ).

Wetlands Regulations Should Be Flexible In The Area of Airport Hazards

AAAE supports a change in existing law that would help to protect public safety by allowing activity in a wetland that would enhance aviation safety or is necessary to prevent an airport hazard. This narrow change to existing law would do much to ensure that the traveling public is not exposed to unsafe conditions at our nation's airports.

Conclusion

Although wetlands preservation is vitally important, public safety must always be the priority when federal regulations are found to be in conflict. Congress needs to provide guidance to regulatory agencies on the administration of wetlands programs. Uncertainty over which federal regulations take priority in a given situation should not be present at the expense of aviation safety. State regulatory agencies also very often follow federal guidelines and procedures. Congress needs to act to set regulatory agencies on the proper course and to keep these programs out of conflict and the courts.

We thank you for the opportunity to submit our views for the consideration of the committee and would be happy to work with the committee and staff to incorporate this needed change into the law.

* * * *

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STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION TO THE HOUSE PUBLIC WORKS AND TRANSPORTATION SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT REGARDING THE CLEAN WATER ACT REAUTHORIZATION

May 26, 1994

STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION TO THE HOUSE PUBLIC WORKS AND TRANSPORTATION SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT REGARDING THE CLEAN WATER ACT REAUTHORIZATION

May 26, 1994

The American Farm Bureau Federation (AFBF) is pleased to offer this statement to the House Public Works and Transportation Committee concerning the reauthorization of the Clean Water Act (CWA). Water quality is of great importance to the four million member families of Farm Bureau. Farm and rural families have a personal stake in protecting water quality. Our membership -- their families, crops, livestock and land -- is heavily dependent on water quality. Specifically, our members are concerned about water within their watershed and the impacts that mandated, prescriptive nonpoint source management plans, penalty-based enforcement and property-use restrictions will have on their lives.

AFBF cannot support H.R. 3948, "The Water Quality Act of 1994," in its present form. We believe this bill as currently written is simply the wrong way to address water quality. We believe it is unnecessarily prescriptive, inflexible and punitive and would not foster the cooperation and partnership needed between landowners and government to ensure that our water quality efforts are achieved.

The commitment to improve water quality has been, and will continue to be, an extremely expensive process, for both the public and private sector. Farmers and ranchers maintain intricate businesses that deal daily with the cost of compliance with government regulations. There is great concern with an apparent endless stream of complex environmental rules and the failure by policymakers to recognize the massive investment in conservation made by farmers over the last decade.

According to a scientific study conducted by the U.S. Geological Survey[1], stream water quality in the contiguous United States improved during the 1980s. This improvement in the nation's water quality is notable because it happened during a decade when the economy and population experienced significant growth.

This committee stands at a clean water crossroads...a crossroads where political and fiscal realities present very clear policy choices. The choice should be one that provides opportunity to achieve water quality and greater environmental improvement at lower cost and with minimum restrictions. The act is working! Flexibility, market-based incentives, adequate funding and time will enable us to reach the goal.

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[1]Stream Water Quality in the Conterminous United States--Status and Trends of Selected Indicators During the 1980s, Richard A. Smith, Richard B. Alexander, and Kenneth J. Lanfear, U.S. Geological Survey, 1993

We believe the CWA should provide enough flexibility to allow states and landowners to develop cooperative, site-specific solutions to water quality problems. Local solutions to local problems are the best approach. We believe this committee can accomplish the nation's goals for clean water by addressing the following issues:

Private Property Rights: Farm Bureau supports property rights language that requires compensation for the loss of property value resulting from regulation. If use of property is restricted for "the public good," it is only fair that the owner be compensated by the public for his loss. Regulations that ignore constitutional property rights penalize many Americans who cannot afford costly litigation to protect these rights.

Adequate Funding: This committee should adequately fund nonpoint source programs. A lack of follow-through on the 1987 CWA has severely hampered further progress in nonpoint source pollution. The most obvious problem with the 319 programs has been the failure of the federal government to fulfill its obligation. Farmers and ranchers have little control over and should not be held accountable for a process that authorizes funding at one level and then appropriates government funds at far less than authorized. Farm Bureau supports an adequately funded nonpoint program. It is essential to ensure that resources are made available to farmers and ranchers in the form of technical assistance, cost-sharing and tax credits.

Unfunded Mandates: Farm Bureau also supports safeguards to ensure that if optimistic funding authorization does not materialize, state and local government and the private sector are not left with mandates and programs without the funds needed to implement them.

Scientific Assessment: Independent analysis of water quality by USDA-EPA indicates that agriculture is **likely** (facts are unknown) to be a problem in only 20 to 30 percent of streams. If this independent analysis indicates the true extent of agriculture's nonpoint pollution, then it is a manageable problem. It's not the crisis that EPA indicates in its 305b reports. But, as long as EPA keeps placing more fuel on the fire of misperception, this committee will be pushed to require a one-size-fits-all regulatory straitjacket on farmers and ranchers. The CWA reauthorization should not reward EPA with yet more funds for bad science and heavy-handed regulations.

The U.S. Geological Survey has concluded that to conduct a statistically-based analysis of water-quality trends, 10 consecutive years of water-quality data are needed to help distinguish short-term variability from long-term changes.

Nonpoint Source: Voluntary conservation endeavors by farmers and ranchers have been instrumental in bringing about meaningful and cost-effective solutions to agricultural nonpoint source pollution problems. Farm Bureau believes that well-funded voluntary programs are more effective and more efficient than

government mandates. Thus far, farmers and ranchers have not been given the support they deserve. Big government is not the answer; solid, voluntary approaches to non-point source concerns should be given a legitimate chance to succeed. Farm Bureau encourages a solution that provides enough flexibility to allow local solutions to local problems and supports incentives for individuals and states to voluntarily adopt site-specific management plans and watershed/basin approaches to water pollution control.

Pollution Prevention Planning: Farm Bureau supports an initiative that directs EPA to undertake demonstration projects on trading of pollution credits. We suggest multiple demonstration projects like that in the Tar-Pamlico region of North Carolina. This type of program affords landowners the opportunity to pursue voluntary bottom-up, incentive-based solutions. Given the uncertainty over federal funding for nonpoint source pollution, this approach offers another solid option with minimal federal investment. This is the one approach that we believe will achieve the most real water quality gains for money spent while protecting the economic interests of all participants.

Anti-degradation: Mandating the development and implementation of strict anti-degradation policy will ultimately restrain economic growth and development. Farm Bureau supports a flexible anti-degradation policy that gives states flexibility to achieve efficient economic growth and development.

Risk Assessment, Cost/benefit Analysis: A regulatory goal of zero risk/zero pollution is not achievable in the real world. This committee should recognize the economic waste associated with a focus based on risk alone. We can do better than forcing the private sector over one regulatory hurdle after another with little to show in terms of human health and safety gains. Farm Bureau supports the incorporation of good science, risk assessment and cost/benefit analysis into regulatory decision-making.

Wetlands: Farm Bureau supports the Hayes bill, H.R. 1330. We believe it adopts meaningful Section 404 reform that:

- provides a realistic wetlands definition;
- excludes prior converted cropland;
- clarifies normal farming, ranching and silvicultural practices;
- classifies wetlands by function and value;
- provides compensation;
- excludes man-made wetlands;
- recognizes compatible wetland crops;
- provides for an appeals process; and
- provides for single agency authority.

In addition, Farm Bureau also supports wetlands delineator certification.

Enforcement and Citizen Suits: Few farmers have the time and resources to defend themselves against the harassment and threat posed by citizen enforcement. In addition, very few citizens understand the complexities of modern agriculture or the increasingly complex requirements of the CWA regulations. In this regard, Farm Bureau opposes any new enforcement and citizen suit provisions.

Expanded Criteria and Standards: The resolution of the CWA will have broad impacts on economic growth and development as well as human and ecological health. Unfortunately, the issues surrounding the clean water debate are absent of conclusive information about existing water quality and what influences current control measures and land-use have on water quality. But one thing is certain, expanded criteria and standards create moving targets and unrealistic objectives. The result is costly food and fiber production. Farm Bureau recommends that the CWA maintain its current scope and avoid provisions for groundwater and drinkable water quality standards.

Problems with EPA's Water Quality Inventory: The Clean Water Act is being debated largely in the absence of conclusive information about existing water quality. We lack the necessary data to determine the influence of current control measures and of various land use and basin characteristics on water quality.

We should not make the expensive mistake of placing credibility in EPA's latest Water Quality Inventory. According to the U.S. Geological Survey, EPA's 305(b) reports are severely flawed and scientifically invalid--305(b) reports contain data with methodological inconsistencies from state to state and in time. These inconsistencies make it impossible to accurately aggregate national water quality condition and trends from state reports.

EPA trends defy logic. Crop residue management went up more than 18 million acres in the two years since EPA issues the last National Water Quality Inventory report 1990. That report found 70 percent of the nation's waters met their designated uses. This latest EPA inventory found that water quality has declined significantly, despite the dramatic increase in crop residue management--from about 142 million acres in 1989 to more than 170 million acres today--and the addition of 36 million acres in the conservation reserve program. Since all of these practices have greatly reduced soil erosion and sediment, this EPA inventory report, which indicates agriculture's impact on water quality is worsening, just doesn't add up.

States reported to EPA a total of 241,407 miles of streams as being "impaired." Agriculture was identified as one of the sources of impairment on 159,353 miles (66 percent of the impaired miles). That's up from 60.5 percent in 1990. States only assessed 642,881 miles (18.4 percent) of the nation's 3.5 million miles of intermittent and perennial streams for the 1992 report.

The case could be made that agriculture is impairing only 4.6 percent of the 3.5 million miles of streams in the U.S., or that it is impairing 24.8 percent of the assessed miles. Which is right, 4.6, 24.8 or 66 percent? They all are.

We believe this report is inconsistent and disregards agriculture's progress in implementing effective best management practices that improve water quality.

The U.S. Geological Survey indicates that EPA's inventory is based solely on state water quality reports that lack sound scientific assessment of agriculture's true relationship with water quality. Data was not provided to EPA by states in a uniform or scientific manner. EPA required no consistent or scientific methodology. EPA's 305(b) reports lack any scientific basis. They are not subject to scientific peer-review. States lack the incentive and/or funding to implement scientific water quality assessment procedures. Many states have not accurately identified water quality problems or the cause-and-effect linkages between farm practices and water quality. In, general, state assessments are based on a combination of ambient monitoring networks, local scale studies conducted for regulatory purposes, and **professional judgment** of state water quality officials. There is little consistency among state programs in the temporal and spatial scales of data collection, the procedures used to collect and analyze the data, or the types of data collected. As a result of these methodological inconsistencies, comparing results from one biennial report to the next to monitor change is impossible.[2]

Summary---Water Quality Trends: We have also compiled and attached a summary of water quality trends as developed by the U.S. Geological Survey.[3]

U.S. Geological Survey found the following trends:

1. Nitrate concentrations and yields in larger streams and rivers have remained nearly constant nationally, but they declined in streams draining agricultural areas where nitrate levels have been historically high.

2. Total-phosphorus yields decreased at least slightly in all land-use classes. Decreases in total-phosphorus yield were greatest in the agricultural and range land-use areas.

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[2]Ibid.

[3]Farm Bureau acknowledges the U.S. Geological Survey's efforts to scientifically asses water quality for providing the extensive details needed to develop this summary.

3. Suspended-sediment concentrations and yields decreased slightly in most of the country, and the quantity of suspended sediment transported to coastal segments decreased or remained the same in all but the North Atlantic region.

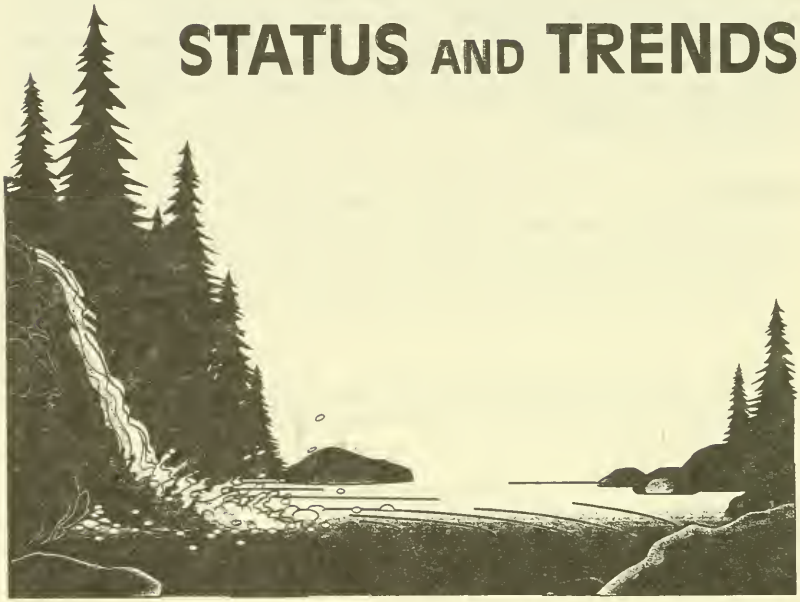
4. Concentrations of the toxic elements arsenic, cadmium and lead and the organic compounds chlordane, dieldrin, DDT, Toxaphene and total PCB's declined significantly.

We believe these trends indicate progress made by agriculture in addressing nonpoint source pollution. We also believe they dispel many of the generalizations, popular misperceptions, unscientific assessments and inconsistencies contained within EPA's national water quality inventory. We hope this summary of scientific information indicates a clear policy choice...a choice for voluntary cost-effective economic incentive vs. an expensive "command-and-control" regulatory strategy.

Attachment

Stream Water Quality in the Conterminous United States

STATUS AND TRENDS



Summarized by the American Farm Bureau Federation

National Water Summary 1990-91: Hydroligic Events and Stream Water Quality United States Geological Survey Water Supply Paper 2400, 1993

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EXECUTIVE SUMMARY[1]

Statistical summaries of national water-quality conditions and trends provide decisionmakers and the public with objective measures of progress towards water-quality goals. Ideally, the data for national water-quality summaries should (a) be geographically representative, (b) include a variety of chemical and biological indicators, and (c) provide a basis for determining water-quality trends. Existing water-quality data fall short of this ideal in several respects. First, due to a lack of scientific consensus on the nationwide validity of any single biological indicator in streams, few national-level data exist to describe biological conditions. Second, there are only a few national-level data series on toxic contaminants in streams, such as pesticides, industrial organic compounds, and toxic trace metals. **Finally, state reporting of water quality that is mandated by section 305(b) of the Clean Water Act to assess whether waterbodies support designated uses contains serious methodological inconsistencies from state to state and over time. These inconsistencies make it impossible to summarize national water-quality conditions and trends from states reporting water quality.**

Trends in other traditional indicators provide evidence of improvement in stream water quality during a decade when the economy and population showed significant growth.

(1) Dissolved-oxygen concentrations nationally changed little from 1980 to 1989, but streams in urban areas showed slight improvement in dissolved-oxygen conditions, possibly reflecting the effect of improving point-source controls.

(2) Nitrate concentrations and yields remained nearly constant nationally, but they declined in a number of streams draining agricultural areas where nitrate levels have been historically high. This general tendency toward constant or declining nitrate concentrations represents a significant departure from the pattern of trends for 1974-81, when widespread increases in nitrate were reported.

(3) Total-phosphorus yields decreased at least slightly in all land-use classes. Decreases in total-phosphorus yield were greatest in the agricultural and range land-use areas. Phosphorus-fertilizer use decreased nationally by 16 percent during 1980-85. A possible additional factor in the decline in total-phosphorus yields in agricultural areas is the general trend toward declining erosion rates and suspended-sediment yields in rural areas. Soil-erosion rates have a potentially important influence on nonpoint-source yields of total phosphorus due to a strong tendency for phosphorus to absorb to soil particles.

(4) Suspended-sediment concentrations and yields decreased slightly in most of the country, and the quantity of suspended sediment transported to coastal segments decreased or remained the same in all but the North Atlantic region.

(5) Concentrations of the toxic elements arsenic, cadmium, and lead and the organic compounds chlordane, dieldrin, DDT, toxaphene, and total PCB's all declined significantly.

(6) Although national-level information on trends in pesticides in stream water is not available, recent studies of herbicide concentrations in streams in agricultural areas of the midwestern United States from 1989 to 1991 provide important regional information on the magnitude and distribution of herbicides in streams. These studies show that, during the first runoff in 1989 following herbicide application, atrazine exceeded applicable EPA drinking-water criteria. Additional sampling for these herbicides in the Mississippi River and its major tributaries showed that alachlor and atrazine occasionally exceeded EPA drinking-water criteria and that substantial quantities of these herbicides are transported by major rivers over long distances.

<u>Conclusion:</u>

Stream water quality in the conterminous United States either improved or remained about the same during the 1980's as shown by most available measures.

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[1]Stream Water Quality in the Conterminous United States--Status and Trends of Selected Indicators During the 1980s By Richard A. Smith, Richard B. Alexander, and Kenneth J. Lanfear, U.S. Geological Survey, 1993

NATIONAL WATER-QUALITY MONITORING[1]

The primary reason for the lack of abundant and scientifically valid data is that water-quality monitoring is technically demanding and expensive, as are most types of environmental monitoring. Moreover, as monitoring programs have evolved over the past 20 years, ideas have changed about which water-quality indicators are important and how to measure them. As a result, long periods have elapsed between recognition of water-quality problems and the availability of national-level data that describe their occurrence, severity, and trends over time.

In conducting a statistically based analysis of water-quality trends, as many as 10 consecutive years of water-quality data are needed to help distinguish short-term variability from long-term changes.

Scientific Assessment

Scientific water quality monitoring requires data. Therefore, any national water quality program or policy must be designed to monitor a wide variety of biological, chemical, and physical indicators. Lawmakers must consider that nearly a decade will be required to amass the quantity of data needed to document environmentally and statistically significant trends in water quality. Ideally, the data for national water-quality summaries should (a) be geographically representative, (b) include a variety of chemical and biological indicators, and (c) provide a basis for determining water-quality trends.

Summary

Trends in other traditional indicators provide evidence of improvement in stream water quality during a decade when the economy and population showed significant growth.

(1) Nitrate concentrations and yields remained nearly constant nationally, but they declined in a number of streams draining agricultural areas where nitrate levels have been historically high. This general tendency toward constant or declining nitrate concentrations represents a significant departure from the pattern of trends for 1974-81, when widespread increases in nitrate were reported.

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(3) Suspended-sediment concentrations and yields decreased slightly in most of the country, and the quantity of suspended sediment transported to coastal segments decreased or remained the same in all but the North Atlantic region.

See Figures 1, 2, 3, & 4

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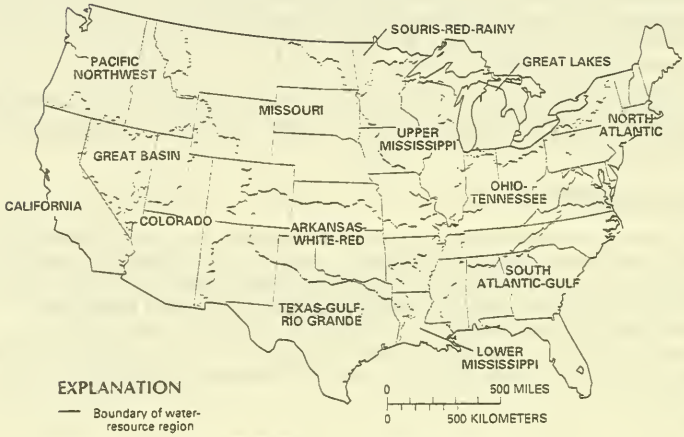
[1]Stream Water Quality in the Conterminous United States--Status and Trends of Selected Indicators During the 1980s By Richard A. Smith, Richard B. Alexander, and Kenneth J. Lanfear, U.S. Geological Survey, 1993



WATER-RESOURCES REGION SHOWN ON MAP	NITRATE 1980–89		TOTAL PHOSPHORUS 1982–89		SUSPENDED SEDIMENT 1980–89	
	Yield, in tons per square mile per year	Percentage change per year	Yield, in tons per square mile per year	Percentage change per year	Yield, in tons per square mile per year	Percentage change per year
North Atlantic	0.558	*	0.077	−1.4	32	−0.4
South Atlantic-Gulf	0.226	*	0.092	+0.1	20	+0.2
Great Lakes	0.647	*	0.067	−3.3	36	+0.5
Ohio-Tennessee	0.847	*	0.125	−1.0	85	−1.3
Upper Mississippi	0.989	−0.4	0.157	−1.2	102	−1.3
Lower Mississippi	0.333	−1.6	0.103	−3.8	111	−1.2
Souris-Red-Rainy	0.011	*	0.008	−0.8	4	+1.2
Missouri	0.060	*	0.028	−1.7	45	−0.2
Arkansas-White-Red	0.056	*	0.039	−3.1	31	−0.7
Texas-Gulf-Rio Grande	0.012	*	0.014	−0.9	15	−0.6
Colorado	0.057	*	0.036	−2.4	92	−0.8
Great Basin	0.049	*	0.018	−2.7	21	−0.2
Pacific Northwest	0.225	*	0.063	−1.7	40	−0.1
California	0.047	*	0.060	−1.4	21	−0.6

* Between −0.1 and +0.1.

Figure 1. Yield and percentage change in yield of nitrate, total phosphorus, and suspended sediment in 14 water-resources regions of the conterminous United States. (Source: Data from U.S. Geological Survey files; water-resources regions modified from Seaber and others, 1987.)

PLANT NUTRIENT APPLICATION RATES

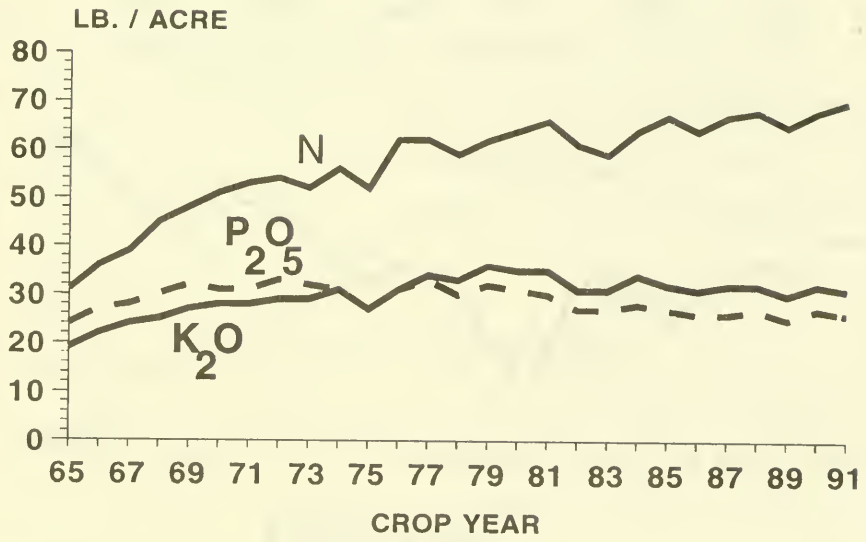


FIGURE 2
AFBF Public Policy Division
MAY 94:PLANTNUT

INDEX OF AGRICULTURAL CHEMICALS
1982=100

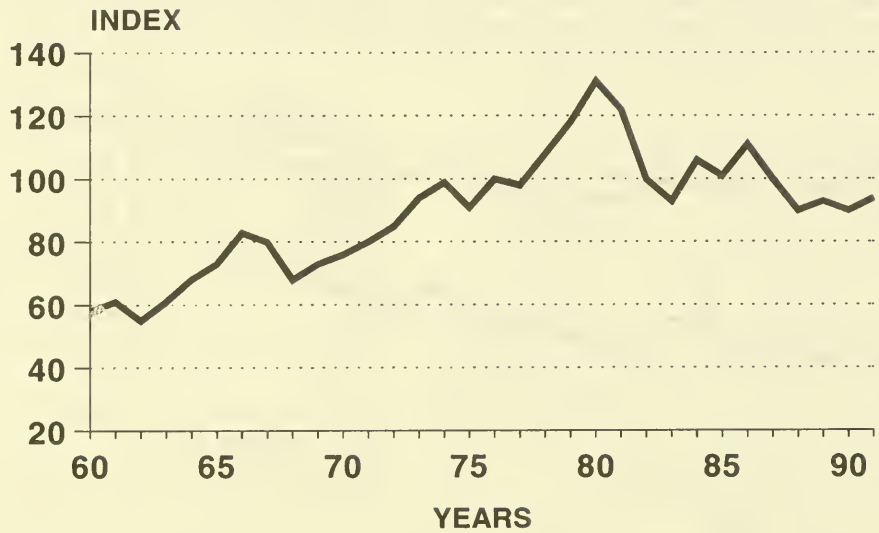


FIGURE 3
AFBF Public Policy Division
MAY 94:IDXAGCHM

HERBICIDE, & INSECTICIDE TOTAL PESTICIDE USE

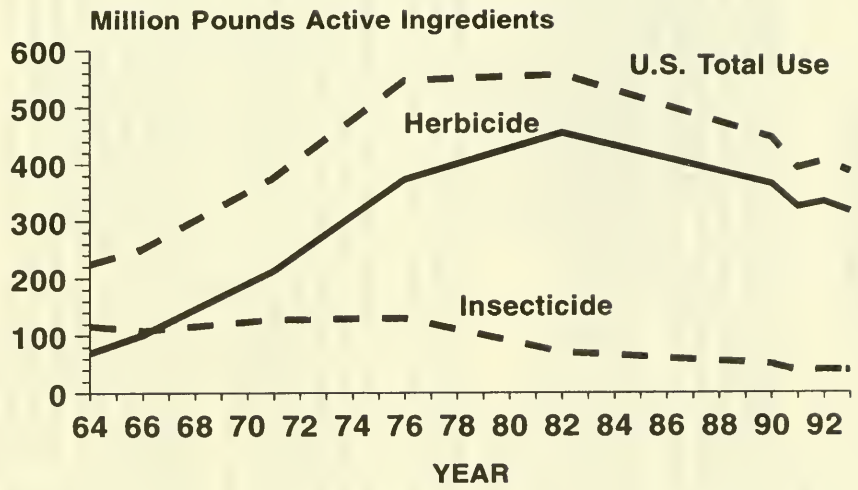


FIGURE 4
AFBF Public Policy Division
MAY 94:PESTICID

85-427 95 – 46

DISSOLVED OXYGEN[1]

Background

Dissolved oxygen is essential to the respiration of aquatic organisms. Dissolved oxygen in streams has a profound effect on the biochemical reactions that occur in water and sediments, which in turn affect numerous aspects of water quality, including the solubility of many toxic elements and esthetic qualities of odor and taste. Dissolved oxygen historically has been one of the most frequently measured indicators of water quality.

Major sources of substances that cause depletion of dissolved oxygen in streams are discharges from municipal and industrial wastewater-treatment facilities; leaks and overflows from sewage lines and septic tanks; stormwater runoff from agricultural and urban land; and decaying vegetation, including aquatic plants from the stream itself and detrital terrestrial vegetation.

National Trends

In general, higher levels of dissolved oxygen represent an improvement in water quality. Among the four land-use types (agriculture, forest, range, and urban), the average concentrations of dissolved oxygen were the lowest at stations in urban areas.

Upward trends (38 stations) in dissolved-oxygen concentration outnumbered downward trends (26 stations). Concentration increases were especially numerous in the central states. Nationally, the percentage of stations, about one-fifth, having more than 20 percent concentrations remained nearly constant. Similarly, the percentage of stations having more than 20 percent dissolved-oxygen-deficit remained constant at about 9 percent. In urban areas, however, the percentage of stations having more than 20 percent dissolved-oxygen concentrations decreased from 42 in 1981 to 21 percent in 1989.

At the national level, part of the explanation for the lack of further change in dissolved-oxygen concentration could be that much of the investment in point-source pollution controls simply has served to keep pace with population increases and economic development. Oxygen-demanding waste loads declined substantially in the 1970's but were nearly stable during the 1980's. Despite point-source control expenditures, the loads did not decline in the 1980's, because during that decade the population increased by 10 percent and the real gross national product increased by 30 percent (U.S. Bureau of the Census, 1990). The maintenance of nearly constant dissolved-oxygen concentration in streams during this period of increased pollution generation represents an important environmental accomplishment.

See Figure 5

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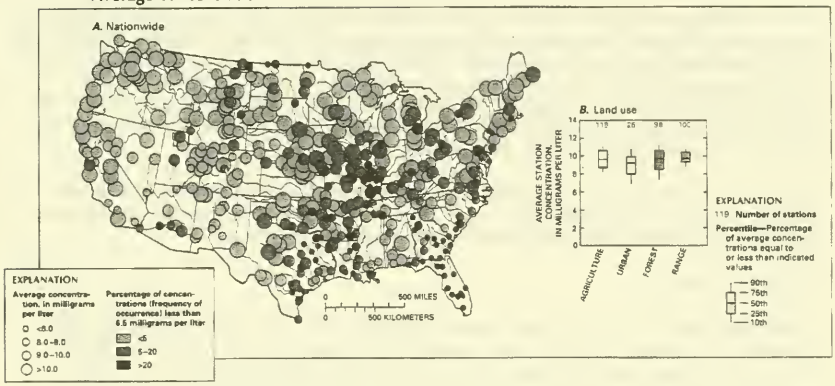
[1]Stream Water Quality in the Conterminous United States--Status and Trends of Selected Indicators During the 1980s By Richard A. Smith, Richard B. Alexander, and Kenneth J. Lanfear, U.S. Geological Survey, 1993

Dissolved oxygen 1980–89

Average concentration



Trends in concentration

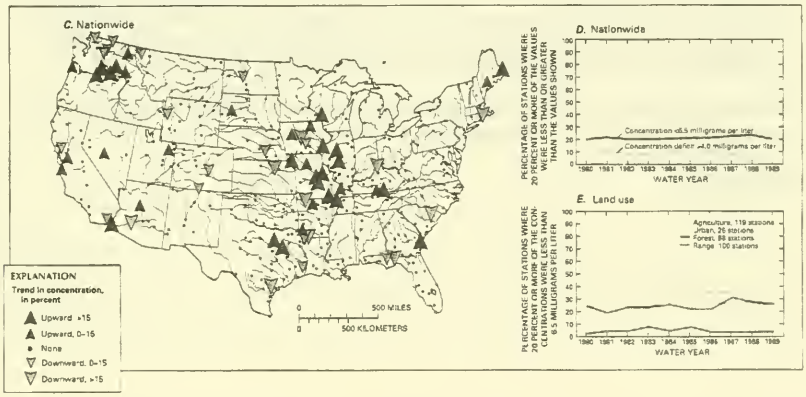


Figure 5 Concentration and trends in dissolved oxygen in stream water at 424 selected water-quality monitoring stations in the conterminous United States, water years 1980–89. (Because some cataloging units do not qualify for the land uses shown in *B* and *E*, the total number of stations represented is less than the 424 stations used to compute *A*, *C*, and *D*.) *A*, Average concentration and percentage of concentrations less than 6.5 mg/L (milligrams per liter) nationwide. *B*, Average concentration, by land use. *C*, Trends in concentration nationwide. *D*, Percentage of stations nationwide where 20 percent or more of the dissolved-oxygen concentrations were less than 6.5 mg/L and 20 percent or more of the dissolved-oxygen-deficit concentrations were greater than 4.0 mg/L. *E*, Percentage of stations where 20 percent or more of the dissolved-oxygen concentrations were less than 6.5 mg/L, by land use. >, greater than; <, less than. (Source: Data from U.S. Geological Survey files.)

FECAL COLIFORM BACTERIA[1]

Background

The concentration of fecal coliform bacteria has been considered an important indicator of water quality because the presence of these organisms in streams is a reliable indicator of fecal contamination from warm-blooded animals. The presence of fecal material in water where humans swim or where shellfish are harvested presents a significant risk of infection from pathogenic organisms associated with fecal coliform bacteria. The major sources of fecal coliform bacteria are untreated sewage, effluent from sewage-treatment plants, and runoff from pastures, feedlots, and urban areas.

In agricultural and urban areas, average concentrations of fecal coliform bacteria were greater than those in forested and range areas; this is expected because the former areas are known to contain point and nonpoint sources of fecal bacteria.

National Trends

Downward trends in fecal-coliform concentrations occurred at 40 stations and upward trends at 10 stations. Concentration decreases were especially common in the central part of the country, and they occurred in cataloging units that had significant urban, agricultural, or range land use. The percentage of stations nationwide where the annual average concentration was greater than 1,000 colonies/100 mL decreased from 18 to 13 percent, and the percentage of stations having annual average concentrations greater than 200 colonies/100 mL decreased from 52 to 35 percent. From 1980 to 1989, in all land-use areas except forested areas, the percentage of stations in which the annual average concentration was greater than 200 colonies/100 mL decreased.

Trends suggest that control of point and nonpoint sources of fecal coliform bacteria improved over the course of the decade.

See Figure 6

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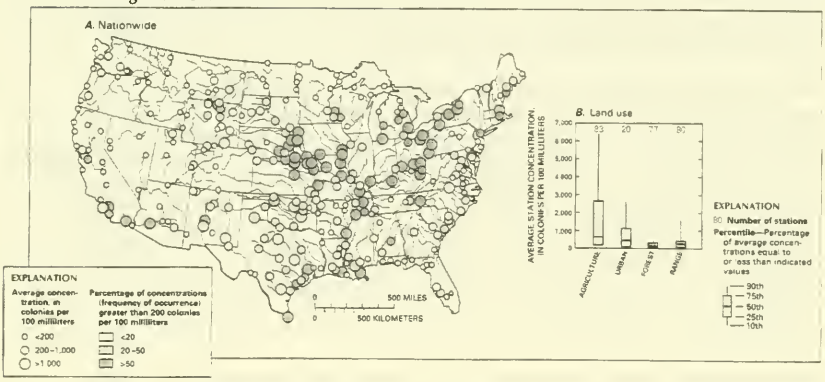
[1]Stream Water Quality in the Conterminous United States--Status and Trends of Selected Indicators During the 1980s By Richard A. Smith, Richard B. Alexander, and Kenneth J. Lanfear, U.S. Geological Survey, 1993

Fecal coliform bacteria 1980–89

Average concentration



Trends in concentration

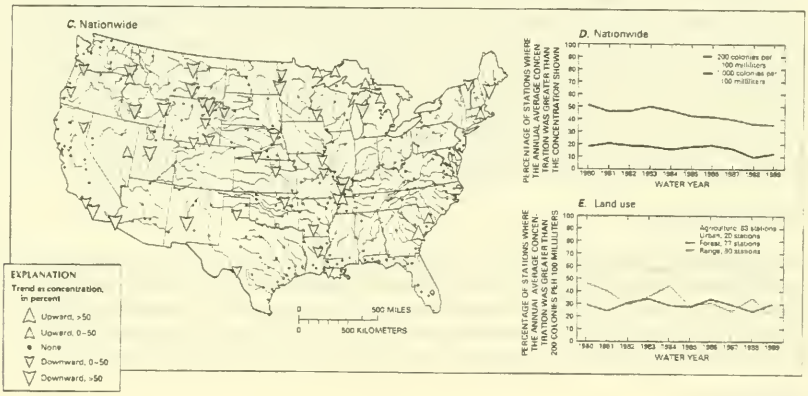


Figure 6 Concentration and trends in fecal coliform bacteria in stream water at 313 selected water-quality monitoring stations in the conterminous United States, water years 1980–89. (Because some cataloging units do not qualify for the land uses shown in *B* and *E*, the total number of stations represented is less than the 313 stations used to compute *A*, *C*, and *D*.) *A*, Average concentration and percentage of concentrations greater than 200 colonies per 100 milliliters nationwide. *B*, Average concentration, by land use. *C*, Trends in concentration nationwide. *D*, Percentage of stations nationwide where the annual average concentration was greater than 200 or 1,000 colonies per milliliter. *E*, Percentage of stations where the annual average concentration was greater than 200 colonies per 100 milliliters, by land use. >, greater than; <, less than. (Source: Data from U.S. Geological Survey files.)

DISSOLVED SOLIDS[1]

Background

Dissolved solids refers to the sum of all dissolved constituents in a water sample. In most streams the major components of dissolved solids are the ions of calcium, magnesium, sodium, potassium, bicarbonate, sulfate, and chloride.

In most streams the major source of dissolved solids is the dissolution of minerals naturally found in soil and rock. Because of the wide variation in the solubility of different minerals, and in the amount of precipitation available to dissolve them, the concentration of dissolved solids in streams nationwide ranges from only a few milligrams per liter to several thousand milligrams per liter. Within this broad range, the highest dissolved-solids concentrations are found in the arid Southwest, where high rates of evaporation and transpiration tend to concentrate dissolved solids. Concentrations are medium to high in parts of the midwestern states, where soluble carbonates are abundant, and they are lowest in the eastern and northwestern parts of the United States, where high precipitation rates dilute dissolved constituents. Average concentrations were lowest in forested areas and highest in range areas, which reflect the more arid areas of the country.

Human activities contribute significantly to dissolved-solids concentrations in most regions, however. A moderate correlation between population and dissolved-solids concentration in streams has long been noted for much of the eastern and northwestern United States, where point-source municipal and industrial effluents typically have higher dissolved-solids concentrations than their receiving streams. Also, land disturbance associated with mining and agriculture increases the exposure of mineral deposits to precipitation and increases the nonpoint-source load of dissolved solids. In recent years, the correlation between population and dissolved-solids concentrations has been strengthened by the increased dissolved salts in streams as a result of the increased use of highway deicing salt. In addition, in arid regions, reservoirs have increased evaporation rates, which result in higher stream concentrations of dissolved solids.

National Trends

Nationwide trends in dissolved-solids concentration varied throughout the 1980-89 period, and downward trends (46 stations) outnumbered upward trends (28 stations) among a total of 340 stations. Downward trends were especially common in the central part of the country, the Pacific Northwest, and far southwestern United States, whereas upward trends were most common in drainage to the Gulf of Mexico and Atlantic Ocean.

See Figure 7

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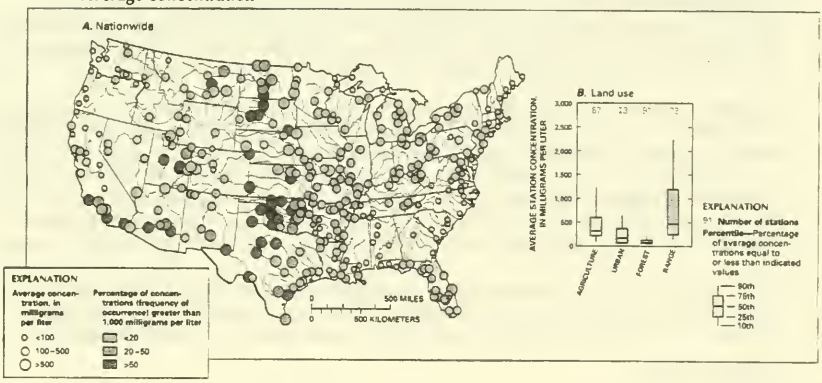
[1]Stream Water Quality in the Conterminous United States--Status and Trends of Selected Indicators During the 1980s By Richard A. Smith, Richard B. Alexander, and Kenneth J. Lanfear, U.S. Geological Survey, 1993

Dissolved solids
1980–89

Average concentration



Trends in concentration

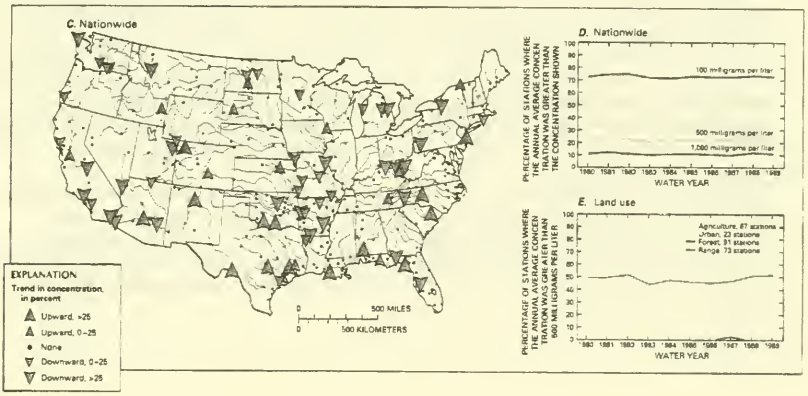


Figure 7 Concentration and trends in dissolved solids in stream water at 340 selected water-quality monitoring stations in the conterminous United States, water years 1980–89. (Because some cataloging units do not qualify for the land uses shown in *B* and *E*, the total number of stations represented is less than the 340 stations used to compute *A*, *C*, and *D*.) *A*, Average concentration and percentage of concentrations greater than 1,000 mg/L (milligrams per liter) nationwide. *B*, Average concentration, by land use. *C*, Trends in concentration nationwide. *D*, Percentage of stations nationwide where the annual average concentration was greater than 100, 500, or 1,000 mg/L. *E*, Percentage of stations where the annual average concentration was greater than 500 mg/L, by land use. >, greater than; <, less than. (Source: Data from U.S. Geological Survey files.)

NITRATE[1]

Background

High nitrate concentrations in streams can have serious toxicological and ecological effects. The most clearly established human-health hazard of high nitrate concentrations in drinking water is that of methemoglobinemia, a potentially fatal disease primarily of infants. Nitrate concentrations rarely exceed threshold level in streams.

Ecological concern about high concentrations of nitrate in streams stems from its potential for contributing to eutrophication, which is the excessive growth of aquatic plants that can impart unpleasant odors and tastes to water and reduce its clarity, and, upon dying, can lower the dissolved-oxygen concentrations. It has not been possible, however, to establish a nationally applicable threshold concentration for nitrate to protect against eutrophication because effects of nitrate concentrations are highly variable from place to place and are greatest in coastal waters that are far removed from inland nitrate sources.

Major sources of nitrate in streams are municipal and industrial wastewater discharge and agricultural and urban runoff. Deposition from the atmosphere of the nitrogenous material in automobile exhaust and industrial emissions also is a significant source.

National Trends

Downward trends (27 stations) in nitrate concentration outnumbered upward trends (22 stations) among a total of 344 stations. Downward trends occurred predominately in the eastern, south-central, and southeastern United States, whereas upward trends were geographically scattered. There is some evidence of success in reducing nitrate levels in streams having very high concentrations because the percentage of stations nationwide having annual high average concentrations declined. In agricultural areas, the percentage of stations where the annual average concentration was greater than 1 mg/L reached a peak of 46 percent in 1984 and then declined to 34 percent by 1989.

1980-89 trends in nitrate concentration represent a noteworthy change from the period 1974-81, when increases in nitrate were widespread and appeared related to large increases in nitrogen-fertilizer use through 1981. The lack of a nationwide trend in nitrate concentration in streams during the 1980's, therefore, is consistent with the fact that nitrogen fertilizer use peaked in 1981 and has remained approximately at that level since.

See Figure 8

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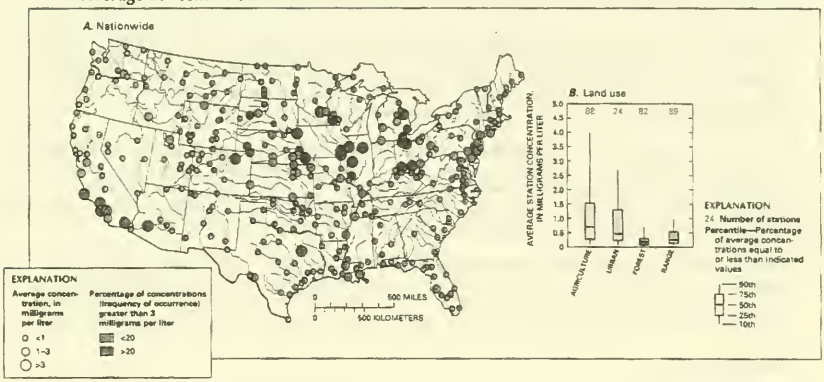
[1]Stream Water Quality in the Conterminous United States--Status and Trends of Selected Indicators During the 1980s By Richard A. Smith, Richard B. Alexander, and Kenneth J. Lanfear, U.S. Geological Survey, 1993

Nitrate
1980–89

Average concentration



Trends in concentration

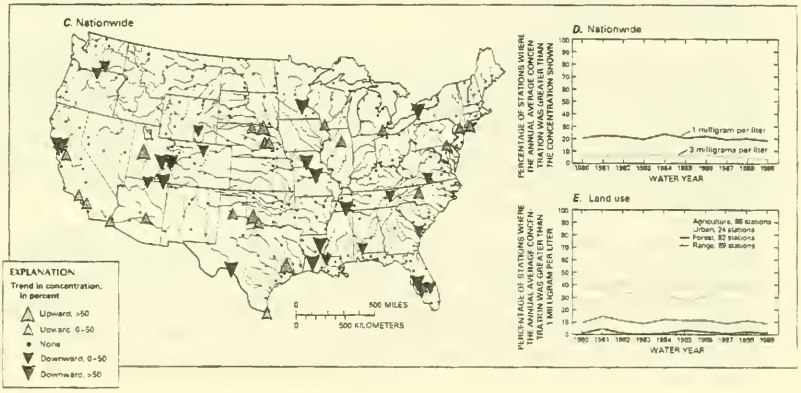


Figure 8 Concentration and trends in nitrate in stream water at 344 selected water-quality monitoring stations in the conterminous United States, water years 1980–89. (Because some cataloging units do not qualify for the land uses shown in *B* and *E*, the total number of stations represented is less than the 344 stations used to compute *A*, *C*, and *D*.) *A*, Average concentration and percentage of concentrations greater than 3 mg/L (milligrams per liter) nationwide. *B*, Average concentration, by land use. *C*, Trends in concentration nationwide. *D*, Percentage of stations where the annual average concentration was greater than 1 or 3 mg/L. *E*, Percentage of stations where the annual average concentration was greater than 1 mg/L, by land use. >, greater than; <, less than. (Source: Data from U.S. Geological Survey files.)

TOTAL PHOSPHORUS[1]

Background

In streams, phosphorus occurs primarily as phosphate and can be either dissolved, incorporated in organisms, or attached to particles in the water or in bottom sediments.

Phosphorus is a particularly important nutrient in freshwater ecosystems because, phosphorus usually is the nutrient in shortest supply and its availability often controls the rate of eutrophication. When human activities make phosphorus available in larger quantities, the accelerated growth of algae and other aquatic plants in streams can cause eutrophication, which depletes dissolved oxygen, imparts undesirable tastes and odors in the water, and clogs water-supply intakes.

Sources of phosphorus are the decomposition of organic matter and inorganic phosphate minerals that are mined and incorporated in fertilizers, detergents, and other commodities. Thus, major point sources of phosphorus to streams are waste discharges from sewage-treatment and industrial facilities. Nonpoint sources of phosphorus include agricultural and urban runoff and, in certain regions, the runoff and ground-water flow from areas that contain natural deposits of phosphate minerals.

Average total-phosphorus concentrations for the 1982-89 period show a higher concentration in agricultural areas but show a wider range of concentrations in urban areas. Total-phosphorus concentrations are high in urban areas, where streams are influenced by a combination of point an nonpoint sources, and in west-central Florida, where there are large deposits of phosphate minerals.

National Trends

Nationally, downward trends (92 stations) in total phosphorus occurred very widely and outnumbered upward trends (19 stations) by a factor of almost 5 to 1. Downward trends occurred in all regions but occurred most frequently in the central states and the Great Lakes region. Upward trends occurred most frequently in the southeastern states.

The widespread pattern of a decline in total-phosphorus concentrations during the 1980's appears to represent the geographic expansion of a pattern begun in the 1970's when downward trends were only slightly more numerous than upward trends, and occurred mostly in the Great Lakes area and the upper Mississippi River basin. Upward trends occurred most frequently in the Southeast. It is likely that widespread declines in total-phosphorus concentrations during the 1980's reflect significant reductions in point-source loads that occurred during the period and some reduction in nonpoint-source loads. The reasons for changes in nonpoint-source loads of phosphorus are more difficult to determine, but phosphorus-fertilizer use has declined more than 20 percent since 1979, and phosphorus contributions from livestock waste declined about 10 percent from 1982 to 1987.

Total-phosphorus yields decreased at least slightly in all land-use classes, a result that is consistent with the regional pattern of yield changes described previously. Decreases in total-phosphorus yield were greatest in the agricultural and range land-use areas. Phosphorus-fertilizer use decreased nationally by 16 percent during 1980-85. A possible additional factor in the decline in total-phosphorus yields in agricultural areas is the general trend toward declining erosion rates and suspended-sediment yields in rural areas. Soil-erosion rates have a potentially important influence on nonpoint-source yields of total phosphorus due to a strong tendency for phosphorus to absorb to soil particles.

See Figure 9

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[1]Stream Water Quality in the Conterminous United States--Status and Trends of Selected Indicators During the 1980s By Richard A. Smith, Richard B. Alexander, and Kenneth J. Lanfear, U.S. Geological Survey, 1993

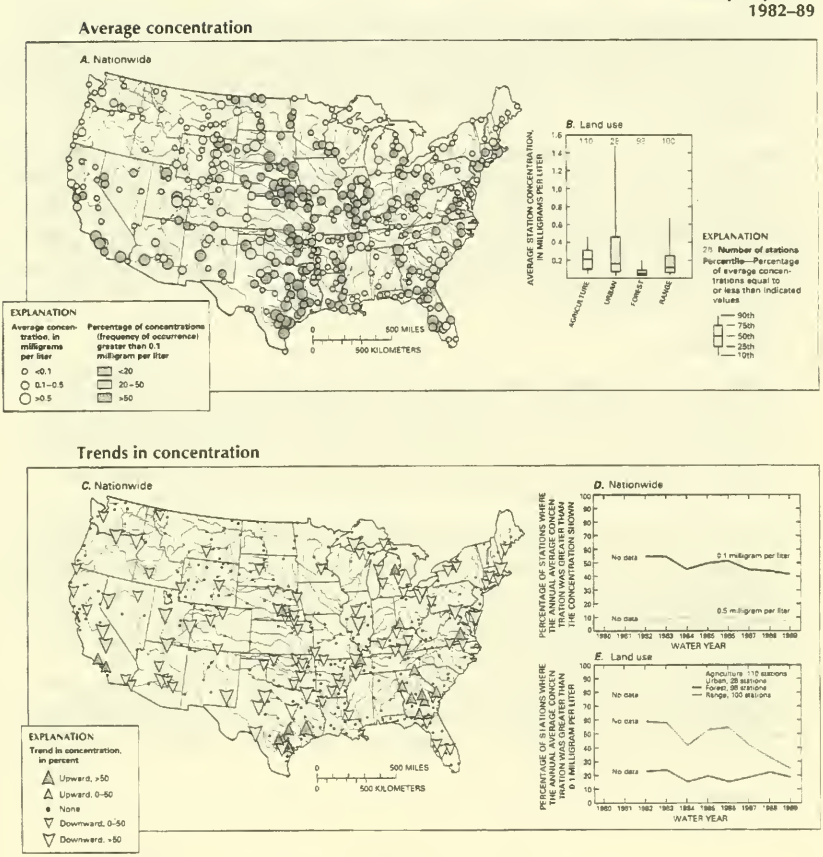

Figure 9 Concentration and trends in total phosphorus in stream water at 410 selected water-quality monitoring stations in the conterminous United States, 1982–89. (Because some cataloging units do not qualify for the land uses shown in *B* and *E*, the total number of stations represented is less than the 410 stations used to compute *A*, *C*, and *D*.) *A*, Average concentration and percentage of concentrations greater than 0.1 mg/L (milligram per liter) nationwide. *B*, Average concentration, by land use. *C*, Trends in concentration nationwide. *D*, Percentage of stations where the annual average concentration was greater than 0.1 or 0.5 mg/L. *E*, Percentage of stations where the annual average concentration was greater than 0.1 mg/L, by land use. >, greater than; <, less than. (Source: Data from U.S. Geological Survey files.)

SUSPENDED SEDIMENT[1]

Background

The suspended-sediment concentration of streams consists of the total quantity of suspended organic and inorganic particulate matter in water and has an important influence on aspects of water use and ecosystem health. High concentrations of suspended sediment in streams diminish the recreational use of streams because pathogens and toxic substances commonly associated with suspended sediment are threats to public health. High concentrations also reduce water clarity thereby affecting the esthetic appeal of streams.

The source of most suspended sediment is soil erosion. Rates of soil erosion vary widely and depend on such factors as soil characteristics, precipitation frequency and intensity, slope of the land surface, and the nature and extent of land disturbance from agriculture, mining, and construction. Because the quantities of sediment entering streams depend greatly on natural factors, it is difficult to establish national criteria for suspended-sediment concentration. In many western areas, for example, stream ecosystems are naturally adapted to suspended-sediment concentrations that periodically are many times greater than those that are detrimental in other areas. The National Research Council has found that channel erosion is estimated to contribute from 25 to 60 percent of the sediment load in rivers in Iowa, Illinois and Mississippi.[2]

National Trends

Downward trends (37 stations) in suspended sediment concentration greatly outnumbered upward trends (5 stations). Downward trends occurred mostly at stations in the south-central part of the country and along the Gulf Coast. The steepest declines in the percentage of stations having annual average concentrations occurred in areas dominated by range and agricultural land and it is likely that increased efforts in soil conservation during 1980-89 contributed at least in part to these trends. The U.S. Soil Conservation Service estimates that sheet and rill erosion on rural land, a category that includes crop and range land cover, decreased by 13 percent between 1982 and 1987.

Suspended-sediment yields in most land-use areas reached peak values early in the 1980's and decreased substantially by the end of the decade. Only the yields in areas dominated by wheat cultivation showed an increase. It is possible that decreases in suspended-sediment yield in streams are a reflection of decreases in soil-erosion rates as reported by the U.S. Soil Conservation Service (1989) for several of their categories of rural land use for 1982-87. The increased use of conservation tillage practices also supports the conclusion that erosion rates on agricultural land declined during the 1980's. A comparison of survey data for 1982 and 1988 (Conservation Technology Information Center, 1982, 1988) shows that the percentage of cropland under conservation tillage increased from 18 to 42 percent for the Northeast, 34 to 42 percent in the Great Lakes and Midwest, and 10 to 23 percent in the southern Great Plains. These areas correspond to parts of the Missouri, Upper Mississippi, Ohio-Tennessee, and North Atlantic water-resources regions where decreases in suspended-sediment yields occurred.

See Figure 10

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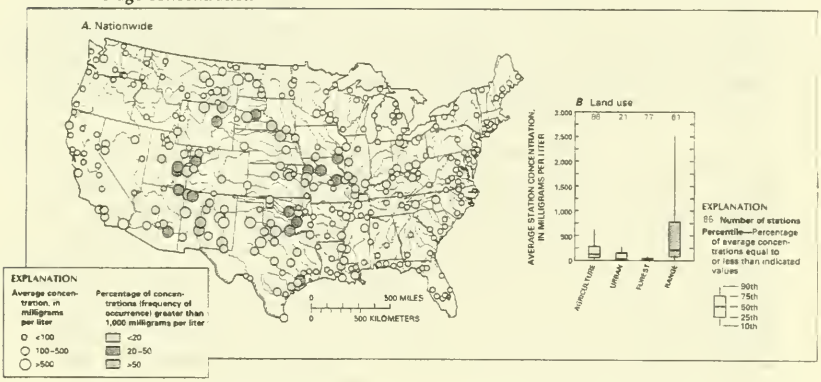
[1]Stream Water Quality in the Conterminous United States--Status and Trends of Selected Indicators During the 1980s By Richard A. Smith, Richard B. Alexander, and Kenneth J. Lanfear, U.S. Geological Survey, 1993

[2]Soil and Water Quality, An Agenda for Agriculture, National Research Council, 1993

Suspended sediment
1980–89

Average concentration



Trends in concentration

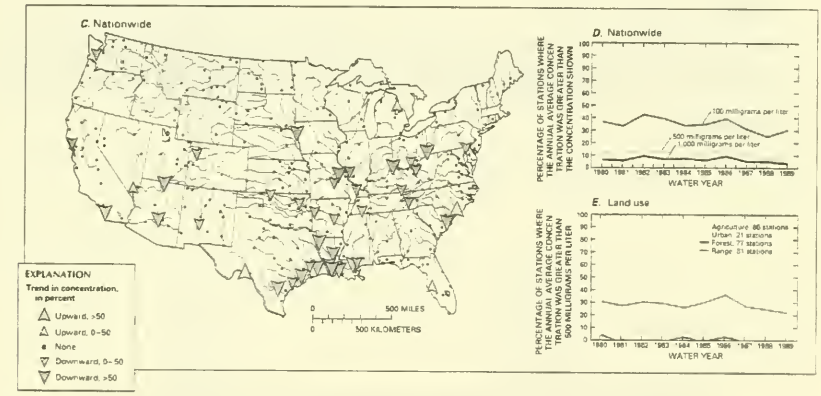


Figure 10 Concentration and trends in suspended sediment in stream water at 324 selected water-quality monitoring stations in the conterminous United States, water years 1980–89. (Because some cataloging units do not qualify for the land uses shown in *B* and *E*, the total number of stations represented is less than the 324 stations used to compute *A*, *C*, and *D*.) *A*, Average concentration and percentage of concentrations greater than 1,000 mg/L (milligrams per liter) nationwide. *B*, Average concentration, by land use. *C*, Trends in concentration nationwide. *D*, Percentage of stations where the annual average concentration was greater than 100, 500, or 1,000 mg/L. *E*, Percentage of stations where the annual average concentration was greater than 500 mg/L, by land use. >, greater than; <, less than. (Source: Data from U.S. Geological Survey files.)

NATIONAL TRENDS IN PESTICIDES AND TOXIC TRACE ELEMENTS IN FINFISH TISSUE[1]

Background

An exception to the general lack of national-level information on both the biological and toxicological aspects of water quality is a data base compiled by the U.S. Fish and Wildlife Service (FWS) in its National Contaminant Biomonitoring Program (NCBP). Data from Christopher Schmitt (U.S. Fish and Wildlife Service, written commun., 1992), shows the locations where fish were collected for analysis, the changes over time in concentration of several trace elements and organic compounds in whole finfish. Geometric-annual-average concentrations shown in figure 11 are computed for two species of fish--one bottom feeding and one predator species--at each station.

Contaminant concentrations in finfish tissue are integrative measures of water quality and can reflect long-term average contaminant concentrations in one or more aspects of the stream environment. Depending on the chemical nature of the contaminant in question and the age and species of fish sampled, contaminant concentrations in fish tissue could be indicative of contaminant levels in either the living or nonliving components of either the stream water or sediments. Moreover, data on contaminant levels in fish tissue provide information on the health risks of the human consumption of fish from the locality where the fish samples were collected. Contaminant concentrations in the NCBP are measured in whole fish as opposed to the more edible portions of fish, whereas U.S. Food and Drug Administration criteria for evaluating the safety of fish for human consumption are based on contaminant concentrations in fish fillets. Second, organic chemical analyses in the NCBP are not specific for the toxic components of certain classes of contaminants such as PCB's but, instead, refer to the total concentration of all compounds in the class. Nevertheless, NCBP data provide a useful summary of national and regional-level trends in the occurrence of historically important toxic contaminants in fish tissues.

National Trends

Fish-tissue concentrations of DDT and related compounds, dieldrin, and total PCB's decreased by more than 60 percent between 1970 and 1986. Between 1976 and 1986, toxaphene concentrations decreased by 65 percent, and chlordane and related compounds decreased by 32 percent from their peak in 1978.

See Figure 11

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[1]Stream Water Quality in the Conterminous United States--Status and Trends of Selected Indicators During the 1980s By Richard A. Smith, Richard B. Alexander, and Kenneth J. Lanfear, U.S. Geological Survey, 1993

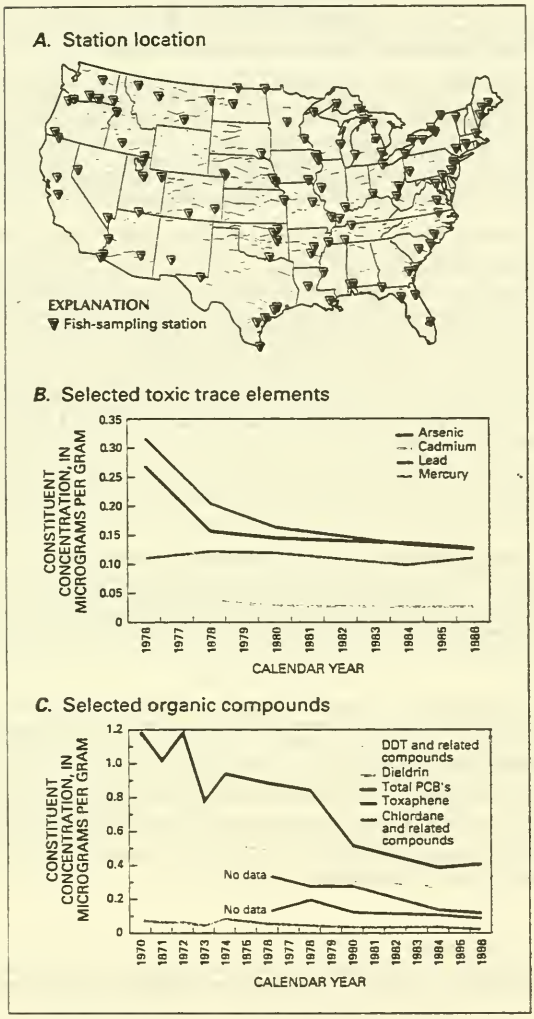

Figure 11 Trends in concentration (geometric-annual average, all in wet weight) of selected constituents in finfish tissue collected at 113 stations on major rivers in the conterminous United States and the Great Lakes for selected years. *A,* Location of fish-sampling stations. *B,* Trends in selected toxic trace elements, 1976–86. *C,* Trends in selected organic compounds, 1970–86. (Source: Based on data from Christopher Schmitt, U.S. Fish and Wildlife Service, written communication, 1992.)

NATIONAL WATER QUALITY INVENTORY-305(b)

SCIENTIFICALLY INVALID[1]

EPA's 305(b) reports are severely flawed and scientifically invalid. 305(b) reports contain data with methodological inconsistencies from state to state and in time. These inconsistencies make it impossible to summarize national water quality condition and trends from state reports.

The primary reason for their lack of scientific validity is that the mechanism for program evaluation in the original 1972 act is not capable of tracking progress toward water-quality goals. The reporting requirements, section 305(b) of the 1972 act, sound simple enough: States must designate each of their water bodies for such specific uses as drinking-water supply, recreation, and cold water fisheries. Then, each state proceeds with its own monitoring and assessment methods to determine whether these uses are being met. Every two years, the Environmental Protection Agency (EPA) compiles the state results and reports on them to Congress in the National Water Quality Inventory.

In 1972, Congress assumed that the states and EPA would coordinate their data gathering, storage, and retrieval functions. Most importantly, Congress supposed that EPA would take the steps necessary to ensure methodological consistency, at least. However, this was not the case; EPA's implementation of the reporting requirements in section 305(b) has not produced the kind of baseline and comparative database needed to evaluate past water-quality trends and to develop future strategies. For example, according to the 1990 National Water Quality Inventory, 51 U.S. states, territories, and jurisdictions assessed 647,066 river miles. This number reflects 36 percent of the total river miles in the United States, or 53 percent of the total river miles in the states that reported. Of the total river miles in these states, 33 percent were judged to support their designated beneficial uses; 20 percent were judged to be either partially supporting, not supporting, or in danger of not supporting; and the remaining 47 percent were not assessed. Interpreting these numbers is problematic at best. No one knows how representative the assessed surface waters were. It is likely that the 64 percent of all U.S. river miles that were unassessed have very different water quality than those that the states targeted for monitoring. In fact, EPA cautions that the numbers should not be compared either state to state or with previous reports because of "inconsistencies among states in how these data were generated." With these limitations, it is difficult to extract much useful national-level information from the data.

Some of the shortcomings of this process may be a consequence of funding. In 1990, EPA estimates that the states spent about $11 million in federal grant money and twice that amount of their own money for ambient monitoring. The magnitude of these expenditures is small when compared to the tens of billions of dollars spent annually by the public and private sectors for water-quality control measures. A comparison of expenditures for information gathering with expenditures for water-quality controls suggests that the information gap is at least partially the result of not enough funds allocated for monitoring.

In addition, there are conceptual and operational problems, both with the 305(b) process itself and with EPA's compilation of the state reports. **In general, the state assessments are based on a combination of ambient monitoring networks, local scale studies conducted for regulatory purposes, and professional judgment of state water-quality officials.** Although the local studies are useful for local management of water quality, their results are difficult to aggregate nationally because the amount of emphasis on each of these information sources is highly variable from state to state. There is little consistency among state programs in the temporal and spatial scales of data collection, the procedures used to collect and analyze the data, and the types of data collected. **As a result of these methodological inconsistencies, comparing results from one biennial report to the next to monitor change is impossible.**

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[1]Twenty Years of the Clean Water Act: Has U.S. Water Quality Improved, By Debra S. Knopman and Richard Smith, Water Resource Division, U.S. Geological Survey. Environment, January\February 1993

ARTBA

Statement of

American Road & Transportation Builders Association

Reauthorization of the Clean Water Act

Submitted to
Subcommittee on Water Resources & Environment
Committee on Public Works & Transportation
U.S. House of Representatives

June 17, 1994

1010 Massachusetts Ave., N.W., Washington, D.C. 20001

STATEMENT OF THE AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION (ARTBA) ON THE REAUTHORIZATION OF THE CLEAN WATER ACT

SUBMITTED TO THE HOUSE PUBLIC WORKS AND TRANSPORTATION SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

June 17, 1994

Chairman Applegate, Congressman Boehlert and Members of the House Public Works and Transportation Subcommittee on Water Resources and Environment.....

The American Road & Transportation Builders Association (ARTBA), a national federation established in 1902, is the only U.S. trade association which concentrates exclusively on issues which are pertinent to the transportation construction industry. Our membership primarily consists of professional engineering firms, construction contractors, heavy equipment manufacturers and materials suppliers. ARTBA's membership also includes 100 universities, particularly their schools of engineering and applied science, as well as 700-plus state and local government transportation officials. We represent our 4,000 members before Congress and the administrative agencies of the federal government, as well as within the federal judiciary, on a wide range of legislative and regulatory matters, program initiatives and issues. ARTBA also arranges and manages a number of conferences and technical meetings, throughout any given year, in which our members are thoroughly briefed and are given an opportunity to engage in in-depth working sessions on key industry topics.

We are pleased to submit the following, suggested amendments to existing provisions of the Clean Water Act as well as sections of the substitute to H.R. 3948 (hereinafter known as "H.R. 3948"). In response to efforts to make the regulation of nonpoint source discharges more stringent, as well as reduce pollutant emissions into the marine environment, we are seeking to have certain transportation issues considered when water quality standards are adopted or dredged/fill material disposal permit applications are being reviewed. The formulation of our position on these issues is largely based on the premise that highway, mass transit, railway and aviation-related improvements are as important to interstate commerce and other significant functions as navigation channel development.

ARTBA is also proposing that the dredged or fill material disposal site specification process be modified in order to ensure that transportation construction - related permit applications are given expeditious and otherwise appropriate consideration. We believe that "appropriate consideration" includes (among other things) the making of final determinations, regarding the approval or disapproval of prospective disposal sites, by the Environmental Protection Agency (EPA) Administrator before the project engineering plans , specifications and (construction phase) cost estimates have been finalized. This alteration of the process would be intended to forestall the issuance of (disapproval) determinations either immediately prior to or during the construction of various projects.

Moreover, although we understand the importance of controlling pollutant discharges into our navigable waters, we are recommending that the minor movement of soil, and the driving of piles needed to support transportation structures, be excluded from the field of activities regulated under

Section 404 of the statute. This amendment reflects our desire to reconcile the objectives of legitimate, regulatory oversight with the demands of expediting the construction of transportation improvements, including structural facilities such as piers and abutments which support bridges.

Mr. Chairman, we have also sought to refine the definition of transportation construction - related discharges which should be subject to the permitting requirements enumerated under Sections 402 and 404 of the Act. We believe that all other discharges from such sites are already being adequately regulated under the Section 319 nonpoint source management program.

Additionally, ARTBA's members believe that the Administrator of EPA, (and officials with delegated authority), should be required to consider the importance of building and operating transportation facilities while nonpoint source pollutant discharge - related water quality criteria are being developed. This proposed amendment seeks to achieve a balance between efforts to mitigate run-off pollution and the need to develop and operate key transportation systems.

Finally, although we have not included an amendment to address the wetlands conservation issue directly, it should be noted that ARTBA supports the inclusion of language in H.R. 3948 which would establish a wetlands "classification system." Under such a regimen, activities (and related discharges) occurring in wetlands of marginal significance would be regulated less stringently than those occurring in wetlands which constitute habitat for migratory waterfowl, facilitate storm water drainage and ground water discharge/recharge, and support other important functions.

The text of the remaining portions of this document address these issues in greater detail.

Description of Prospective Amendments

Although our first five amendments would be made to provisions of the existing statute rather than to sections of H.R. 3948, it should be noted that our fourth amendment presumes that the proposed addition to Section 404(d) of the Act, concerning pile driving, would be adopted. Moreover, in the preparation of our fifth amendment, we took into account the anticipated enactment of the amendment to the Act's Section 402 (p) which is contained in H.R. 3948. ARTBA's sixth and final amendment seeks to add language to a provision of Section 308(e) of H.R. 3948.

Our first amendment, if enacted, would ensure that state-adopted water quality standards reflect the need to accommodate the construction and utilization of surface transportation improvements (including railway systems) and airport facilities. This language would compel appropriate officials to reconcile anti-degradation policy, and water quality standard attainment efforts, with the development, existence and operation of key elements of our national transportation infrastructure.

ARTBA's second proposed revision is intended to ensure the designation and ongoing use of appropriate sites for the disposition of fill material generated through the construction of land-based transportation facilities. These projects would primarily include the construction of roads, bridges, tunnels, mass transit and railway facilities (including interurban commuter systems), and airport

improvements. This language is designed to compel the Corps of Engineers to consider the economic repercussions of rejecting a proposed disposal site designation in those cases where discharges, into such a site, would not meet the Section 403(c) anti-degradation guidelines.

These first two amendments would, of course, require the appropriate water pollution control officials to recognize the importance of surface transportation and aviation facility development and utilization, **in addition to the significance of waterborne navigation**, when drafting water quality standards or considering applications for dredged/fill material disposal site designation. We believe that such revisions are justified in view of the importance of land-based transportation facilities to local and interstate commerce, international trade, postal service operations, national defense and other key, transportation-intensive functions. (As you are well aware, other provisions of statutes within the full Committee's purview, such as Section 1006 [National Highway System] of ISTEA and the Declaration of Policy of the Airport and Airway Improvement Act of 1982, contain language citing the importance of surface transportation and aviation-related improvements to national security.) ARTBA is, therefore, proposing that land-based transportation development be given the same stature as maritime navigation in the regulatory process emerging from the enactment and revision of the Clean Water Act.

The Association's third amendment is designed to expedite the review and increase the certainty of the final evaluation of dredged or fill material discharge permit applications, including those sections pertaining to the specification of disposal sites. ARTBA's proposed revision of Section 404(c) of the Act would accomplish these objectives by requiring the appropriate officials to complete their assessment(s) of the effects of the proposed discharge on the public interest, aquatic resources, aesthetic/recreational values, economic assets/activity, etc. during the engineering design phase of the construction project. This amendment also seeks to enhance the certainty of the permitting process by precluding the EPA Administrator from withdrawing the specification of formerly-designated, dredged or fill material disposal areas. Additionally, this revision would promote the progress of the environmental review effort by compelling the appropriate federal agencies/officials to consider and fully evaluate the suitability of proposed, alternative disposition sites during the project's engineering phase. Finally, this revision establishes an advisory role for the Secretary of Transportation in those cases in which the denial of the specification of a partcular site would delay or scuttle a transportation project residing within his purview.

(Although ARTBA would support efforts to repeal Section 404(c), we believe that our proposed modification of this subsection represents a reasonable compromise between maintaining the existing authority of EPA and the Corps of Engineers and vigorously promoting efforts to accelerate Section 404 permit - related decision-making.)

Our fourth amendment is intended to distinguish the incidental movement of soil from deliberate discharges of fill material into "specified disposal sites", without seeking to remove intentional discharges of fill material from the range of activities regulated under the Section 404 permitting process. These modifications would also bar the inclusion of transportation-related pile driving among those activities to be covered under the definition of "discharge(s) of dredged or fill material" contained in Title IV of H.R. 3948. The construction/installation of piers and other facilities, performed for the purpose of assuring or enhancing the structural integrity of transportation

improvements, should be considered as important as efforts to control the discharge of pollutants into navigable waters, including wetlands.

ARTBA's fifth amendment comprises the following revisions, to be made in two different sections of the Act, which correspond with each other:

Part One of the amendment would limit Section 402 regulation of transportation construction - related discharges to that provided under the subsection (p) (municipal and industrial storm water discharge) permit program.

Part Two of the amendment would establish that pollutant discharges, originating from transportation construction sites, would not be considered point source emissions except in those cases where the waste load consists of dredged or fill material being disposed of under a Section 404 permit. Therefore, the Section 402 requirements would not be applicable to (nonpoint source) waste inputs ensuing from transportation construction activity. These discharges, however, would continue to be regulated under the nonpoint source management provisions codified under Section 319 of the Act.

(The Section 402[p] - regulated storm water discharges from certain construction sites may be special cases in that they are run-off [i.e. nonpoint source] discharges which would be subject to the National Pollutant Discharge Elimination System [NPDES] permitting process. Recognition of this special case, however, presumes enactment of Section 402 [Stormwater Discharge Permits] of H.R. 3948 which would firmly establish certain construction run-off [storm water] discharges within the purview of Section 402[p] of the Act.)

Finally, our sixth amendment would compel the Administrator of EPA to consider the impact which the adoption of nonpoint source discharge - related water quality criteria would have on the construction and utilization of land-based transportation facilities. We believe that such criteria should be drafted in a manner which serves to establish a balance between efforts to protect aquatic organisms, recreational uses, etc. and the need to maintain and expand our surface transportation, railway and airborne transport capacity.

The following section contains the actual language of the aforementioned revisions, as well as additional (clarifying) language which may be reworked and expanded for the purpose of including such explanations in the legislative history:

Proposed Statutory Language and Attendant Clarifying Remarks

ARTBA Recommends ----

(First Amendment)

..that Section 303(c)(2)(A) of the Clean Water Act be amended by replacing the period after "navigation" with a comma, and then adding the phrase "and other transportation activity."

Subparagraph (A) ensures that the importance of navigation channel development and operation is considered when a state, or other appropriate authority, adopts or revises water quality standards for specific bodies of water. This amendment would require water quality control administrators to also consider the need for land-based transportation improvements when developing such criteria and standards.

(Second Amendment)

..that Section 404(b)(2) be amended by replacing the period after the phrase "navigation and anchorage" with a comma, and then adding the phrase "as well as other transportation activity."

Before a dredged or fill material disposal site can be designated as such, it must be shown that the discharge of this material into the site will meet certain guidelines. These guidelines, which are based on the criteria enumerated under Section 403(c), are designed to protect (among other things) "human health and welfare", aquatic biota, and "shorelines and beaches." The promulgation and enforcement of these guidelines is also intended to maintain "aesthetic, recreation, and economic values."

Paragraph (2) requires the Corps of Engineers to consider the economic importance of a prospective dredged or fill material disposal site, to navigation and anchorage, when such a site would not otherwise meet the criteria for designation. This amendment would merely require the Corps to make the same type of (economic impact) assessment when highway and other land-based improvements, (as well as the attendant designation of an appropriate fill material disposal site), are at stake.

We would suggest that the same phrase also be added to the corresponding provision of Section 405(b) of H.R. 3948 which seeks to rework the language of Section 404(b) of the Act.

(Third Amendment)

..that Section 404(c) be amended by deleting the phrase "(including the withdrawal of specification)", wherever it occurs, and then inserting, immediately after the word "Secretary.", the following sentences:

"In any case where the discharge would be related to the construction of land-based transportation improvements, the Administrator shall also consult with the Secretary of Transportation prior to making such determination. Final determinations shall be made

regarding the impact of a proposed (transportation construction - related) discharge on the public interest, in addition to the prospects for compliance of the discharge with Sec. 404(b)(1), as part of the environmental review process completed during the engineering design phase of the attendant construction project. Final determinations made pursuant to Sec. 404(b)(2) shall also occur during this same environmental impact assessment process. In the event that one or more alternative disposal sites are proposed by the permit applicant, a determination made in accordance with this subsection shall include the review and approval or disapproval of one or more of such alternatives."

Section 404(c) currently authorizes the EPA Administrator to "deny or restrict" the use of certain sites for the discharge of dredged or fill material . This subsection also allows the Administrator to withdraw the specification of such a disposal site which had been formerly designated for this purpose. The Administrator can only take such actions after having determined that a proposed discharge would jeopardize the quality of public water supplies, cause unreasonable degradation of the marine environment, or unduly constrain recreational activity. The Administrator is required to provide opportunities for public hearings to be held, in addition to consulting with the Corp of Engineers prior to making such a determination. The Administrator's written findings, which support a given determination, must also be made available to the public.

This amendment would preclude the EPA Administrator from withdrawing the specification of a dredged/fill material (Section 404) disposal site once the Agency has designated the site as a suitable area for the disposition of such material. We believe that prospective permittees need such certainty in order to proceed with the timely and cost-effective implementation of their construction projects. This amendment is also designed to provide the appropriate federal officials with an opportunity to explain to the Administrator how certain key transportation objectives are to be met through the development and operation of a particular, land-based transportation facility. Such explanations would occur during consultations, (held by the Administrator), with U.S. Department of Transportation officials before the Administrator would determine that the specification of a dredged/fill material disposal site should be prohibited due to the anticipated impact of the proposed discharge on municipal water supplies, shellfish, fish and wildlife, and recreational activities.

This modification would also compel both the EPA and the Corps of Engineers to make their final determinations, regarding the impact which the proposed dredged/fill material disposition would have on such things as human health and welfare, marine organisms, aesthetic/recreational values and economic activity, during the (construction project) environmental review process.

Moreover, this amendment seeks to require the Corps of Engineers and/or EPA to fully consider the possible designation of one or more alternative disposal sites, as part of the environmental impact assessment process, when such alternatives are proposed by the permit applicant. Environmental assessments and environmental impact statements are, of course, generally finalized before the project engineering design process has been completed. Therefore, we are proposing that this language regarding final determinations and the consideration of alternative disposal sites be added to Section 404(c) in order to preclude any disruption of the competitive bidding process, or the scheduling or sequencing of the various stages of the construction phase.

(Fourth Amendment)

..that Section 404(f)(2) be amended by replacing the word "incidental" with the word "related", and then adding (after the period) the following sentence:

"The minor movement of soil, which is incidental to the construction of transportation improvements, and the driving of piles, related to the construction or rehabilitation of transportation facilities, shall not be defined as discharges of dredged or fill material under Section 404(d)(1)."

Paragraph (2) requires the obtainment of permits in those cases where "incidental" discharges of fill material, into the navigable waters, occur due to activity intended to substantially modify the use of such waters. (Ostensibly, this requirement could apply to the construction of improvements within wetland sites.) As stated above, our proposed language would differentiate the incidental movement of soil and the intentional discharge of fill material.

(A similar distinction has already been made, in effect, with regard to the random spillage of dredged material which occurs during navigation channel construction. Although the ultimate disposition of dredged spoils at the specified disposal site is subject to Section 404 regulation, the spillage, discharge or re-deposition of this material, occurring while the spoils are "in transit" between the excavation site and the disposal area, is exempt from the Section 404 permitting requirements.)

This amendment would also exempt pile driving, which is generally required to install the structural facilities needed to support bridges, wharves and other improvements, from Section 404 regulation.

(Fifth Amendment)

Part One

..that Section 402(l) be amended through the addition of the following new paragraph (3):

"(3) DISCHARGES ASSOCIATED WITH THE CONSTRUCTION OF TRANSPORTATION FACILITIES.— The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any state to require a permit for discharges, related to transportation construction activity, which are not regulated under subsection (p)."

Part Two

..that the last sentence of Section 502(14) be amended by replacing the word "include" with the phrase "pertain to", and by replacing the word "and" with a comma and then removing the period at the end before adding the following phrase:

"or discharges, related to the construction of transportation improvements, which are not subject to the permitting requirements established under Section 404."

Currently, Section 402(l) does not include a paragraph which exempts transportation construction - related discharges from NPDES regulation. Moreover, the existing language of Section 502(14) is not written in a manner designed to exclude such discharges from the range of emissions characterized as originating from "point sources." However, both parts of our proposed, fifth amendment would operate together to ensure that the appropriate distinction is made between non - Section 404, construction-related discharges and (conventional) point source discharges. Pollutant discharges, occurring during construction, are generally the type of inadvertent and sporadic emissions usually associated with nonpoint sources, rather than the deliberate and continuous releases of treated effluents (i.e. outfall discharges), for example, made by municipal treatment plants and industrial facilities. (Section 304 [f] [2] [C] of the Act strongly indicates that construction activity and recently-constructed facilities are to be viewed, by the EPA Administrator, as nonpoint sources.)

We believe that Section 402 is primarily designed to regulate the latter type of discharge, whose waste load consists of the "by-products" of technology-based treatment processes, rather than the former category of discharge which is unrelated to any manufacturing, processing, cooling or domestic waste water management process subject to technological (treatment) and effluent limitation (numeric [discharge]) standards.

(Sixth Amendment)

..that Section 308(e) of H.R. 3948 be amended by striking the quotation mark and the period at the end of the proposed, new paragraph (9) of Section 304(a) of the statute, and then adding the following sentence:

"In developing such criteria, the Administrator shall consider the impact which these criteria would have on the feasibility of constructing and operating land-based transportation improvements."

After this new sentence has been added, a quotation mark will be added after the period.

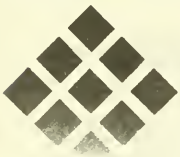
Section 304 (a) requires the EPA Administrator to develop water quality - based criteria which are consistent with the findings of the most recent studies on the degradation of aquatic resources (including ground water reserves) caused by pollutant discharges. Section 308(e) of H.R. 3948, of course, seeks to compel the Administrator to promulgate additional criteria designed to control the discharge and ensuing presence of pollutants generally thought to migrate from nonpoint sources. ARTBA's prospective amendment to Section 308(e) of H.R. 3948 would require the Administrator to consider the potential which the adoption of selected, new criteria would have for delaying or scuttling transportation projects, (or inhibiting their [cost-effective] operation), during the process of drafting such criteria. (The rationale behind this amendment is consistent with the intent of our first proposed revision which is designed to make a similar change in Section 303 [c] [2] [A] of the statute.)

We greatly appreciate having this opportunity to recommend that the aforementioned amendments be enacted as part of this vitally important legislation. We would be pleased to respond to any comments or questions which you might have pertaining to these suggested revisions.

TM/tm

AMEND4

ACWA



ASSOCIATION OF
CALIFORNIA
WATER AGENCIES

Testimony Submitted by Stephen K. Hall
Executive Director
Association of California Water Agencies
on
Reauthorization of the
Federal Water Pollution Control Act
before the
Subcommittee on Water Resources and Environment
of the
Committee on Public Works and Transportation
U.S. House of Representatives
May 26, 1994

I would like to thank the Chairman and members of the Public Works and Transportation Committee for allowing the Association of California Water Agencies (ACWA) this opportunity to comment on the reauthorization of the Federal Water Pollution Control Act, more commonly referred to as the Clean Water Act (CWA). As you know, Mr. Chairman, ACWA is a non-profit association of California's public water agencies. It is the largest single-state coalition of water purveyors in the United States. ACWA represents more than 400 agencies which together are responsible for delivering 90 percent of California's urban and agricultural water.

ACWA believes the following issues should be considered by the Committee as it continues the process of reauthorizing the Clean Water Act.

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States' rights must be preserved.

For the last twenty years, the Clean Water Act has protected our nation's waterways from the discharge of harmful pollutants. Now there is increasing interest in expanding the Act's scope to protect the physical and biological integrity of America's surface waters. The desire to protect aquatic

ecosystems through the use of the Clean Water Act is a laudable goal. It is also a dramatic departure from the current implementation of the Act. Such a departure could have a significant impact on California's water allocation system.

Water is the lifeblood of California's economy. Over the last century and a half, a complex amalgamation of overlapping water rights, State laws and interstate compacts have been woven into a water allocation system. It is on this system that California's population and economy has grown and now depends. As complex as this system seems, it represents the only rational system for allocating water within the State.

ACWA believes that neither the Clean Water Act nor any of its amendments should supersede, abrogate, or impair State water allocation systems and water rights. Under section 101(g) of the Clean Water Act, the regulation of water rights is specifically reserved to the States. Section 101(g) should apply to all existing and new or altered programs resulting from the reauthorization of the Clean Water Act.

Therefore, ACWA supports amending the Clean Water Act to codify Section 101(g) language on State primacy in water allocation. Such an amendment would place Section 101(g) language into another section of the bill (i.e., Section 510 - State Authority) to clarify the deference of the Clean Water Act to State laws to allocate water and to protect rights established under State law.

Creative partnership-based solutions to non-point source pollution should be promoted.

The reauthorization of the Clean Water Act provides an important opportunity to amend the Act to provide source water protection for public drinking water supplies, and to provide linkage between drinking water requirements under the Safe Drinking Water Act and water quality control programs under the Clean Water Act, so that a consistent approach for protection of the resource is developed.

ACWA believes the Clean Water Act should be amended to establish a relationship between clean water and safe drinking water by promoting voluntary source water protection partnerships to reduce nonpoint source pollution. These partnerships would be created by allowing a State to establish a source water quality petition program that would allow urban and agricultural communities to submit a joint petition requesting that the State assist in addressing financial or technical limitations and their capability to reduce nonpoint source pollution.

Through federal grants the States may initiate a petition program that relies on voluntary, incentive-based partnerships among all affected persons.

The Act should promote the use of reclaimed water.

In the arid West, water recycling can boost available water supplies for economic and environmental uses. Unfortunately, the lack of flexibility under current law requires reclamation projects to meet the Act's stringent "fishable and swimable" standard. It is often impossible for reclamation projects to economically meet this standard, preventing what would otherwise have been economically and environmentally sound projects from going forward.

ACWA appreciates the inclusion in H.R. 3948 of the policy statement supporting the use of reclaimed water in Section 101. However, a separate arid West provision should also be included that, at a minimum, establishes definitions for ephemeral and effluent-dominated streams and also makes clear that separate water quality standards should be established for these streams.

ACWA believes that water quality standards should be set, maintained and met for natural waterways. However, to encourage the use of treated or reclaimed water, and in acknowledgment of the fact that non-point sources of pollution are fundamentally different from point sources, standards for man-made waterways should be set on a site specific basis. The Clean Water Act must allow States the flexibility to make such site specific determinations, consistent with the goal of protecting the nation's natural waterways.

ACWA also supports an amendment that would allow San Diego to apply for an ocean discharge exemption in order to provide appropriate time for the city to build a new wastewater treatment plant.

The Act should include antidegradation language that allows States' to establish a statewide policy and procedures for implementation.

Current law requires States to adopt standards and uses for their waters and set specific criteria to protect those uses. Strict federal antidegradation regulations would result in federal land use planning and would shift antidegradation authority from the State to the federal government. A "one size fits all" approach will not work because of the different hydrological and climatic conditions across the country.

ACWA has developed antidegradation language, endorsed by both urban and agricultural members of the Association, that would require States to develop a statewide antidegradation policy and procedures for implementation subject to EPA approval. Existing instream water uses and water and sediment quality necessary to protect the existing uses, would be maintained and protected. The State would allow a reduction in the degree of water quality or sediment quality to accommodate important economic or social development only after public notice is given and there is an opportunity to conduct a public hearing.

ACWA urges this language be included in the Act to provide guidance to EPA and to the States on implementation of antidegradation policy. ACWA's antidegradation language has been provided to the Committee under separate cover.

The wetlands provisions of the Act should be modified.

ACWA supports amending section 404 to include the following provisions:

• A regional approach to wetlands preservation should be established. Regional master plans for wetlands should be developed to identify existing wetlands. An assessment should be made of their relative biological value and whether they were created naturally or artificially. Future wetlands mitigation sites should also be identified.

Wetlands types and needs vary tremendously from one region to the next. Developing a regional master plan would not only end much of the confusion landowners and public works project planners face when determining which areas are protected under the Act, but it would also aid State and local long-term land use planning efforts.

• The 404 permitting process must be streamlined. A process for potential project applicants should be developed which would allow them to meet with all the federal agencies involved in the 404 permitting process to address potential problems before an application is submitted. Further, new 404 permits should not be required every time standard maintenance is performed on an existing project. The process also should allow maintenance requirements to be considered in the initial project application, forestalling the need for additional permits unless the circumstances change significantly. Maintenance activities should include access roads to and within drinking water treatment plants and activities necessary to maintain reservoir operations, capacity, and water quality.

An expedited permitting process should also be developed for projects which fit within the criteria outlined in the new regional master plans. Deadlines should be established for the permitting process and periodic progress reviews should be conducted to prevent permits from bogging down. An effective dispute resolution mechanism should be established to resolve differences between the varying federal agencies and between the federal agencies and the applicant.

• The application of the 404 permitting process must be more uniform and fair. The Act should require EPA vetoes to be based on evidence presented in the administrative record. EPA should also provide feasible alternatives when a project is rejected. Training and coordination of personnel for both the Army Corps of Engineers and the EPA is needed. The permitting process should also give consideration to a project's social importance.

• Emergency maintenance of water conveyances needs to be included in the list of activities exempt from wetlands regulation.

• Finally, 404 permitting requirements for incidentally created artificial wetlands associated with water treatment and delivery systems should be eliminated. Section 404 was developed to preserve existing natural wetlands which are an integral part of our country's ecological systems. Incidentally created man-made wetlands are clearly not part of our natural heritage, and should not be protected by the Clean Water Act.

Again, I would like to express my thanks to the Chairman and the other members of the Public Works Committee for considering ACWA's comments on the reauthorization of the Clean Water Act. Over the last twenty years the Act has helped to markedly improve the quality of many of our nation's rivers, streams and lakes. More needs to be done, but Congress should proceed judiciously as it attempts to improve on one of our country's more successful environmental laws.

naiop

June 7, 1994

The Honorable Norm Mineta
Chairman, Committee on Public Works
and Transportation
U.S. House of Representatives
2165 Rayburn Building
Washington, DC 20515

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Rosers
6/23/94

Dear Mr. Chairman:

The National Association of Industrial and Office Properties (NAIOP) would like to submit the enclosed statement to be included in the hearing record on H.R. 3948 and the bipartisan alternative, the "Water Quality Act of 1994."

NAIOP - The Association for Commercial Real Estate is comprised of 5,000 members nationwide and represents developers, owners, and investors of industrial, office, and related real estate. Our organization wants to ensure the continued improvement of our nation's water quality and is particularly concerned about provisions in the proposed legislation to manage urban stormwater runoff. Because of the potentially astronomical costs of urban stormwater management measures and its relatively minor contribution to water quality impairment, Congress must ensure that the stormwater provisions are not another expensive unfunded federal mandate that provides little improvement in environmental quality.

Our testimony describes our specific concerns and recommends that the legislation include the following provisions:

1. Require the same standard for stormwater discharges and other nonpoint sources. H.R. 3948 and the bipartisan alternative set a more onerous and costly standard for urban stormwater runoff.

2. Be specific about the types of commercial and light industrial discharges that might require separate permits.

3. Ensure that stormwater management measures are flexible and can be adopted as appropriate to the needs and circumstances of each locality.

4. Provide adequate federal funding to meet the requirements of this mandate.

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5. Provide for risk assessment and cost-benefit analysis of stormwater and other regulatory requirements of the Act.

6. Provide explicit protection of local land use authority.

7. Ensure the protection of private property rights in the overall development of the legislation.

We appreciate your considering these points as the Committee deliberates amendments to the Clean Water Act. If you have questions or comments, please contact Robert Landis at (703) 904-7100, ext. 115.

Sincerely,

Joan C. Woodward
President

Enclosure

naiop
The Association for Commercial Real Estate

STATEMENT

NAIOP - THE ASSOCIATION FOR COMMERCIAL REAL ESTATE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
U.S. HOUSE OF REPRESENTATIVES

JUNE 2, 1994

The National Association of Industrial and Office Properties (NAIOP) appreciates this opportunity to comment on proposed amendments to the Clean Water Act, H.R. 3948 and the bipartisan alternative, under consideration in the Committee. NAIOP - The Association for Commercial Real Estate is comprised of 5,000 members nationwide and represents developers, owners, and investors of industrial, office and related commercial real estate.

Although we are concerned about several provisions in the proposed amendments, we will focus our comments on the stormwater provisions. We have grown increasingly concerned about this program as the potential regulatory costs rise and as light industrial and commercial activities are targeted for separate regulation, a source of financing costly control measures, or unnecessary development restrictions.

Like all Americans, the owners and managers of and investors in commercial real estate want to see the continued improvement of our vital environmental resources, including the quality of our

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nation's water. We have all contributed to the success of the Clean Water Act over the past 20 years by paying the costs of treatment and prevention of pollution primarily from point source discharges such as wastewater and industrial discharges. The challenge before us now is to address nonpoint sources which are more difficult to identify and more costly to control. In order to realize the greatest environmental benefit, we must identify the major causes of nonpoint source pollution and develop feasible control strategies.

In the most recent EPA water quality survey, states reported that agricultural activities are the primary sources of nonpoint pollution and that urban runoff constitutes between only 4 and 10 percent of remaining water quality impairment. Drainage from commercial activities such as office and industrial parks generally falls within this category. While the survey is not conclusive and demonstrates that the causes of water quality impairment are varied and diverse, the survey clearly illustrates that urban stormwater runoff is a less significant cause of impairment than other nonpoint sources.

The National Urban Runoff Program (NURP) studies of 28 communities also determined that the flows and quality of urban runoff varied significantly and that the major causes of impairment to receiving waters were due to erosion, agricultural sources, and sanitary sewage. These impacts may be even less significant today considering the corrective measures instituted since the NURP studies ten years ago such as secondary wastewater treatment,

prohibiting illicit storm sewer discharges, and pretreatment of industrial discharges.

The impact of urban stormwater runoff can be characterized as usually less significant than other nonpoint sources, although it can be a potentially significant source of pollution within some watersheds. We are not aware of any studies that justify establishing urban stormwater runoff as a national priority worthy of large expenditures of private and public funds to correct a major water quality problem. Yet the legislation under consideration will inevitably result in such expenditures.

BACKGROUND

Congress recognized the potential costs and inconclusive evidence about the significance of stormwater impacts on water quality when it adopted the municipal storm sewer permit provisions in 1987. The intent was to establish a modest program to control stormwater discharges to the maximum extent practicable at industrial sites and in municipalities over 100,000 in population. Congress granted these storm sewer systems a reprieve from complying with NPDES permits requirements, during which time enough experience would be gained to guide the development of a manageable stormwater regulatory program when Congress again amended the Clean Water Act. In addition, EPA was to designate additional classes of stormwater discharges by October 1993 to be controlled in a second phase of permitting. EPA missed that deadline and has still not released its recommendations for Phase II.

EPA was so late publishing final regulations for Phase I permits that no stormwater permit has been in existence long enough to fully evaluate the benefits of these stormwater control measures. As noted, the scope of Phase II permits has not even been defined. Despite this lack of experience with a stormwater regulatory program, the legislation before Congress presses ahead with a new generation of stormwater control technologies that will be imposed upon even more cities and private industry.

This more aggressive regulatory program is unjustified considering the varied and relatively minor impact of urban stormwater runoff on water quality impairment and the extremely limited experience of the regulatory program since 1990.

H.R. 3948 AND THE BIPARTISAN ALTERNATIVE

The following section outlines our major concerns with the two proposals and provides recommended changes. We also list the provisions which we support and urge the Committee to adopt.

Water Quality Standards

The two major proposals under consideration in the Committee are different in many respects but share a premise which we strongly urge the Committee to reconsider. Both pieces of legislation require that water quality standards be attained by December 31, 2009. Although direct compliance with a water quality standard or a numeric effluent limitation will not be required before 2009, reasonable progress toward that goal must be

demonstrated, even to the extent that EPA may indeed require the achievement of specific numeric limitations and standards for implementation of management measures.

What is given with one hand is taken away by the other. This open-ended authority has the very strong potential of negating any assurances provided in the legislation that attaining standards will be delayed. Our experience with environmental statutes has led us to be skeptical of such discretionary authority which can be interpreted as a mandate by the courts or by agencies seeking to avert litigation. We recommend that the exception which would allow EPA to require the attainment of any numeric standards be deleted from the permit requirements of both bills.

We also recommend against a requirement to meet end-of-pipe water quality standards. Simply put, such standards are inappropriate for stormwater discharges. Though it may be conveyed through pipes and channels, stormwater is more indicative of a nonpoint source (and is characterized as such by EPA) because its frequency and flow cannot be predicted. This unpredictability and the potential for tremendous volume dictate astronomical expenditures for containment and treatment to attain water quality standards for discharges.

Requiring that stormwater attain the same level of treatment as point source discharges is costly and unjustified, particularly for urban stormwater runoff which generally is not a major contributor to water quality impairment. The American Public Works Association has estimated that to meet numeric effluent limits and

attain specific standards, the cost of stormwater controls could reach higher than $406 billion for total capital improvements and $543 billion in annual operation and maintenance of such improvements.

For the commercial real estate industry, this translates into rooftop runoff storage and separators, parking lot oil and grease separators, installation of porous pavement, on-site collection and detention basins, covered parking lots and storage facilities, and unnecessary siting requirements. While some of these requirements might be appropriate for certain areas, they should not be mandated nationwide. In fact, some NAIOP members have conducted water quality tests of rooftop runoff and have found the quality so good that it should be used for groundwater recharge rather than collected and treated.

We urge the Committee to eliminate any requirement to attain discharge standards, and instead recommend that if a general standard must be included in the legislation that the standard be consistent with that standard proposed for other nonpoint sources. The standards established for receiving waters under Section 303 of the Act should take stormwater discharges into consideration and standards for those receiving waters set accordingly. Given urban stormwater runoff's relatively minor contribution to water quality impairment, it simply does not make sense to impose a higher standard on urban runoff than on other more problematic nonpoint sources.

Commercial and Light Industrial Activities

We congratulate the Committee for avoiding the bureaucratic nightmare of developing a separate permitting program for commercial and light industrial activities. The amendments adopted by the Senate Environment and Public Works Committee establish a new regulatory regime for these activities and give EPA as long as eight years to sort it out. EPA itself is very concerned about the prospect of issuing over 7 million permits for such activities, which are not defined at all in the Senate proposal. It is ironic that runoff from commercial properties would be targeted for separate regulation when tenant and marketing demands in the private sector usually require commercial properties to be well-maintained, particularly with respect sweeping streets and parking lots, frequent cleaning of catch basins, and prompt removal of snow.

The bipartisan alternative and H.R. 3948 propose to permit only those stormwater discharges that are contaminated by contact with material handling equipment, industrial machinery, raw material, intermediate product, byproduct, or waste product located on the site of an industrial activity. This provision is still broad and could result in the unnecessary regulation of discharges which might not be contributing to water quality impairment. We recommend that these types of industrial discharges comply with standards established for receiving waters rather than end-of-pipe standards otherwise required of all industrial activities.

Stormwater data has been over-generalized in EPA studies and

reports, implicating runoff from commercial activities along with all other types of runoff as a major cause of water quality impairment. Before Congress considers a new generation of stormwater management measures, the sources of concern must be identified. We therefore recommend that more rigorous review of stormwater runoff problems be conducted, and offer the expertise of NAIOP to assist the states and EPA to evaluate runoff from commercial properties.

Management Measures and Practices

Both H.R. 3948 and the bipartisan alternative call for EPA to develop management measures to be incorporated into stormwater management plans. We commend the definition of management measures contained in the bipartisan alternative because it calls for cost-effective controls and does not include "siting criteria" as a management measure. Such criteria can be used to over-rule local land use decisions with federal siting requirements. Local land use decisions are made after all factors--including potential runoff impacts--are taken into consideration.

H.R. 3948 also requires EPA to establish objective minimum performance standards for each management measure. We are concerned that such standards will be numeric and become rigid practices that must be adopted nationwide. Minimum performance standards can easily result in regulators and facility managers debating numbers rather than concentrating on the quality of the resource and viable means to protect it. Stormwater studies

unanimously conclude that stormwater runoff varies not only from region to region but from one storm even to another. This clearly argues against imposing national management measures, and instead calls for the greatest degree of flexibility to allow management measures to be adopted according to local conditions and circumstances.

This flexibility is essential considering the antidegradation policy contained in H.R. 3948, which requires that all applicable management measures be in place before any activity with potentially adverse water quality impacts is undertaken. While antidegradation is an essential part of protecting water resources, the policy established in H.R. 3948 is too restrictive, precluding economic development without securing a waiver from the state and ensuring that conditions for all point and nonpoint sources are met. The antidegradation policy requirements of the bipartisan alternative provide a clear objective to preserve resources without prejudicing economic and social development.

We recommend that management measures be qualitative and provide a range of alternatives which localities can adopt as appropriate to their watershed. Regional variation is recognized in H.R. 3948 for other nonpoint source management measures and should also be provided for stormwater management measures. Again, this will allow local authorities to better manage this program which will ultimately contribute to the overall success of the program without requiring Congress to revisit this issue time and time again.

Funding

The issue of local authority brings up a larger, more compelling concern: the stormwater management program could become one of the largest unfunded environmental mandates ever imposed on state and local governments. The potential expenditures could far exceed the total spent by all levels of government over the past 20 years to build wastewater treatment facilities. Yet there is virtually no federal funding provided in the proposed legislation. These enormous costs will be passed onto private industry and utility rate payers. The real estate industry will ultimately be asked to pay higher impact fees for land use, assume extremely high development and operation costs for on-site containment and treatment facilities, and even be denied land uses because of perceived runoff impacts.

H.R. 3948 provides for expanded use of the state revolving loan fund to help pay for stormwater controls. But the prospects of obtaining large commitments of federal funds to capitalize the loan fund are not encouraging. Assuming the federal funds are committed, the SRF is still a loan program requiring repayment by local governments. The bipartisan alternative provides $20 million annually for stormwater demonstration grants and postpones the water quality standard attainment deadline for one year for each fiscal year in which less than $20 million is appropriated. The alternative also requires that reasonable progress toward attainment be determined by the general availability of federal financial assistance. This is a step in the right direction, but

even these provisions are meager considering the mandate to attain discharge water quality standards.

Again, we recommend that changing the ultimate objective to receiving water quality standards rather than end-of-pipe standards, will not only be consistent with the mandate for other nonpoint sources but will reduce the cost requirements for stormwater management. But even that revised standard must be accompanied by a federal financial commitment. The success of the Clean Water Act over the past 20 years was based on the shared commitment of federal, state, and local governments to achieve water quality objectives. That commitment must be continued for any priority established by the Clean Water Act amendments of 1994.

Risk and Cost-Benefit Analysis

Section 304 of the bipartisan alternative requires that any regulatory requirement of the Clean Water Act must consider risk and social, environmental, and economic benefits must be reasonably related to the anticipated costs. This provision will help contain the cost of stormwater management measures, and we urge the Committee to adopt it. We recognize that this type of provision is highly controversial, but it is entirely appropriate that environmental mandates meet the same rigorous cost-benefit tests as any federal project or activity. The Senate recently addressed some of these issues when it amended the Safe Drinking Water Act. The commercial real estate industry must conduct and be subject to environmental impact assessments ensuring that a proposed action

does not result in more harm to the environment than the benefits justify. The same test should be required of environmental regulations which must provide at least an equal benefit to their costs.

Risk assessment will ensure that environmental priorities will be established by EPA. The credibility of environmental statutes has been strained because federal agencies have been unable to keep up with mandates passed on to them by Congress. Litigation has been left to define regulatory programs. Risk assessment will enable these agencies to focus their resources on developing and enforcing regulations for priority environmental concerns. The shotgun approach to environmental protection simply does not work, and risk assessment analysis will arm EPA with the rapier to attack priority water quality concerns.

Citizen Activism

H.R. 3948 contains a number of provisions which unnecessarily invite litigation and empower individuals to intercede in regulatory actions. The nation's experience with Superfund provides ample evidence that aggressive legal action does not necessarily result in environmental improvement. The open ability to litigate and intervene in regulatory decisions can unnecessarily encumber property and diminish property values. Certain provisions in H.R. 3948 would repeat some of the failures that plague other environmental statutes.

Any citizen would be able to intervene as a matter of right in

any federal action. While public participation and comment is certainly appropriate, enabling an individual to intervene in any permit, regulatory, approval, or funding decision of the federal government is excessive. This would provide standing to any individual regardless of the credibility of their claim, resulting in delays, additional mitigation requirements to satisfy claims, and even obstructing government actions.

Citizen monitoring teams are authorized to collect data on any discharges and provide that information to state and federal regulators. The information will be used for developing watershed and nonpoint source management plans. H.R. 3948 even provides a set-aside of federal proceeds to fund such activities. While training is provided under the proposed legislation, the quality of data collected by such sources can be varied and may be entirely inadequate for developing a regulatory program. There is no recognition of private property rights in enabling these teams to collect data. Our association feels very strongly that property right be of primary concern in this area. Even more disturbing is a provision which provides a financial incentive for teams to collect incriminating data against specific dischargers. H.R. 3948 authorizes sharing of fines with those individuals or groups of individuals who assist in prosecuting violators. With scarce federal resources available for prevention and treatment programs, it seems inappropriate to set-aside funds for citizen monitoring efforts that could easily result in vigilante enforcement. We recommend deleting these provisions.

RECOMMENDATIONS

In summary, we urge the Committee to recognize the potential negative and undesired impacts of over-regulating urban stormwater runoff. We would be happy to provide a realistic scenario of how this mandate will be implemented to illustrate the unintended consequences upon businesses and municipalities. To avoid such consequences, ensure a feasible stormwater management program, and provide the greatest benefit to water quality, we recommend the following provisions:

1. Require the same standard for stormwater discharges and other nonpoint sources.

2. Be specific about the types of commercial and light industrial discharges that require separate permits.

3. Ensure that management measures are flexible to be adopted as appropriate to the needs and circumstances of each locality.

4. Provide adequate federal funding to meet the requirements of this mandate.

5. Provide for risk assessment and cost-benefit analysis of stormwater and other regulatory requirements of the Act.

6. Provide explicit protection of local land use authority.

7. Ensure the protection of private property rights in the overall development of the legislation.

CONCLUSION

The regulatory requirements on urban stormwater runoff should be commensurate with the degree of impairment attributed to such runoff. Adhering to this principle is not only fair but ensures that adequate resources will be dedicated appropriately to an environmental concern. The commercial real estate industry is prepared to do its fair share to ensure continued improvement of our nation's water resources, but we must advise against excessive regulation that will only drive up the cost of real estate, diminish property values, contributing to the financial crisis already facing many local governments which fund services from taxes assessed on property value, and ultimately result in consumers paying unnecessary higher prices for goods and services to satisfy misconceived environmental concerns.

We appreciate this opportunity to provide these comments and look forward to working closely with the Committee toward the enactment of appropriate amendments to the Clean Water Act.

MAY-20-94 FRI 16:37 WILLIAM.J.DEY 908 775 3206 P.01

Bill & Cathy Dey
INNKEEPERS

May 19, 1994

Clean Ocean Action
Box 505
Highlands, N.J. 07732

Our Representatives;

Please be assured of our concern for maintaining the efforts to insure quality of water on the NJ Coast. We depend on clean water and beaches for our livelihood as innkeepers of a Bed & Breakfast at the Jersey Shore.

ANY Act that weakens the current standards and allows contaminates, sewage, or dumping of any proportion should not be considered by our Representatives on the State or Federal level.

We will endeavor to insure all members of our State and Local B&B Associations, and guests, of what kind of support we are receiving from our elected officials. The idea of weaker regulations that could remotely result in conditions experienced during 1987-88 is beyond comprehension.

Quality of water and beaches has vastly improved since 1988, and the result is confidence in our Representatives. Our guests from out of State, and those from areas away from the ocean, have been pleasantly surprised in the improvement. We urge that every effort be made to maintain a condition of improvement and assist us and all those who enjoy this limited resource.

Thank you for your consideration and assistance in this effort.

Respectfully,

William J. & Catherine P. Dey
Innkeepers

20 Woodland Ave., Avon-by-the-Sea, NJ 07717 ✦ 908-774-8505

The Bay Institute of San Francisco

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June 3, 1994

Committee on Public Works and Transportation
U.S. House of Representatives
2165 Rayburn Bldg.
Washington, D.C. 20515

RE: OPPOSITION TO HR 3948 (MINETA)

Dear Congressman Mineta and members of the Committee,

The Bay Institute of San Francisco, a nonprofit research and advocacy organization that works to protect and restore the ecosystems of San Francisco Bay and its watershed areas, opposes HR 3948 (Mineta). We also oppose similar legislation introduced by Rep. Schuster. The revisions of Section 404 of the Clean Water Act contained in these bills would virtually eliminate protection for millions of acres of wetlands across the United States.

HR 3948 would remove current restrictions against development of our nation's wetlands, and result in loss of the enormous environmental and economic benefits they provide for society. Here in California, where over 90 percent of our wetlands have disappeared, the important remaining wetland areas of the San Francisco Bay/Delta estuary and the Central Valley would be adversely affected. In view of the bill's negative effects on wetlands protection, we urge you to oppose HR 3948 and the Schuster bill, and instead support HR 350 (Edwards), which would significantly increase wetlands protection.

Please enter this letter into the May 24-26 Clean Water Act hearing record.

Sincerely,

Gary Bobker
Policy Analyst

10 Liberty Ship Way, #120 Sausalito, CA 94965 415-331-2303
Fax 415-332-8799

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The Board of Chosen Freeholders
of the County of Monmouth

DEPARTMENT OF
PUBLIC INFORMATION TOURISM

PAUL P. RIDNER
DIRECTOR

P.O. BOX 1255
27 EAST MAIN STREET
FREEHOLD, NEW JERSEY 07728-1255

TELEPHONE (908) 431-7310

May 23, 1994

TESTIMONY ON BEHALF OF THE

MONMOUTH COUNTY DEPARTMENT OF PROMOTION/TOURISM

Since the enactment of the Clean Water Act five years ago, tourism has flowered and grown in New Jersey as a result of a cleaner ocean and beaches to a point where in 1992 tourism became our second most important industry, generating 346,000 jobs with a payroll of $7.6 billion and revenues from State taxes of $2.3 billion.

In these troubled economic times of unemployment and recession, any decrease in our efforts to maintain a high level of water quality would be disastrous to the economy of New Jersey.

The Department of Tourism of the County of Monmouth whose eastern boundary is the Atlantic Ocean asks that you keep alive and strengthen the Clean Water Act and use your power to avoid any decrease in water quality.

Thank you for your help.

Paul P. Ridner
Paul P. Ridner, Director
Department of Promtion/Tourism

Patricia L. Padula
Patricia L. Padula
Tourism Representative

PPR:PLP:je

C-829 REV 2 84

Clean Water Act Toxics Standards: Jobs, Environment, and Policy
The "Clean Safe Jobs" Model for the Nation

Testimony of Citizens for a Better Environment (CBE)
before the

House Committee on Public Works and Transportation
Subcommittee on Water Resources and Environment
regarding
Proposed Reauthorization of the Clean Water Act

Respectfully submitted by
Greg Karras
Senior Scientist
Citizens for a Better Environment
501 Second Street, Suite 305
San Francisco, CA 94107
415/ 243-8373

Clean Water Act Toxics Standards: Jobs, Environment, and Policy.

The "Clean Safe Jobs" Model For The Nation.

Jobs

- Pollution prevention can make $100 million and save from hundreds to thousands of jobs in Silicon Valley.
- Under exemptions from Clean Water Act toxics standards, inefficient manufacturing wasted jobs down the drain in Silicon Valley.

page 5

Environment

- Pollution prevention already cut toxic discharges to South San Francisco Bay by 58% despite polluter projections of 25% increases in toxics.
- Pollution prevention can reduce toxic metals discharges from key industries in Silicon Valley by 75% to 95%.

page 9

Policy

- Enforceable standards provide specific objectives that organize communities' investments to prevent pollution and save local jobs.
- Risk-management and pollution-trading <u>manage</u> but do not <u>prevent</u> pollutant releases. Exemptions from enforceable standards under these schemes block community efforts to invest in sustainable industry.
- The "Clean Safe Jobs" model should be expanded beyond Silicon Valley. Congress should support citizen enforcement of environmental standards and provide for locally-controlled investments in sustainable industries.

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Testimony of CBE before Congress

Summary

For too long our government has failed to stop polluters from robbing Americans of our right to fish and swim in poison-free waters throughout this land. Two decades after Congress declared "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985" an estimated forty percent of the nation's waters are polluted at levels that violate water quality standards.[1] As just one example, in San Francisco Bay, a water body given national priority for restoration, since the 1980s state health warnings have told women and children not to eat certain food resources contaminated by oil refinery discharges of the toxic pollutant selenium.[2] Yet the oil companies have increased this toxic pollution.[3] It cannot be argued that the Clean Water Act has been adequately enforced.

Meanwhile, innovative citizen enforcement of water pollution prevention has proved its potential to strengthen the Silicon Valley jobs base. Exemptions from environment-based NPDES and Pretreatment discharge limits were overturned. Now better industrial efficiency is beginning to waste less raw materials. Local electronics companies can increase their profits and the community can save jobs while cutting industrial toxic metals discharges.

This evidence exposes the short-sighted economics that have wasted jobs as well as natural resources down the drain, and the falsehood that risk-based or market-based schemes can replace enforceable standards. Without enforceable standards, even now some Silicon Valley polluters would choose to make a quick buck and dump the excess toxic waste, instead of switching to cleaner industrial processes that increase their profits over the long term.

The "Clean Safe Jobs" strategy worked in Silicon Valley where exemptions, risk-management, and pollution trading have failed. We recommend that Congress embrace this proven strategy of enforceable water quality standards coupled with community controlled investment to prevent industrial toxic pollution and save local jobs.

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[1] Clean Water Act Section 101(a)(1); USEPA, 1994. Nation's 1992 Water Quality Summary. An April 1994 EPA report; and April 20, 1994 Statement of Carol M. Browner, Administrator, USEPA entitled: "On Earth Day: a Rededication to Clean Water."

[2] USEPA, 1990. September 5, 1990 response to comments and petitions regarding listing decisions for California waters under Section 304(l) of the Clean Water Act.

[3] Total refinery selenium discharges from six major refiners to San Francisco Bay increased by 24% in the first four years of the 1990s, as compared with 1980s discharge levels, based on self-monitoring reports submitted by the oil companies to the state NPDES permitting authority. CBE, 1994. Dirty Crude; the first oil industry-wide analysis of selenium discharge trends impacting San Francisco Bay. Citizens for a Better Environment, San Francisco, CA.

Testimony of CBE before Congress

Background

These key elements of the "Clean Safe Jobs" agreement between the cities of San Jose, Santa Clara, CBE, and other citizens groups apply to the controversial industrial aspects of the South Bay pollution problem:[4]

- Intensive internal audits of pollution prevention potential for the "Largest Dischargers" of industrial copper and nickel;

- Industry implements maximum pollution prevention for copper and nickel that pays back on initial investments in 5 years or less;

- Cities establish pretreatment local limits that assure these "maximum feasible reductions" from industry;

- Cities establish a "Capital Fund" to provide financial assistance to small businesses investing in pollution prevention; and

- A new Pollution Prevention Center facilitates continued dialogue and planning for pollution prevention.

As predicted by the Clean Safe Jobs report, San Jose has confirmed that industrial copper and nickel pollution is highly concentrated in a small number of industrial plants that almost all manufacture printed circuit boards, magnetic disks, finished metal parts, or semiconductors for the electronics industry. The following figure shows that only 26 copper dischargers (7% of all industrial dischargers) and 35 nickel dischargers (9% of all industrial dischargers) cause fully 85% of all industrial copper and nickel. Seventeen printed circuit board shops and 9 disk makers cause more than half of these discharges. The largest discharging plants causing 85% of these copper and nickel discharges are the "Largest Dischargers" as defined by the agreement.

Preliminary local limits analyses performed by the cities and CBE used different analytical methods, yet all confirm that the environment-based copper and nickel limits on final discharges to the Bay will not be met (and thus toxic pollution threats cannot be prevented) unless industrial discharges through the South Bay's public sewage plants are substantially reduced. In addition to pollution reductions from non-industrial sources, further industrial pollution prevention is needed.

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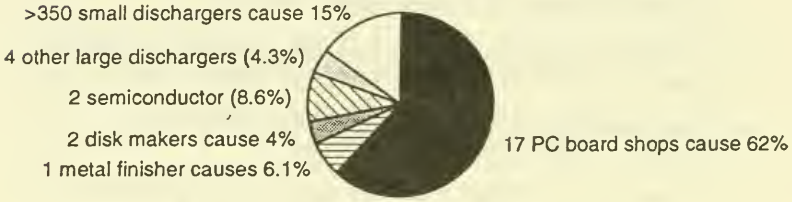
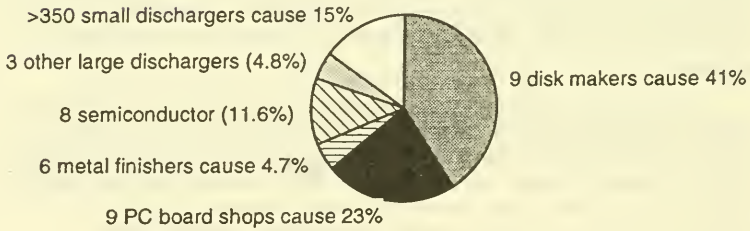
[4] Detailed findings regarding these events and the substantive components of the pollution prevention plans in the agreements are found in California State Regional Water Quality Control Board orders 93-118, 93-084, and 93-083.

Most of the industrial copper and nickel discharged through the San Jose/Santa Clara sewage treatment plant comes from a small number of printed circuit board, magnetic disk making, and metal finishing plants.

Copper, by mass discharged



Nickel, by mass discharged



Source: City of San Jose Pretreatment Records. See especially September 14, 1993 submittal to CLEAN South Bay and the California Regional Water Quality Control Board entitled "List of Largest Dischargers."

Testimony of CBE before Congress

Section I. Jobs

Industrial pollution prevention can make an estimated $100 million for Silicon Valley electronics businesses over the next decade and help to save anywhere from hundreds to thousands of local jobs in critical manufacturing sectors.

This conclusion is based in part on the results of seven intensive pollution prevention audits performed in Silicon Valley printed circuit board, metal finishing, and magnetic disk making plants by independent expert consultants to the cities of San Jose and Palo Alto.[5] These audits were reviewed by the cities' technical staffs and the staff of the State Regional Water Quality Control Board. Their results were also confirmed by a technical consultant to CBE and other citizen groups who was approved by the cities under the agreements. (The State Regional Board's summary of these audits are presented -- in their tables -- below.) The results are consistent with those from similar plants in other areas, and show that:

- Pollution prevention capital costs range from $39,000 to $3 million depending on the size and situation of the industrial plant;

- Savings from improved efficiency due to these prevention measures will range from $15,600 to $1,154,000 each year; and

- Savings from improved efficiency fully pay for these costs in every case with pay back periods ranging from 1.8 to 5 years (3.2 yrs average).

As suggested in the Regional Board tables, most of these pollution prevention measures are relatively straightforward, and save water and related waste costs. Further, the savings figures do not include savings from improved production quality and production consistency, which in some cases could provide even greater savings than the reduced waste costs that could be quantified. The San Jose and Palo Alto "Fact Sheets" confirming these results are attached.

These pollution prevention measures are affordable. For the individual companies audited, total capital costs are from 1% to 3% of the company's annual sales, and annualized costs[6] are consistently less than 1% of annual sales. Before savings pay back capital costs, annual savings consistently exceed annualized costs by amounts ranging from 40% to 280% of

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[5] A total of about 60 "Largest Discharger" printed circuit board, metal finishing, and disk making plants are performing pollution prevention audits in Silicon Valley, but the balance of these audits are not yet available for public review, or have been found to need further work, as discussed in Section III below.

[6] Assuming a seven-year no interest loan. Qualifying small businesses that need financial assistance will receive it from the Capital Fund provided in the Clean Safe Jobs plan. In any case, the cost of interest appears insignificant given the rate of cost savings. (Palo Alto, 1994. Reasonable Control Measures report. p 5.)

WASTE MINIMIZATION OPTIONS

DRAG OUT MINIMIZATION
(SPRAYS, CAPTURE TANKS)

BATH LIFE EXTENSION
(PURIFICATION AND MINIMIZATION OF DRAG IN)

PIPING RINSEWATER VS WET FLOOR

RINSEWATER FLOW REDUCTIONS
(COUNTER-CURRENT, SPRAYS)

RINSEWATER RECYCLING

POLLUTION PREVENTION AUDIT RESULTS

	PALO ALTO	SAN JOSE
COPPER REDUCTION	60-99%	60-90%
NICKEL REDUCTION	44-99%	94-99%
FLOW REDUCTION	50-99%	55-99%
CAPITAL COST	$160,000-3,000,000	$39,000-1,100,000
PAYBACK	2.6-5 YEARS	1.8-3 YEARS

these costs. Aggregate analyses using available economic data[7] for the Largest Dischargers to the San Jose/Santa Clara plant show total and annualized capital costs less than 1% of annual sales, and annual savings exceeding annualized capital costs by 60% to 240%.

After the cost savings pay for the pollution prevention investments Silicon Valley industry will profit from pollution prevention. Palo Alto projects annual savings of $1.5 million to $1.7 million from five Silicon Valley printed circuit board plants of various sizes.[8] This is consistent with the seven independent audits discussed above, which project total annual savings from recommended cost effective pollution prevention measures of $1.97 million before financing costs.

The individual profits realized depend upon the measures each individual plant discovers and implements. However, the 43 Largest Dischargers to the San Jose/Santa Clara plant can achieve similar results in the aggregate. The Clean Safe Jobs agreement could save these companies an estimated twelve million dollars each year. After the cost of capital, pollution prevention can make these industries about $100 million in ten years.

This additional income could directly pay more than a hundred workers' salaries, but a larger total of 6,700 jobs in these firms could be affected. The Clean Safe Jobs report shows many Largest Dischargers are smaller companies doing the "dirty work" for big companies. These sub-contractors can benefit most from the capital funds and increased income now available. Further, the blue collar jobs and local manufacturing of electronics "building blocks" that could be saved by retaining these small businesses appears crucial to the Valley's long term economic health.

Unfortunately, under exemptions from proper local pretreatment limits that stalled these pollution prevention investments, these benefits were not realized by local businesses or the Valley's jobs base.

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[7] Corporate Technology Directory 1993, 8th U.S. Edition; Ward's Business Directory of U.S. Private and Public Companies - 1994; Santa Clara County Commerce and Industry 1985-1986 Directory; Dunn & Bradstreet On-line Database - 1993 data; Financial Reports from selected companies; and On-Line CD-Rom (Ziff Communications Co.) • Computer Select 1994, Computer Profiles.

[8] The larger $1.7 million/yr savings are projected by Palo Alto assuming no interest loans (financial assistance pays financing costs), and the industries implement maximum pollution reductions that are estimated, for these five plants, to have an aggregate payback period of 2.2 years. Palo Alto, 1994. Reasonable Control Measures for Copper and Nickel Discharges of Circuit Board & Metal Finishing Firms. March 1994. p C-6.

Testimony of CBE before Congress

Section II. Environment

Pollution prevention has already cut South Bay copper discharges by 58% and industry can cut copper and nickel discharges by another 75% to 95% to meet even the zero-dilution effluent limits needed to protect Silicon Valley's highly industrialized watershed from toxics.

In 1988 the San Jose/Santa Clara plant discharged more than 4,000 pounds of the highly potent aquatic toxicant copper into the South Bay, according to its self monitoring reports submitted to the State Regional Water Quality Control Board. South Bay dischargers were exempted from numeric water quality standards and effluent limits on toxics at that time, as discussed below. Innovative pollution prevention plans were not on the dischargers' agenda. As the EPA noted in a later enforcement action, proper implementation of local pretreatment limits had already languished for years.[9] A key technical report submitted by San Jose and the other South Bay dischargers during this period summed it up concisely, projecting that metals mass discharges to the already polluted South Bay from the San Jose/Santa Clara, Sunnyvale, and Palo Alto plants would increase by 25% by 1995.[10]

This discharger projection of increased pollution is shown for copper from the San Jose/ Santa Clara plant in the gray bars on the figure below.

Instead of dramatically increasing as the dischargers projected, copper discharges were cut by approximately 58% based on 1994 discharges to date. This is shown in the black bars on the figure below.

This dramatic environmental progress was caused primarily by pollution reductions at the source. The reduced pollution cannot be explained by improvements in end-of-pipe treatment because the advanced treatment system in place before 1988 was not significantly altered. It cannot be explained by reductions in waste water volume because copper effluent concentrations decreased far more than waste water discharge volume during this period. However, the total mass of copper entering the San Jose/Santa Clara plant was cut dramatically during this period.[11]

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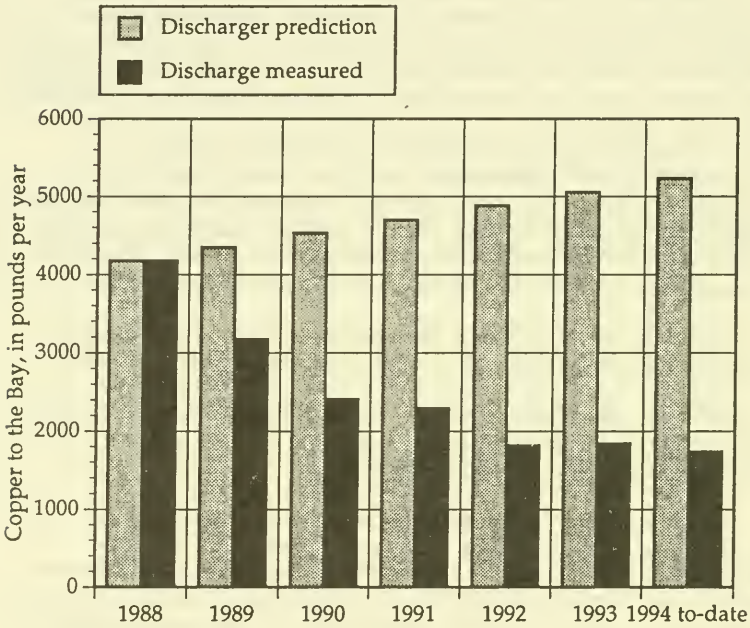
[9] In 1991 EPA Administrative Enforcement Order CWA-IX-FY91-18 stated; "San Jose's local limits are not technically-based and they have not been reevaluated adequately in over 10 years."

[10] Larry Walker Associates, Kinnetic Laboratories Inc., 1987. South Bay Dischargers Authority Water Quality Monitoring Program Final Technical Report. December 1981-November 1986. Prepared for the South Bay Dischargers Authority.

[11] EOA, Inc., 1991. Investigation of unpermitted sources of Copper and Nickel in the San Jose/Santa Clara WPCP influent. Prepared for the City of San Jose; and self monitoring reports submitted by San Jose to the State Regional Water Quality Control Board.

Instead of increasing by 25% as dischargers predicted, copper mass discharges to South San Francisco Bay from its largest routine discharger decreased by 58%.



Copper discharge to South San Francisco Bay from the San Jose/Santa Clara Water Pollution Control Plant, based on self monitoring reports submitted to the California Regional Water Quality Control Board by the City of San Jose. Predicted increase from Larry Walker Associates, 1987. South Bay 5-year Water Quality Monitoring Program Technical Report. Analysis by CBE.

Testimony of CBE before Congress

Copper effluent concentrations are also down in South Bay discharges, as shown by the figure below that was created by the California Regional Water Quality Control Board staff. Inspection of this figure reveals that for nearly a year, even the maximum copper effluent concentrations have been within 20% to 30% of meeting the 4.9 micrograms-per-liter copper effluent limit that is needed to protect the South Bay.

This discharge limit can be met with the cost-saving pollution prevention measures discussed in Section I above. As shown in the Regional Board tables above and the cities' attached "Fact Sheets," the independent expert audits found that Largest Dischargers can significantly reduce copper and nickel discharges. Reductions ranged from 44% to 99%, and averaged 86%. Analysis of these results show that they are consistent with other pollution prevention experience for plants in these industry sectors.[12] While individual plants' results will vary, total copper and nickel discharge reductions from all Largest Dischargers can be projected with reasonable accuracy in the aggregate.

Total copper and nickel discharge reductions from Largest Dischargers are most likely to range from 75% to 95%, based on the 95% confidence limits of the data available from independent audit results that are confirmed by experts for all parties to the agreements.[13] With planned reductions in other copper discharges, industrial reductions in this range can achieve compliance with environment-based Bay discharge limits.[14]

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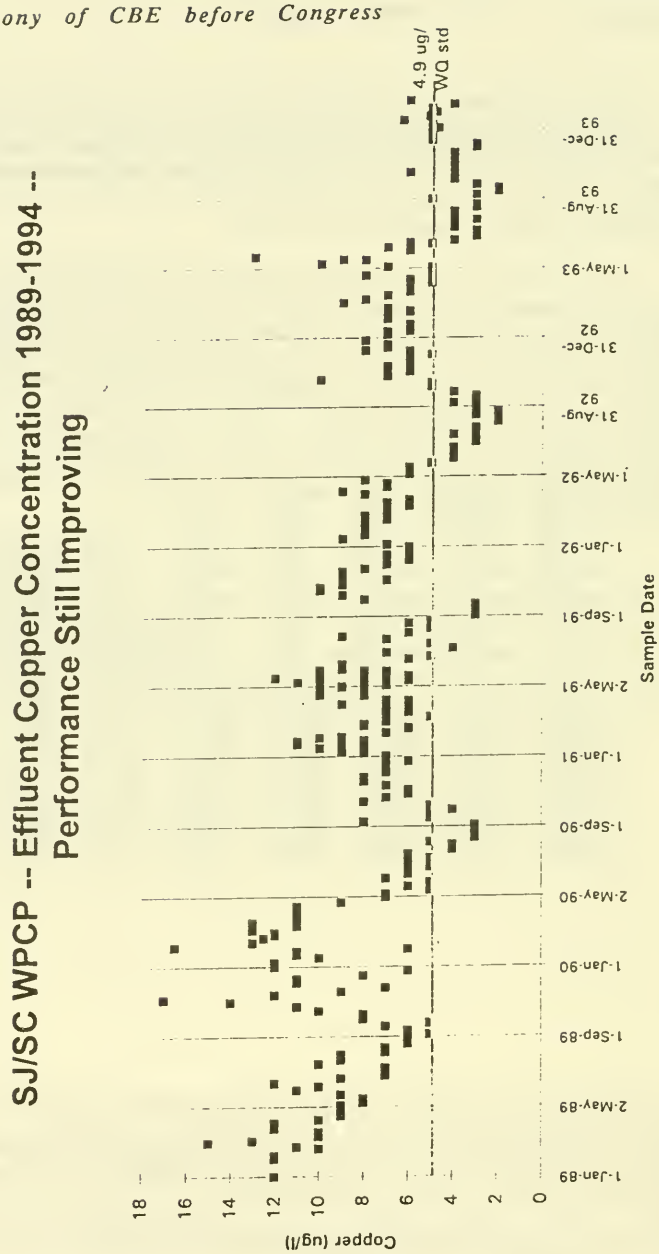
[12] The Clean Safe Jobs Report (attached) found that about 100 pollution prevention outcomes were reported by metal finishing and printed circuit board plants in various parts of the U.S. and world.

[13] This projection assumes that maximum cost effective reductions -- those that pay back the costs of pollution prevention measures in 5 years -- are implemented by industry as required by the Clean Safe Jobs agreement. This assumption depends in part upon whether water quality based NPDES limits are retained so that enforceable local limits on individual industrial dischargers can be based upon specific environmental objectives.

[14] After years of study and debate the Regional Water Quality Control Board determined that the maximum discharge levels which protect the pollutant-vulnerable South Bay from these massive discharges are 4.9 ug/l for copper and 8.3 ug/l for nickel, and established these limits in NPDES permits.

Testimony of CBE before Congress



Testimony of CBE before Congress

Section III. Policy

- **Enforceable standards provide specific objectives that organize communities' investments to prevent pollution and save local jobs.**

We have tried it both ways, and found that enforceable standards are needed to organize toxic pollution prevention in a watershed.

To address a toxic "hot spot" caused by Silicon Valley industry and other sources in South San Francisco Bay,[15] citizen groups proposed an innovative strategy to prevent pollution while strengthening the local economy. This proposal was first made to the South Bay Dischargers Authority in 1988, and is fully articulated in the 1992 CBE report *Clean Safe Jobs* (attached). It was rejected by the dischargers when they were exempted from numeric water quality standards for toxics.

The South Bay is the only part of San Francisco Bay where no numeric water quality based standards for toxic pollutants were in effect throughout the 1980s.[16] A citizen appeal overturned the exemptions in 1990.[17] Numeric standards and NPDES effluent limits were established by the State in 1991. The South Bay sewage authorities were then in violation of discharge limits and were compelled to focus on the merits of the "Clean Safe Jobs" proposal. After lengthy negotiation the cities of Palo Alto and Sunnyvale signed agreements to implement the key elements of the proposal in early 1993. An agreement with the South Bay's largest industrial/municipal discharger, the San Jose/Santa Clara Water Pollution Control Plant, followed only after a citizen enforcement action.[18]

Under exemptions from enforceable environmental standards the sewage authorities, cities and industry leaders proved unable to respond to legitimate citizen demands for pollution prevention in the watershed. When enforceable standards were restored, these same people and entities proved able to focus their efforts on a pollution prevention program that is now found to be practical for the watershed. The resulting Clean Safe Jobs plan,

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[15] The State and EPA found that toxic pollutants, including copper and nickel, violate water quality standards and "impair" beneficial uses of water, and that the San Jose/Santa Clara, Sunnyvale, and Palo Alto sewage treatment plants are "substantial" sources of these pollutants. EPA decision regarding Section 304(l) for California, September 28, 1990; and California State Water Resources Control Board Order WQ 90-5, October 1990.

[16] "[F]or this area, the objectives contained in Tables II-2A and III-2B will be considered guidance only... ." [The tables cited contain numeric water quality standards for toxics in the rest of the Bay.] Water Quality Control Plan, San Francisco Bay Basin, Approved by the State Water Resources Control Board May 21, 1987. p III-5.

[17] California State Water Resources Control Board, Order WQ 90-5. In the matter of the petition of CBE et al... .

[18] Detailed findings regarding these events and the substantive components of the pollution prevention plans in the agreements are found in California State Regional Water Quality Control Board orders 93-118, 93-084, and 93-083.

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with its Capital Fund for small businesses, is a model for community-directed investment in manufacturing jobs and the environment.

- **Risk management and pollution markets manage but do not prevent pollutant releases. Exemptions from enforceable standards under these schemes block community efforts to invest in sustainable industry.**

Risk-management and pollution-trading formed the rationale for the exemptions that held Silicon Valley back. First, a different pollution problem was deemed to rank as a higher priority "risk" to be "managed" first before enforcing standards in the South Bay:

> "Nowhere else in the Region will nonpoint source economic considerations have such an impact on the attainability of objectives. Therefore, for this area, the objectives contained in Tables III-2A and III 2-B will be considered guidance only ... ."
> 1987 Water Quality Control Plan ("objectives" is the state term for numeric water quality standards).

Second, a pollution trade was orchestrated. South Bay waste water dischargers were exempted from enforceable water quality based effluent limits in return for their agreement to control runoff:

> "Discharges to the South Bay south of the Dumbarton Bridge are not obligated to comply with the effluent limits ... . However, they are obligated to do specific, detailed work identified in the Municipal Facilities Section of this Chapter ... ." 1987
> Water Quality Control Plan.

In that Section, the South Bay Dischargers were required to submit a number of studies and:

> "Submit a program no later than June 15, 1989 for the implementation of additional nonpoint source controls ... ." Ibid.

The dischargers liked this pollution trade, citizen groups objected, and the State Water Resources Control Board eventually overturned the exemption in part because both pollution problems should be addressed, not only one of them. Order WQ 90-5.

The South Bay Dischargers are still trying to use pollution trading to exempt them from toxics standards. Their "Joint Proposal" to the state Regional Water Quality Control Board proposes to place more attention on wet weather runoff pollution in trade for being exempted from further

reductions in waste water discharges now violating toxics standards.[19] They have asked other municipal and industrial discharge interests and Congress to promote pollution trading policies that would block citizen enforcement. Unfortunately, current pollution trading proposals in the Clean Water Act represent a drastic retreat from enforceable water quality standards.[20]

There are at least four reasons why risk-ranking and pollution-trading proposals should be rejected by Congress just as they were by the California State Water Resources Control Board in 1990.

1. Exemptions from enforceable standards block communities from focusing their investments on pollution prevention. As detailed above, the experience in the Silicon Valley watershed proved that enforceable environmental standards were needed to focus community leaders' attention, and direct investments to the right solutions for the community's environment and jobs base. Local control of local watersheds often leads to exemption of powerful or influential local polluters. Proposed Section 322(h)'s weakening of citizen enforcement is a fatal flaw.

2. Trading in toxic pollutant allowances requires managing toxic pollutant releases to the environment. Toxic pollution can not be prevented if it is being managed. The Clean Water Act has always had the goal of eliminating pollutant discharges in Section 101(a)(1). Section 322(h)'s establishment of a "right" to manage and trade pollutant releases would, for toxic pollutants, represent a historic retreat from this fundamental Clean Water Act goal.

3. Even for pollutants that might not be totally eliminated, such as trace elements, pollution trading as practiced is environmentally unsound. In the polluters' version of watershed management revealed by the South Bay Dischargers' "Joint Proposal" discussed above, excess copper discharge would be allowed in dry weather in return for discharging less copper in wet weather. However, dry weather discharges accumulate to far greater environmental concentrations in the arid west that cause greater toxic impacts. A state technical report has concluded that discharge levels allowed by the plan would cause toxic pollution in South San Francisco Bay every dry season.[21] A ton of copper when the river is a trickle can be different than a ton of copper when it is a torrent, but pollution traders miss this environmentally crucial distinction.

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[19] Submittal to the Regional Water Quality Control Board, Oakland, California pursuant to San Jose/Santa Clara NPDES permit Limitation B.5.1.b and Provision E.7.

[20] [Committee Print] Amendment in the Nature of a Substitute to H.R. 3948. Proposed Section 322(h)(3)

[21] California Regional Water Quality Control Board, 1993. Final Staff Report, Waste Load Allocation for Copper for San Francisco Bay. June 1, 1993. p 42.

Testimony of CBE before Congress

4. Pollution trading schemes wrongly assume that pollution prevention is a voluntary business activity when it is dependent in large part upon enforceable standards which define the pollution to be prevented. In contrast to the results of the independent audits of South Bay industries cited above, ten comparable "Largest Discharger" metal finishing and printed circuit board firms turned in self-audits that found different results.

As compared with the independent audits, the industry self-audits proposed to make significantly smaller capital investments with significantly shorter payback times, and would achieve significantly smaller long-term cost savings and pollution reductions. These self-audits were found deficient by the state permitting authority.[22] CBE's technical consultant provided under the agreements concurs. Similarly, 1989 NPDES permit provisions required voluntary pollution prevention by the same industries that now can make dramatic further cost-saving reductions based on mandatory audits. In other words, many Silicon Valley industries chose quicker short-term profits even though this means smaller long term profits and more toxic pollution.

When Silicon Valley industries were exempted from pretreatment local limits they did not adopt even straightforward, cost-saving pollution prevention measures that could greatly reduce pollution. By weakening enforcement of environment-based standards against individual companies in a watershed, the proposed amendments to 322(h)(3) will weaken incentives for pollution prevention instead of strengthening them.

- **The "Clean Safe Jobs" model should be expanded beyond Silicon Valley. Congress should support citizen enforcement of environmental standards and provide for locally-controlled investments in sustainable industries.**

The Clean Safe Jobs strategy works because it combines the same elements that resulted in the widespread (though not total) success of the municipal treatment works strategy under the Act: enforceable standards and investments in solutions. It works because it is a locally controlled model needed to address differences in local economies and industrial sectors, and avoids the traditional weakness of local environmental enforcement when faced with jobs extortion. It does this through preserving citizen enforcement options. Realistically, these enforcement powers are needed to assure investments are directed for the long-term good of the community, because private entities are organized to seek profits on a shorter time scale than that which is best for the community's jobs base and environmental health.

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22 Letter to Marvin Rose, City of Sunnyvale, from Steven R. Ritchie, Executive Officer, California Regional Water Quality Control Board, dated May 11, 1994.

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POLLUTION PREVENTION REVIEW: MARTEX CIRCUITS, INC.

Introduction

This Fact Sheet is one of six that summarize the findings from pollution prevention reviews conducted by the Palo Alto Regional Water Quality Control Plant (RWQCP). The purpose of these Reviews was to explore the potential to reduce sewer discharges of copper and nickel through modifications of industrial processes and wastewater treatment systems.

This Fact Sheet summarizes the pollution prevention review of Martex Circuits, Incorporated in Mountain View, California. Martex is a printed circuit board manufacturer with about 60 employees. Martex manufactures multi-layer and single layer printed circuit boards through a production process that involves plating, etching, and stripping of copper, nickel, tin/lead solder, gold, and silver. Five processes at Martex Circuits involve copper- and nickel-containing solutions. Copper racks used to mount pieces for electroplating are also a source of copper in the facility's wastewater discharge.

Current Discharge Status

Martex Circuits discharges an average of about 35,000 gallons per day (gpd) of treated wastewater to the Palo Alto RWQCP. The discharge contains about 4.2 ounces per day (oz/day) of copper, and 0.09 oz/day of nickel. During the study period, the facility discharged about 50,000 gpd. On-site wastewater treatment at Martex Circuits removes most copper and a portion of the nickel from the process wastewater prior to sewer discharge. For each of the processes that involve copper- and nickel-containing solutions, Table 1 summarizes the discharge copper content, nickel content, and flow to the on-site treatment unit during the study period.

Table 1: Martex Process Wastewater Characteristics Prior to On-site Treatment

Industrial Process	Copper Content (oz/day)	Nickel Content (oz/day)	Flow (gpd)
Micro-Etch	42	NA	4,500
Ultra-Etch	15	NA	6,800
Electrolytic Copper Plating	5.3	NA	4,500
Electroless Copper Plating	0.47	NA	2,200
Tin/Lead Plating	0.05	NA	2,200
Other Processes	30	1.5	29,000
TOTAL	93	1.5	49,000

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Waste Minimization Recommendations

Table 2 summarizes the waste minimization measures proposed by the study for the racks and for each of the five processes using copper- and nickel-containing solutions. Implementation of these measures would reduce the metals loading and wastewater flow from Martex Circuits' processes to its wastewater treatment system. Table 3 summarizes the metal and wastewater flow reductions, before on-site treatment, estimated to result from implementation of the identified measures. Table 3 also provides approximate project capital costs and the estimated simple payback period for all projects together, excluding interest costs.

Table 2: Identified Waste Minimization Measures

Industrial Process	Waste Minimization Measures
Micro-Etch	Add drip bars, drag-out tank, and two-stage cascade rinse; air agitation for drag-out tanks and rinses; flow control; and electrowinning.
Ultra-Etch	Install recirculating pump and plumbing, ion exchange, and electrowinning.
Electrolytic Copper Plating	Add drag-out tank, two-stage rinses, and drip bars; air agitation for drag-out tank and rinses; flow control; and electrowinning cell.
Electroless Copper Plating	Convert to drag-out tank and single rinse, air agitation for drag-out tank and rinses, flow control, electrowinning cell, and process-bailout recovery system.
Tin/Lead Plating	Install drag-out tank and single rinse with air agitation, drip bar, and flow control.
Other Processes	Replace racks with coated racks; install additional drag-out tanks and rinses for other processes.

Table 3: Estimated Potential Process Discharge Reductions Prior to On-Site Treatment

Industrial Process	Copper [oz/day (%)]	Nickel [oz/day (%)]	Flow [gpd(%)]	Capital Cost	Simple Payback (yrs)
Micro-Etch	34 (81%)	none	3500 (79%)	$9,100	
Ultra-Etch	12 (80%)	none	6700 (99%)	$15,000	
Electrolytic Copper Plating	4.2 (80%)	none	4400 (98%)	$8,800	
Electroless Copper Plating	0.37 (74%)	none	2200 (99%)	$11,000	
Tin/Lead Plating	0.03 (68%)	none	840 (38%)	$5,600	
Other Processes	25 (84%)	1.2 (81%)	21,000 (76%)	$21,000	
Engineering (all processes)	none	none	none	$120,000	
TOTAL	76 (82%)	1.2 (81%)	39,200 (80%)	$190,000	2.6

Wastewater Treatment

The pollution prevention review investigated the potential to reduce copper and nickel discharges from Martex to the RWQCP by altering the on-site wastewater treatment practices. The study evaluated the potential effects of treatment system alterations both with and without implementation of the above waste minimization measures. Table 4 summarizes the reductions (as compared to current discharges) in copper, nickel, and flow discharged to the RWQCP as a result of implementation of the various treatment measures both with and without implementation of waste minimization. The table also provides approximate project capital costs and simple payback periods, which do not include interest costs.

Table 4: Estimated Potential Sewer Discharge Reductions

Wastewater Treatment System		Copper Sewer Discharge Reduction [oz/day (%)]	Nickel Sewer Discharge Reduction [oz/day (%)]	Flow Reduction [gpd (%)]	Capital Cost	Simple Payback Including Waste Min. (yrs)	Simple Payback for Treatment System Only(yrs)
Use Existing System (precipitation)	With waste minimization	3.4 (81%)	0.08 (89%)	25,000 (71%)	$190,000	2.6	Not applicable
Waste Min. and Distill remainder	Haul residuals off-site	4.2 (100%)	0.09 (100%)	35,000 (100%)	$830,000	No Payback	No Payback
Waste Min. and Reverse Osmosis	Treat residuals through existing system and sewer	4.0 (96%)	0.08 (90%)	33,000 (94%)	$410,000	5.1	26
Waste Min., Reverse Osmosis and Distill remainder	Haul residuals off-site	4.2 (100%)	0.09 (100%)	35,000 (100%)	$590,000	No Payback	No Payback
	Treat residuals through existing system sewer	4.2 (99%)	0.8 (90%)	35,000 (99%)	$600,000	9	No Payback

Review Recommendations

The review recommends that Martex consider the following in addition to the waste minimization measures:

- validating identified waste minimization measures with pilot tests; and
- integrating waste minimization into the planned facility expansion.

Reference

Complete results of the study are presented in the report: *Pollution Prevention Review: Martex Circuits, Incorporated, Mountain View, California, Summary Report*, prepared by Kennedy/Jenks Consultants with assistance from Applied Waste Minimization, September, 1993

Copies of this report or any of the other five studies may be obtained from the Palo Alto RWQCP, 2501 Embarcadero Way, Palo Alto, CA 94303, (415) 329-2598.

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POLLUTION PREVENTION REVIEW: DAVILA INTERNATIONAL CIRCUITS, INC.

Introduction

This Fact Sheet is one of six that summarize the findings from pollution prevention reviews conducted by the Palo Alto Regional Water Quality Control Plant (RWQCP). The purpose of these Reviews was to explore the potential to reduce sewer discharges of copper and nickel through modifications of industrial processes and wastewater treatment systems.

This Fact Sheet summarizes the pollution prevention review of Davila International Circuits, Inc. in Mountain View, California. Davila is an independent printed circuit board manufacturer with approximately 95 employees. Printed circuit board manufacture involves plating and etching of copper, nickel, tin/lead solder, and gold onto and from fiberglass base boards. Davila produces both single-layer and multi-layer printed circuit boards through a series of selective cleaning, plating, and etching steps, each of which involves metal-containing solutions. Five of Davila's processes involve the use of copper- and nickel-containing solutions.

Current Discharge Status

Davila discharges an average of about 39,000 gallons per day (gpd) of treated wastewater to the Palo Alto RWQCP. The discharge contains about 2.9 ounces per day (oz/day) of copper and 0.09 oz/day of nickel. On-site wastewater treatment at Davila removes most metals in the process wastewater prior to sewer discharge. Table 1 summarizes the process discharge copper content, nickel content, and flow to the on-site treatment unit.

Table 1: Davila Process Wastewater Characteristics Prior to On-site Treatment

Industrial Process	Copper Content (oz/day)	Nickel Content (oz/day)	Flow (gpd)
Micro-Etch	43	NA	1,700
Ultra-Etch	18	NA	48
Electrolytic Copper Plating	19	NA	3,400
Electroless Copper Plating	0.85	NA	1,700
Tin/Lead Plating	0.05	0.2	1,700
Other Processes	16	4.9	32,000
TOTAL	97	5.1	39,000

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Waste Minimization Recommendations

Table 2 summarizes the waste minimization measures proposed by the study for each of the five processes using copper- and nickel-containing solutions. Implementation of these measures would reduce the metals loading and wastewater flow from the five processes to the facility's wastewater treatment system. Table 3 summarizes the metal and wastewater flow reductions, before on-site treatment, estimated to result from implementation of the identified measures. Table 3 also provides approximate project capital costs and the estimated simple payback period for implementing all measures together, excluding interest costs.

Table 2: Identified Waste Minimization Measures

Industrial Process	Waste Minimization Measures
Micro-Etch	Install drip board, drag-out tank, air agitation for drag-out tank, flow control, and an electrowinning cell.
Ultra-Etch	Add electrowinning cells.
Electrolytic Copper Plating	Reconfigure drag-out tank and rinses, install drip bars, air agitation for drag-out tank and rinses, flow control, and an electrowinning cell.
Electroless Copper Plating	Reconfigure for drag-out tank, air agitation for drag-out tank and rinses, flow control, and an electrowinning cell
Tin/Lead Plating	Convert to drag-out tank and single rinse with air agitation, drip bar, and flow control.
Other Processes	No specific measures identified, but reduction assumed to occur through implementation of measures similar to those above.

Table 3: Estimated Potential Process Discharge Reductions Prior to On-Site Treatment

Industrial Process	Copper [oz/day (%)]	Nickel [oz/day (%)]	Flow [gpd (%)]	Capital Cost	Simple Payback (yrs)
Micro-Etch	34 (81%)	none	1,100 (64%)	$7,800	
Ultra-Etch	14 (80%)	none	0 (0%)	$7,900	
Electrolytic Copper Plating	15 (79%)	none	3,100 (91%)	$14,000	
Electroless Copper Plating	0.59 (69%)	none	1,700 (99%)	$6,300	
Tin/Lead Plating	0.03 (68%)	none	780 (46%)	$2,100	
Other Processes	9.4 (57%)	3.7 (76%)	15,000 (45%)	$5,600	
Engineering (all processes)	none	none	none	$120,000	
TOTAL	73 (76%)	3.7 (76%)	20,000 (50%)	$160,000	4.8

Wastewater Treatment

The pollution prevention review investigated the potential to reduce copper and nickel discharges from Davila to the RWQCP by altering the on-site wastewater treatment practices. The study

evaluated the potential effects of treatment system alterations both with and without implementation of the above waste minimization measures. Table 4 summarizes the reductions (as compared to current discharges) in copper, nickel, and flow discharged to the RWQCP as a result of implementation of the various treatment measures evaluated both with and without implementation of waste minimization. The table also provides approximate project capital costs and simple payback periods, which do not include interest costs.

Table 4: Estimated Potential Sewer Discharge Reductions

Wastewater Treatment System		Copper Sewer Discharge Reduction [oz/day (%)]	Nickel Sewer Discharge Reduction [oz/day (%)]	Flow Reduction [gpd (%)]	Capital Cost	Simple Payback Including Waste Min. (yrs)	Simple Payback for Treatment System Only(yrs)
Use Existing System (precipitation)	With waste minimization	1.8 (60%)	0.04 (44%)	20,000 (50%)	$160,000	4.8	Not applicable
Waste Min., Ion Exchange and Distill remainder	Haul residuals off-site	2.9 (100%)	0.09 (100%)	39,000 (100%)	$570,000	No Payback	No Payback
	Treat residuals through existing system and sewer	2.8 (99%)	0.085 (99%)	39,000 (99%)	$570,000	14	43
Waste Min., Reverse Osmosis and Distill remainder	Haul residuals off-site	2.9 (100%)	0.9 (100%)	39,000 (100%)	$720,000	No Payback	No Payback
	Treat residuals through existing system sewer	2.8 (99%)	0.085 (99%)	39,000 (99%)	$720,000	34	No Payback

Review Recommendations

The review recommends that Davila consider the following in addition to the waste minimization measures:

- conversion to rinsing with deionized water;
- evaluating the potential to treat (through processes such as electrowinning) and recycle select waste streams, such as copper-only rinse streams; and
- conducting further evaluating of less costly treatment alternatives, such as evaporation.

Reference

Complete results of the study are presented in the report: *Pollution Prevention Review: Davila International Circuits, Inc., Mountain View, California, Summary Report*, prepared by Kennedy/Jenks Consultants with assistance from Applied Waste Minimization, September, 1993.

Copies of this report or any of the other five studies may be obtained from the Palo Alto RWQCP, 2501 Embarcadero Way, Palo Alto CA 94303, (415) 329-2598.

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POLLUTION PREVENTION REVIEW: SYMTRON CORPORATION

Introduction

This Fact Sheet is one of six that summarize the findings from pollution prevention reviews conducted by the Palo Alto Regional Water Quality Control Plant (RWQCP). The purpose of these Reviews was to explore the potential to reduce sewer discharges of copper and nickel through modifications of industrial processes and wastewater treatment systems.

This Fact Sheet summarizes the pollution prevention review of Symtron Corporation in Mountain View, California. Symtron, a relatively large printed circuit board manufacturer, has about 300 employees. Printed circuit board manufacture involves plating and etching copper, tin/lead solder, and gold onto and from fiberglass base boards. Symtron uses manual and automated processes to produce multi-layer printed circuit boards through a series of selective cleaning, plating, and etching steps, each of which involves metal-containing solutions. Seven of Symtron's processes involve the use of copper-containing solutions. Because none of Symtron's processes involve nickel-containing solutions, nickel is not considered in the study.

Current Discharge Status

Symtron Corporation currently discharges an average of 200,000 gallons per day (gpd) of treated wastewater to the Palo Alto RWQCP. The discharge contains about 2.9 ounces per day (oz/day) of copper. During the pollution prevention study period, the flow was 136,000 gpd. On-site wastewater treatment at Symtron removes most metals in process wastewater prior to sewer discharge. For each of the seven processes that involve copper-containing solutions, Table 1 summarizes the discharge copper content and flow to the on-site treatment unit during the study period.

Table 1: Symtron Process Wastewater Characteristics Prior to On-site Treatment

Industrial Process	Rinse Discharge Copper Content (oz/day)	Batch Discharge Copper Content (oz/day)	Rinse Flow (gpd)	Batch Flow (gpd)
Electroless Copper Plating	10	980	3,000	790
Manual Oxide Line	71	520	4,100	300
Pattern Plating	61	12	5,800	23
Hot Air Leveler	20	21	9,200	8
Outer Layer Etcher	36	0.1	9,600	5
Manual Pattern Plating	1.5	11	12,000	38
Inner Layer Etcher	6.9	0	7,800	0
TOTAL	210	1,500	51,000	1,200

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Waste Minimization Recommendations

Table 2 summarizes the waste minimization measures proposed by the study for each of the six processes using copper-containing solutions. Implementation of these measures would reduce the metals loading and wastewater flow from the seven processes to the facility's wastewater treatment system. Table 3 summarizes the metal and wastewater flow reductions, before on-site treatment, estimated to result from implementation of the identified measures. Table 3 also provides approximate project capital costs and the estimated simple payback period for each project, excluding interest costs.

Table 2: Identified Waste Minimization Measures

Industrial Process	Waste Minimization Measures
Electroless Copper Plating	Convert micro etch to sulfuric/peroxide; change dwell time from 0 to 20 sec; add crystallizer to recover copper sulfate; plate out for electroless copper bail out; ion exchange recycling with electrowinning for micro etch and electroless copper rinses; flow control on final rinses.
Manual Oxide Line	Convert micro etch to sulfuric/peroxide; change dwell time from 0 to 20 sec; add crystallizer to recover copper sulfate from etch; electrowinning for drag-out rinse; flow control on final rinse; set final rinse to 5 mg/l.
Pattern Plating	Convert micro etch to sulfuric/peroxide; convert cascade rinse to drag-out rinse; replenish evaporation losses from acid copper solution with drag-out rinse; change dwell time from 0 to 20 sec; add crystallizer to recover copper sulfate from etch; ion-exchange recycling with electrowinning for drag-out rinses; flow control on final rinse; set final rinse limits to 10 mg/l.
Hot Air Leveler	Replace ferric chloride etch with sulfuric/persulfate mix; add drag-out rinse chamber; electrowinning for etchant and drag-out rinse; photo-cell flow control for running rinse.
Outer Layer Etcher	Reclaim unit for etcher; flow control for rinse; change final rinse limits to 10 mg/l.
Manual Pattern Plating	Convert micro etch to sulfuric/peroxide; replenish evaporation losses from acid copper with drag-out rinse; convert cascade rinse followed by 10% sulfuric acid to drag-out rinse followed by cascade rinse; add crystallizer to recover copper sulfate from etch; electrowinning for drag-out rinses; meter drag-out rinse into wastewater; flow control on final rinse; set final rinse limits to 10 mg/l.
Inner Layer Etcher	Reclaim unit for etchant; flow control for rinse; change final rinse to 5 mg/l.
Miscellaneous	Eliminate metered micro etch and limit batch treatment to 500 gpd. (The waste minimization measures listed above enable these measures to be implemented, creating additional savings).

Table 4: Estimated Potential Sewer Discharge Reductions

Wastewater Treatment System		Copper Sewer Discharge Reduction [oz/day (%)]	Flow Reduction [gpd (%)]	Capital Cost	Simple Payback Including Waste Min. (yrs)	Simple Payback for Treatment System Only (yrs)
Use Existing System (Memtek)	With waste minimization	0.82 (28%)	53,000 (39%)	$1,200,000	1.0	Not applicable
Ion Exchange followed by use of Existing System	No process changes	2.5 (85%)	110,000 (80%)	$810,000	Not applicable	4.5
	With waste minimization	2.6 (91%)	120,000 (88%)	$1,800,000	1.4	6.0
Waste Min., Ion Exchange and Distill remainder	Haul residuals off-site	2.9 (100%)	140,000 (100%)	$3,000,000	No Payback	No Payback
	Treat residuals through existing system and sewer	2.7 (94%)	130,000 (98%)	$3,000,000	2.6	No Payback

Review Recommendations

The review recommends that Symtron consider the following in addition to the waste minimization measures:

- conducting supplementary studies to: (1) verify the accuracy of the mass balance that forms the basis of the analysis and (2) explores opportunities to reduce wastewater flow from non metal-generating processes;
- evaluating reductions in use of batch waste treatment;
- evaluating potential improved MEMTEK control at lower operating concentrations;
- validating the identified potential waste minimization measures with pilot tests;
- outer-layer etcher conversion to ammonium-sulfate etchant with recycling; and
- installation of a drag-out rinse chamber on the hot-air leveler.

Reference

Complete results of the study are presented in the report: *Pollution Prevention Review: Symtron Corporation, Mountain View, California, Summary Report*, prepared by Kennedy/Jenks Consultants with assistance from Applied Waste Minimization, November, 1993.

Copies of this report or any of the other five studies may be obtained from the Palo Alto RWQCP, 2501 Embarcadero Way, Palo Alto CA 94303, (415) 329-2598.

Table 3: Estimated Potential Process Discharge Reductions Prior to On-Site Treatment

Industrial Process	Copper Use [oz/day (%)]	Cu Batch Discharge [oz/day (%)]	Rinse Flow [gpd (%)]	Batch Flow [gpd (%)]	Capital Cost	Simple Payback (yrs)
Electroless Copper Plating	6.9 (69%)	980 (100%)	2900 (96%)	800 (100%)	$320,000	1.0
Manual Oxide Line	55 (78%)	520 (100%)	3300 (81%)	300 (100%)	$100,000	0.5
Pattern Plating	60 (98%)	12 (100%)	5700 (99%)	23 (100%)	$97,000	1.5
Hot Air Leveler	20 (97%)	21 (100%)	8000 (87%)	8 (100%)	$32,000	1.4
Outer Layer Etcher	35 (96%)	0.06 (57%)	9100 (95%)	0(0.0%)	$92,000	1.3
Manual Pattern Plating	0.0 (0.0%)	11 (100%)	11 (99%)	38 (100%)	$71,000	2.7
Inner Layer Etcher	-0.5 (-0.07%)	None	None	None	$360,000	1.7
Miscellaneous	None	None	None	None	$100,000	0.5
TOTAL	180 (85%)	1,500 (100%)	47,960 (94%)	1200 (99.6%)	$1,200,000	1.1

Wastewater Treatment

The pollution prevention review investigated the potential to reduce copper discharges from Symtron to the RWQCP by altering the on-site wastewater treatment practices. The study evaluated the potential effects of treatment system alterations both with and without implementation of the above waste minimization measures. Table 4 summarizes the reductions (as compared to current discharges) in copper and flow discharged to the RWQCP as a result of implementation of the various treatment measures evaluated both with and without implementation of waste minimization. The table also provides approximate project capital costs and simple payback periods, which do not include interest costs.

It should be noted that the percentage copper reduction from waste minimization alone (Table 3) does not equal the percentage reduction in the effluent after treatment (Table 4), because it is believed and was assumed that the concentration of metals in the effluent of the current on-site wastewater treatment unit would not change. The copper reduction in the effluent is therefore a result of flow reductions.

Regional Water Quality Control Plant

Operated by the City of Palo Alto
for the communities of East Palo Alto
Los Altos Los Altos Hills Mountain View
Palo Alto and Stanford University

POLLUTION PREVENTION REVIEW: TECHNITRON, INC.

Introduction

This Fact Sheet is one of six that summarize the findings from pollution prevention reviews conducted by the Palo Alto Regional Water Quality Control Plant (RWQCP). The purpose of these Reviews was to explore the potential to reduce sewer discharges of copper and nickel through modifications of industrial processes and wastewater treatment systems.

This Fact Sheet summarizes the pollution prevention review of Technitron, Inc. in Mountain View, California. Technitron is a printed circuit board manufacturer with about 60 employees. Printed circuit board manufacture involves plating and etching of copper, nickel, tin/lead solder, and gold onto and from fiberglass base boards. A specialty manufacturer, Technitron produces both single-layer and multi-layer printed circuit boards through a series of selective cleaning, plating, and etching steps, each of which involves metal-containing solutions. Six of Technitron's processes involve the use of copper- and nickel-containing solutions.

Current Discharge Status

During the study period, Technitron discharged an average of about 18,000 gallons per day (gpd) of treated wastewater to the Palo Alto RWQCP. The discharge contained about 0.3 ounces per day (oz/day) of copper, and 0.2 oz/day of nickel. On-site wastewater treatment at Technitron removes most metals in process wastewater prior to sewer discharge. For each of the six processes that involve copper- and nickel-containing solutions, Table 1 summarizes the discharge copper content, nickel content, and flow to the on-site treatment unit during the study period.

Table 1: Technitron Process Wastewater Characteristics Prior to On-site Treatment

Industrial Process	Copper Content (oz/day)	Nickel Content (oz/day)	Flow (gpd)
Electroless Copper Plating	6.0	NA	5,800
Electrolytic Copper Plating	0.3	NA	2,900
Inner/Outer Layer Etcher	9.6	NA	5,800
Copper Oxide Line	4.9	NA	1,900
Nickel Sulfamate Plating	NA	0.2	1,000
Tin/Nickel Plating	NA	8.4	1,000
TOTAL	20.8	8.6	18,000

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Waste Minimization Recommendations

Table 2 summarizes the waste minimization measures proposed by the study for each of the six processes using copper- and nickel-containing solutions. Implementation of these measures would reduce the metals loading and wastewater flow from the six processes to the facility's wastewater treatment system. Table 3 summarizes the metal and wastewater flow reductions, before on-site treatment, estimated to result from implementation of the identified measures. Table 3 also provides approximate project capital costs and the estimated simple payback period for each project, excluding interest costs.

Table 2: Identified Waste Minimization Measures

Industrial Process	Waste Minimization Measures
Electroless Copper Plating	Convert single rinse after micro etch to drag-out rinse; electrowinning for drag-out rinse; replenish evaporation losses with drag-out rinse; flow control/timer for rinse.
Electrolytic Copper Plating	Replenish evaporation losses with drag-out rinse; electrowinning for drag-out rinse; flow control/timer for rinse; minimize rinse volume to increase final rinse concentrations.
Inner/Outer Layer Etcher	Closed loop cooling; convert to ammonium sulfate from ammonium chloride; photo cell flow control.
Copper Oxide Line	Convert to drag-out tank and double rinse; electrowinning for drag-out tank; evaporative losses replenished; flow control/timer.
Nickel Sulfamate Plating	Process evaporation replenishment from drag-out rinse; electrowinning from drag-out rinse; manual timer and flow control for rinse.
Tin/Nickel Plating	Process evaporation replenishment from drag-out rinse; electrowinning from drag-out rinse; manual timer and flow control for rinse.

Table 3: Estimated Potential Process Discharge Reductions Prior to On-Site Treatment

Industrial Process	Copper [oz/day (%)]	Nickel [oz/day (%)]	Flow [gpd (%)]	Capital Cost	Simple Payback (yrs)
Electroless Copper Plating	5.0 (88%)	none	5,700 (99%)	$6,000	0.6
Electrolytic Copper Plating	0.01 (8%)	none	2,800 (97%)	$5,000	0.6
Inner/Outer Layer Etcher	4.8 (50%)	none	5,600 (94%)	$25,000	1.6
Copper Oxide Line	4.4 (88%)	none	1,800 (97%)	$9,000	1.8
Nickel Sulfamate Plating	none	-0.01 (-6%)	920 (96%)	$6,000	2.8
Tin/Nickel Plating	none	7.5 (89%)	360 (37%)	$6,000	11
TOTAL	14 (69%)	7.5 (87%)	17,020 (93%)	$57,000	1.4

Wastewater Treatment

The pollution prevention review investigated the potential to reduce copper and nickel discharges from Technitron to the RWQCP by altering the on-site wastewater treatment practices. The study evaluated the potential effects of treatment system alterations both with and without implementation of the above waste minimization measures. Table 4 summarizes the reductions (as compared to current discharges) in copper, nickel, and flow discharged to the RWQCP as a result of implementation of the various treatment measures evaluated both with and without implementation of waste minimization. The table also provides approximate project capital costs and simple payback periods, which do not include interest costs.

Table 4: Estimated Potential Sewer Discharge Reductions

Wastewater Treatment System		Copper Sewer Discharge Reduction [oz/day (%)]	Nickel Sewer Discharge Reduction [oz/day (%)]	Flow Reduction [gpd (%)]	Capital Cost	Simple Payback Including Waste Min. (yrs)	Simple Payback for Treatment System Only(yrs)
Use Existing System (Memtek)	With waste minimization	0.25 (83%)	0.17 (85%)	17,000 (93%)	$57,000	1.4	Not applicable
Ion Exchange followed by use of Existing System	No process changes	0.24 (80%)	0.2 (98%)	16,000 (80%)	$230,000	Not applicable	10.2
	With waste minimization	0.29 (97%)	0.2 (99%)	18,000 (97%)	$180,000	4.2	88.5
Waste Min., Ion Exchange and Distill remainder	Haul residuals off-site	0.3 (100%)	0.2 (100%)	18,000 (100%)	$250,000	No Payback	No Payback
	Treat residuals through existing system and sewer	0.3 (99%)	0.2 (99%)	18,000 (99%)	$250,000	6.4	No Payback
Waste Min., Ion Exchange and Evaporate remainder	Haul residuals off-site	0.3 (100%)	0.2 (100%)	18,000 (100%)	$210,000	No Payback	No Payback
	Treat residuals through existing system sewer	0.3 (99%)	0.2 (99%)	18,000 (99%)	$210,000	5.0	No Payback

It should be noted that the percentage copper reduction from waste minimization alone (Table 3) does not equal the percentage reduction in the effluent after treatment (Table 4), because it is believed and was assumed that the concentration of metals in the effluent of the current on-site

wastewater treatment unit would not change. The copper reduction in the effluent is therefore a result of flow reductions.

Review Recommendations

The review recommends that Technitron consider the following in addition to the waste minimization measures:

- conducting supplementary studies to: (1) improve the accuracy of the mass balance that forms the basis of the analysis and (2) explores opportunities to reduce wastewater flow from non metal-generating processes;
- evaluating reductions in use of batch waste treatment;
- evaluating potential for improvements in MEMTEK controls at lower operating concentrations;
- validating the identified potential waste minimization measures with pilot tests;
- etcher conversion to closed-loop cooling and ammonium-sulfate etchant; and
- conversion to coated racks for electroplating.

Reference

Complete results of the study are presented in the report: *Pollution Prevention Review: Technitron, Inc., Mountain View, California, Summary Report*, prepared by Kennedy/Jenks Consultants with assistance from Applied Waste Minimization, November, 1993.

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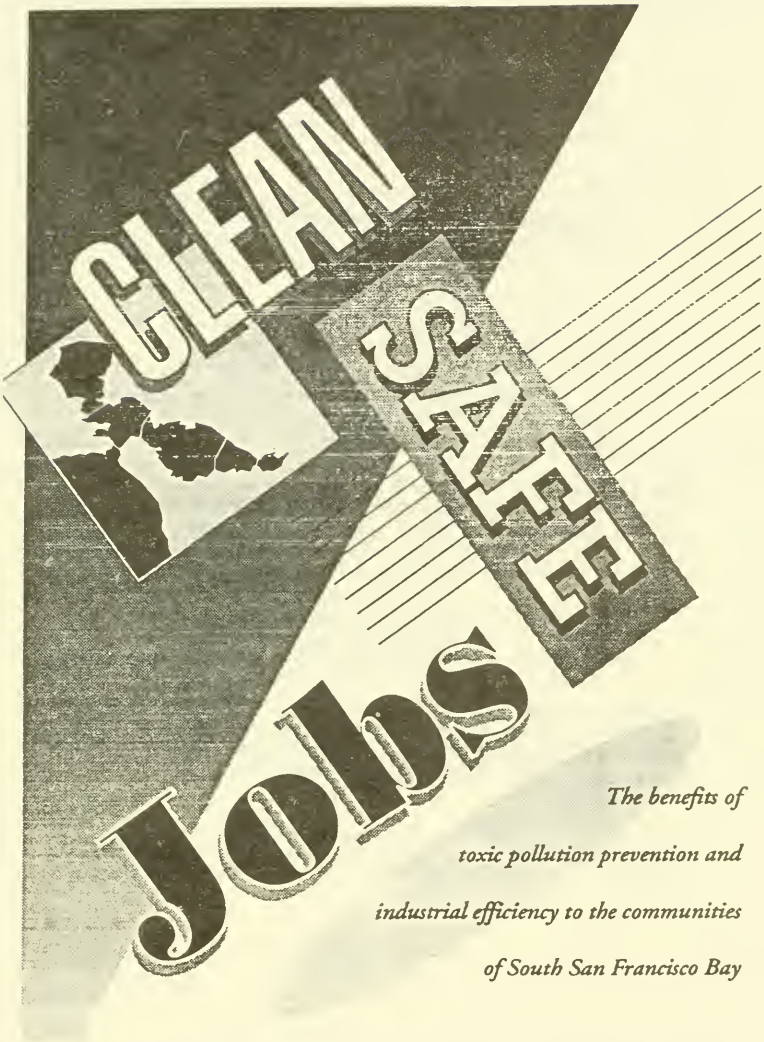

The benefits of toxic pollution prevention and industrial efficiency to the communities of South San Francisco Bay

A Preliminary Report by Citizens for a Better Environment

CLEAN SAFE JOBS

The benefits of toxic pollution prevention and industrial efficiency to the communities of South San Francisco Bay. A preliminary report.

CITIZENS FOR A BETTER ENVIRONMENT

August 1992

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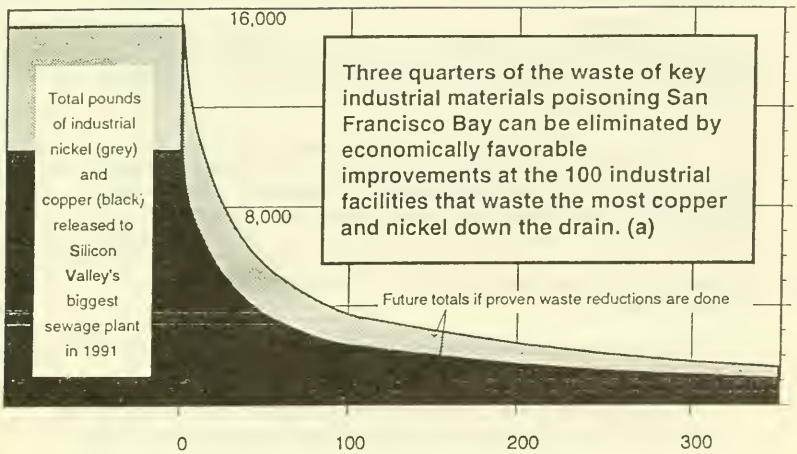
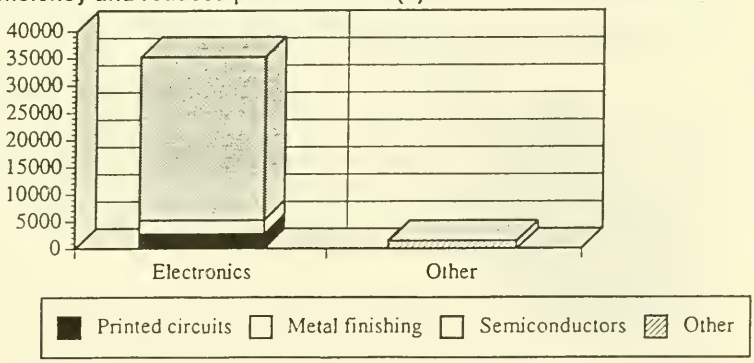


Estimated number of jobs at the 100 industrial facilities that would realize the greatest benefits through increased industrial efficiency and reduced process waste. (b)



(a) Based on waste reduction levels that have been demonstrated by industry and San Jose/Santa Clara Water Pollution Control Dept. pretreatment records.
(b) Based on published business information. Business information systems Inc., 1990; Database publishing Co., 1992; and Gale Research Inc., 1992.

Executive summary

This preliminary investigation shows that investments in pollution prevention in Silicon Valley's electronics industry could help retain thousands of jobs, create more jobs, increase competitiveness, and significantly reduce the severe toxic pollution of San Francisco Bay.

It reports on a case study in progress in Santa Clara County, California, where a small portion of the electronics industry is the biggest industrial cause of the ongoing poisoning of the San Francisco Bay National Wildlife Refuge. It demonstrates that the industry as a whole can cut these wastes by 75% to 90% through improved industrial efficiency that would save the polluting firms money. It pinpoints the failure to enforce environmental protection, and failure to invest in community industry, that now block these industrial efficiency/reduced waste improvements.

The report sets forth a four-point technical assistance program that would, if implemented, prevent toxic pollution and retain local jobs:

- 1. Fund pollution prevention audits and business plans that recommend the best process changes to eliminate waste water pollution at the source.

- 2. Provide technical experts to help assure that the pollution prevention plans are successfully carried out.

- 3. Help smaller firms finance their pollution prevention plans through loan guarantees, buy down of interest rates, or other actions.

- 4. Ensure worker retraining and involvement in industrial efficiency/waste reduction improvements.

This program can help most by cutting high levels of waste at fifty metal finishing and printed circuit board shops in ways that increase efficiency and help to retain the 5,000 jobs in these shops. Those most helped will be small and mid-sized businesses in key manufacturing sectors that play an important role in the economic health, competitiveness, and retention of wealthier parts of the electronics industry. With adequate environmental law enforcement, this "clean safe jobs" proposal could help stop severe losses of San Francisco Bay resources and Silicon Valley manufacturing jobs.

California's private industry wasted 31.9 million pounds of toxic chemicals down the drain into publicly owned sewers in 1990, fully thirty-five percent more than their 23.6 million pounds in 1989. (Toxic Chemical Release Inventory, 1992) This waste disposal through public sewer systems costs our communities in lost resources, and sewage treatment plants cannot neutralize it. We need to stop subsidizing industrial waste, and start investing in industrial efficiency for our health, environment, and jobs.

The San Francisco Bay/Delta, its National Wildlife Refuge, and the area causing the largest effluent discharge south of Oakland and San Francisco.

Introduction: Wildlife Refuge or Industrial Dump Site?

- *The environmental setting.*

The southern reach of the San Francisco Bay/Delta estuary stretches south from the San Francisco/Oakland Bay Bridge, and is also called San Francisco Bay, the Lower Bay, and the South Bay. Some of the physical features of the estuary are roughly mapped on the facing page. The southern reach receives only ten percent of total river flow into the estuary (Smith, 1987), but its catchment contains Silicon Valley, and the largest concentration of industrial waste discharges to public sewers in the estuary. (CBE, 1989) Reduced water circulation in the southern reach that is caused by river water diversions from the Delta further worsens the locally-caused pollution here. (Flegal et al., 1991; Luoma et al., 1985; Davis et al., 1991; and Belliveau and Grove, 1987)

The map also shows the approximate location of the San Francisco Bay National Wildlife Refuge in the southern reach. The officially designated "beneficial uses" of water in the Bay's southern reach include navigation, recreation in and on the water, commercial and sport fishing, wildlife habitat, preservation of rare and endangered species, fish migration, shellfish harvesting, and estuarine habitat. (San Francisco Bay Basin Plan, 1987)

In addition to the Refuge, the southern reach of the Bay is part of a "National Priority Estuary" under Section 320 of the Federal Clean Water Act. It is an important stopover for birds migrating along the Pacific Flyway. It includes the largest harbor seal haul-out and pupping area in the Bay, and part of one of the Bay's last remaining commercial fisheries, trawling for bay shrimp. Unfortunately, a number of negative impacts including pollution, wetlands destruction, and water diversions have greatly reduced the abundance of many populations of Bay species in recent years. Several species are threatened with extinction. At least one endangered bird species, the California Clapper Rail, depends on the southern reach for its survival. (Herbold et al., 1992; Lonzarich et al., in press)

Finally, the map outlines the areas of Santa Clara County that discharge wastes to the Bay through the San Jose/Santa Clara sewage system. This collection, treatment, and discharge system is owned by the cities of San Jose and Santa Clara and services three quarters of Silicon Valley's industrial waste water discharges (CBE, 1989), and accepts wastes from water supply and other services for more than a million people who live in its collection area (Dept. of Finance, 1989). Despite advanced treatment of degradable pollutants, the San Jose/Santa Clara plant causes the largest release of non-degradable toxic pollutants in the South Bay.

• *Industrial sewer pollution is one of three key causes of severe toxic pollution in the southern reach of San Francisco Bay.*

Sewage plant effluents and urban storm runoff are the major sources of copper, nickel, mercury, selenium, and other toxic pollutants in the South Bay, according to the U.S. Environmental Protection Agency and the California Water Resources Control Board. (EPA, 1990; and SWRCB, 1990) Sewage effluents and local runoff pollution cause elevated concentrations of copper, nickel, cadmium, and other pollutants throughout the southern reach of the Bay. (Flegal et al., 1991) The pollutant concentration gradients extend to approximately the San Francisco/Oakland Bay Bridge, with the greatest concentrations near the effluent discharges from Santa Clara County, the heart of California's industrialized Silicon Valley. (Ibid.)

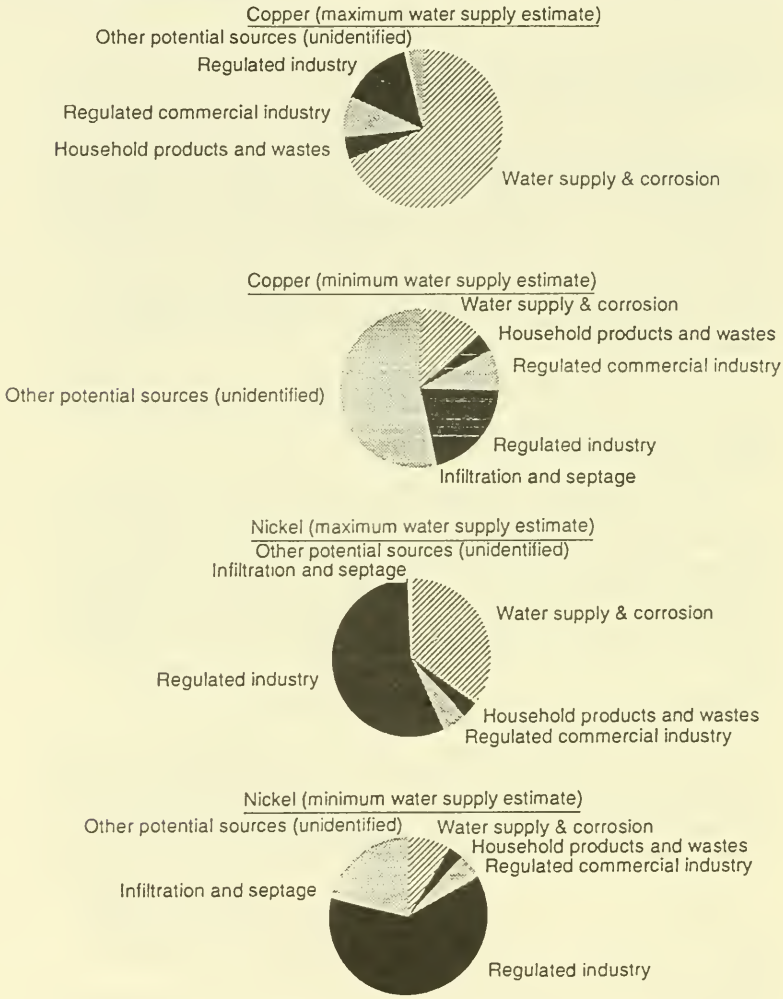
There are three major known causes of this toxic pollution of sewage and storm runoff: manufacturing and "commercial" industrial facilities; the water supply industry's pesticide use and corrosion of its piping; and transportation system pollution of urban storm runoff.

In the past, discharger representatives insisted that industrial pollution was small compared to other causes, but that may be changing. Discharger estimates of copper and nickel discharges to the San Jose/Santa Clara plant are shown on the facing page. (EOA Inc., 1991) As can be seen, the dischargers now agree that industry and water supply are the two largest causes of these pollutants in sewage effluents. CBE believes that the discharger "maximum water supply" estimates shown here still overestimate the amount of water supply pollution by about three times, and thus down play the relative importance of industrial pollution. (CLEAN South Bay, 1992) Nevertheless, even these discharger estimates show they will need to reduce industrial sewer pollution as well as water supply pollution to best halt sewage poisoning of the Bay.

Most of the pounds of those toxics that can be adequately traced in South Bay runoff come from gasoline combustion, engine emissions, vehicle leaks and wear, and the washing of these emissions from streets and other surfaces by storm runoff. Industrial runoff pollution is significant, but causes less total pounds of toxics to enter local runoff than transportation. (CBE, 1991)

In dry years, local runoff pollution causes a significant portion of the total toxic discharge, but more copper, nickel, and other pollutants enter the South Bay from sewage plants than runoff. (Woodward-Clyde, 1990) Some studies predict runoff pollution will exceed sewage plant pollution in wetter rainfall years (Ibid.), but these predictions are questionable because pollutant concentrations were not measured in wet-year runoff, and may be reduced when there is ten times more runoff or more. (SWRCB, 1990)

Discharger consultant estimates of the causes of copper and nickel releases through the San Jose/Santa Clara sewage treatment plant (by relative mass).



Source: EOA Inc., 1991. Investigation of Un-permitted sources of nickel and copper in Santa Clara/San Jose WPCP Influent. Prepared for: City of San Jose. See Table 2.

The EPA and State Board have found that toxic pollution threatens or impairs beneficial uses of water in South San Francisco Bay, in violation of the requirements of the Federal Clean Water Act. (EPA, 1990; SWRCB, 1990)

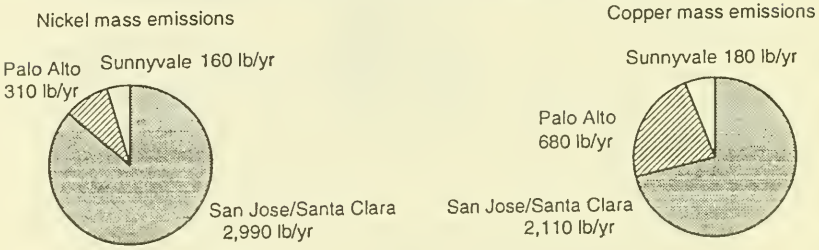
Overwhelming evidence points to a severe toxic pollution problem. Concentrations of copper, nickel, and six other toxic chemicals in South Bay waters violated EPA criteria for the protection of aquatic life. (SWRCB, 1990) State Health Warnings say "no one should eat more than four meals a month of any striped bass" or "more than 4 oz. ... of greater scaup meat" from the area because of elevated mercury and selenium levels in these food resources. (Cal. Fishing Reg.; and Cal. Hunting Reg.) Further: "Women who are pregnant or may soon become pregnant, nursing mothers," and children should not eat *any* of these fish or ducks from the Bay. (Ibid.) South Bay selenium levels in ducks "were similar to those in livers of dabbling ducks in the nearby San Joaquin Valley where reproduction was impaired severely." (Ohlendorf et al., 1986) "Mercury concentrations in [California Clapper Rail eggs were] ... similar to levels associated with reproductive effects..." (Lonzarich et al., in press) The blood of Bay harbor seals contains copper and selenium at concentrations significantly greater than those of seals from other waters. (Kopec et al., 1991)

Cadmium and copper were linked to a disease epidemic that led to a crash in the South Bay shrimp fishery in 1985. (SWRCB, 1990) South Bay shellfish that accumulated copper, silver, and cadmium to extremely elevated concentrations in their tissues were negatively impacted by toxicity. (SWRCB, 1990) This is important because "grazing by benthic invertebrates may limit phytoplankton biomass in South Bay. If so, damage to the benthic community through an increase in contaminant stress could have widespread impacts on the entire biological community of the Bay." (Luoma and Cloern, 1982) Indeed, copper and other toxics reach levels that may explain the elimination of dinoflagellate plants from the South Bay ecosystem. (Kuwabara et al., 1989) For more details of toxics threats see SWRCB, 1990; and CBE, 1992.

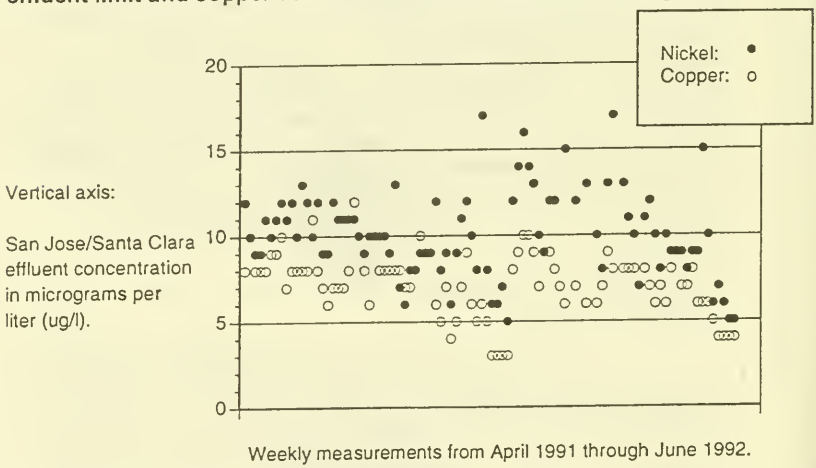
• *Industrial pollution prevention for the toxic pollutants copper and nickel: A case study in progress.*

This study explores a win-win solution to the conflict over whether San Francisco Bay will be a healthy ecosystem or a toxic dump site. It addresses the San Jose/Santa Clara discharge because it is the biggest source of pollution, as shown on the facing page. It explores acceptable solutions to ongoing pollution violations for the toxic pollutants copper and nickel. (also shown) Despite its environmental policies in other areas, San Jose has failed to enforce industrial clean up (EPA, 1991), and has sued the State of California to weaken toxics standards for the Bay (San Jose v. State Water Resources Control Board), citing fears of economic harm and job losses. To address these concerns, the study focuses on the economic effects of industrial pollution prevention.

Pie charts comparing the proportion of nickel and copper discharged to San Francisco Bay by South Bay sewage treatment plants.



Scattergram plot of San Jose/Santa Clara effluent measurements showing nickel concentrations that violate the plant's 8.3 ug/l effluent limit and copper concentrations that violate the 2.9 ug/l limit.



Source: All data from discharger self monitoring reports to the California Regional Water Quality Control Board, Oakland, Calif. Pie charts based on approximately 150 weekly effluent measures from January through June 1992. Scattergram shows approximately 180 weekly measures from April 1991 through June 1992. Effluent limits from NPDES permit CA0037842.

Industrial waste, industrial efficiency, and industrial investment.

• *A small portion of the electronics industry causes most of the industrial copper and nickel pollution in the South Bay.*

The stacked bar charts on the facing page show the contributions of each monitored industrial facility and the total release of industrial copper and nickel to the San Jose/Santa Clara sewage treatment plant. Each bar starts with the largest discharge at the bottom of the stack, followed by the next largest, and so on. The first bar on the left of each chart shows the subtotal for the ten largest industrial discharges. The middle bars show the subtotal for the fifty largest industrial discharges. The bars on the far right show the total discharges from approximately 350 industrial facilities -- the total number monitored and regulated under this plant's pretreatment program.[1] Copper and nickel are shown separately because the biggest dischargers of one pollutant are sometimes, but not always, the biggest dischargers of the other pollutant.

These measurements show that a large proportion of industrial sewer pollution comes from only a few industrial facilities. The ten industrial facilities that released the most pounds of copper caused nearly *half* of all copper discharges from all 350 facilities. The ten biggest nickel discharges also caused nearly half of all 350 nickel discharges. The fifty biggest discharges of copper caused 85% of total industrial copper; the fifty biggest nickel discharges caused 84% of total industrial nickel. For both copper and nickel, less than 15% of the firms caused more than 80% of industrial sewer pollution.

Further, these trends appear consistent among different toxic chemicals, different areas, and different years. Most of the industrial chromium, copper, lead, nickel, silver, and zinc wastes released to Santa Clara County sewers in 1987 and 1988, and released to Los Angeles sewers in 1988 and 1989, also came from less than ten percent of industry. (CBE, 1990)

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[1] For readers familiar with the Toxic Chemical Release Inventory (TRI) database required by federal Superfund legislation, it is important to note that these estimates are based on a different database that is more reliable for measuring industrial toxic metals releases to sewage treatment than the TRI database. The data presented here are from pollutant and flow measurements of each individual facility's effluent discharge connection to the public sewer system that are collected for all industry regulated by the "pretreatment program" of the federal Clean Water Act. (San Jose, 1992) In contrast to the very limited industry self-estimates typical of the TRI, this database includes measurements of more industrial facilities, and each pollutant measurement is based on standardized chemical analyses that are reliable enough for use in enforcement of pretreatment standards intended to restrict pollutant discharges. In general, these data support very accurate estimates of copper and nickel releases and trends for groups of facilities. The data and methods of analysis are discussed further in CBE (1990).

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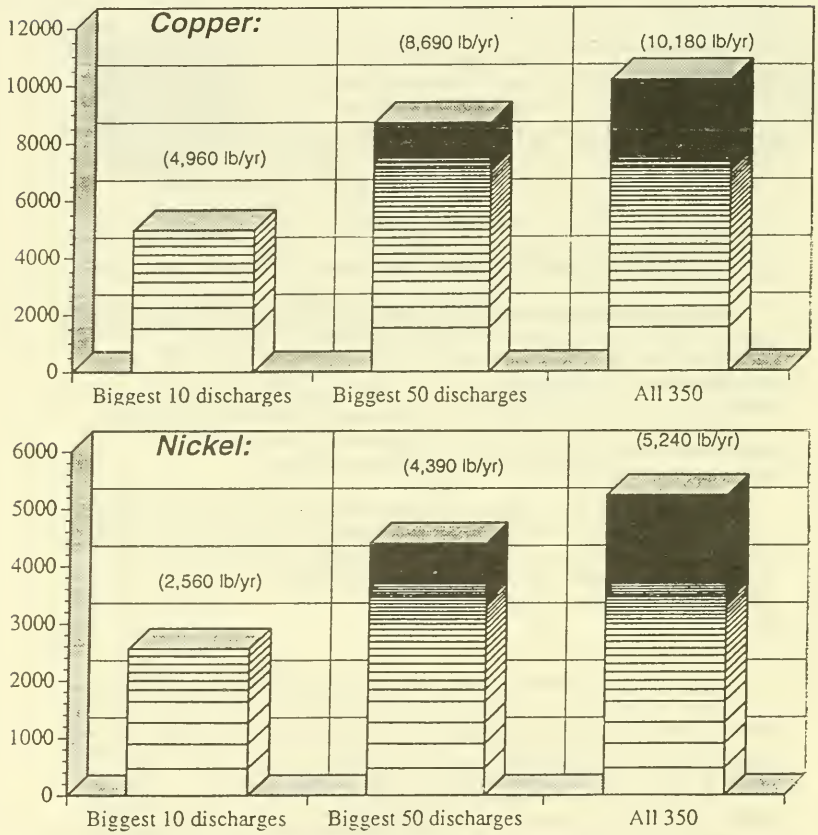
For the toxic pollutants copper and nickel, a small proportion of industry (only 50 of 350 facilities) causes more than eighty percent of the industrial pollution of San Jose/Santa Clara effluent.



Source: All data from "pretreatment program" measurements of pollutant chemistry and flow at individual industrial facility connections to public sewers. City of San Jose, March 25, 1992. Also see CBE, 1989; and CBE, 1990. Analysis by CBE.

Most of the big dischargers that cause more than 80% of industrial copper and nickel pollution are in Silicon Valley's electronics industry. The pie charts on the facing page show the breakdowns: For copper, almost half the fifty biggest dischargers manufacture printed circuit boards, more than 20% are Silicon Valley metal platers and finishers (metal finishers), and 20% manufacture semiconductors. For nickel, more than a third of the fifty biggest dischargers are metal finishers, more than a third make semiconductors, and 15% make printed circuit boards. The smaller "other" category includes diverse activities such as paperboard production, industrial laundering, and medical industries.

This industry profile has important implications for our environment and economy. The concentration of toxic waste releases in a smaller number of industrial *firms* means that larger cuts in toxic pollution can be made through fewer actions. The concentration of waste in three electronics *sectors* indicates the efficiency of key local manufacturing sectors might be significantly strengthened by actions that reduce this waste.

Several lines of evidence suggest increased industrial efficiency in printed circuit board manufacture and metal finishing might be of particular importance to the local economy. More than half the biggest copper and nickel dischargers are in these sectors. These sectors may also be impacted most by a given amount of waste because, as discussed below, more printed circuit board and metal finishing firms are small or mid sized businesses when compared to semiconductor firms. These types of firms are also more likely to have difficulty attracting investments for capital improvements than semiconductor manufacturers. (Judd et al., 1987) They are further characterized by relatively high fixed costs and deep boom-bust cycles. (Ibid.; and Center for Neighborhood Technology, 1990) Finally, these sectors provide local production of essential "building blocks" upon which the computer and communications industries depend. (Judd et al., 1987)

• *Individual firms in polluting sectors reaped economic benefits through increased industrial efficiency that greatly reduced toxic waste releases to sewers.*

Toxic sewer releases from printed circuit board making and metal finishing firms can be cut by more than 90%. In more than one hundred cases around the world, facilities drastically cut or eliminated[2] waste water releases of copper or nickel from at least one process by improving the efficiency of their manufacturing. The engineering solutions that achieved these improvements are relatively straightforward, and these results can be generally achieved by other firms in these industries. However, site-specific planning, design, and

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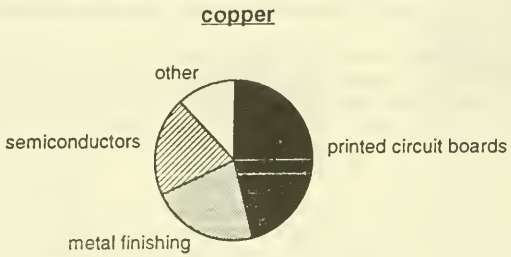
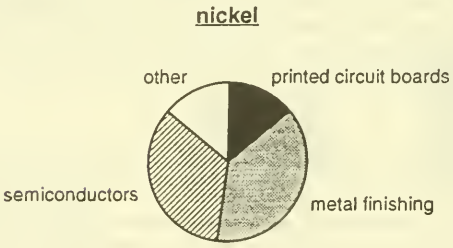
[2] While these techniques can reduce 90% to 99% of toxic releases, entropy will cause *some* release of any chemical still in use. This also applies to the term "closed loop."

Breakdowns of the fifty biggest industrial dischargers of copper and nickel by to the San Jose/Santa Clara sewage treatment plant by industrial sector. These dischargers cause 85% of industrial copper pollution, and 84% of industrial nickel pollution from the plant.





Source: All data from the most recent San Jose Department of Water Pollution Control records. (Pollution ranking based on 1991-92 data.) Analysis by CBE.

investment are needed before these proven, generally feasible solutions can be properly applied to individual industrial facilities.

Metal finishing and printed circuit board making processes use water and other chemicals in a series of tanks, as shown on the facing page. In the process bath, metals are either deposited on the surface of the parts (often using electricity to attract metals to the surface), or removed (often using acids or caustics to etch copper away). The processed parts are immersed in the rinse bath(s) to remove impurities.

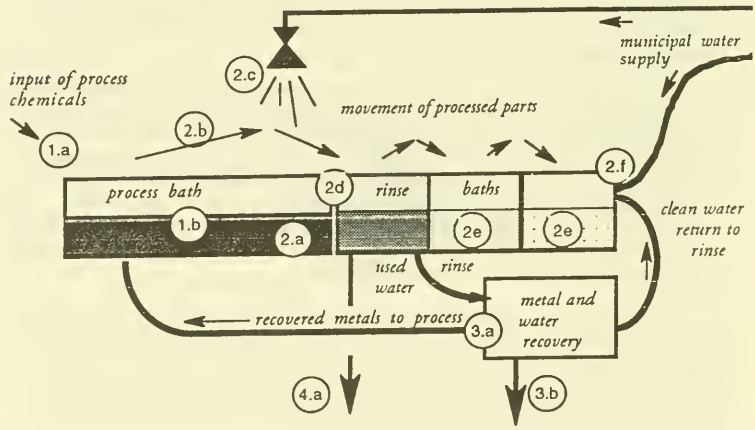
The most important solutions to these sectors' pollution problems attack process efficiency problems at the points circled on the diagram. Use of raw materials less toxic than copper eliminated copper releases to the sewer at twenty-six Silicon Valley facilities. (CBE, 1989) Changing process chemistry or temperature can reduce the amounts of toxic by-products created. (Shannon, 1991; Judd et al., 1987; Rosenblum Engineering, 1991; and Cal EPA, 1992) Filtration of the process bath removes impurities that can interfere with product quality and allows longer use of the bath, reducing waste of copper, nickel, and other process chemicals. (Shannon, 1991)

Before rinsing, processed parts should be fully drained into the process bath to save raw materials and reduce waste. (Foecke, 1989) Spray rinses and splash boards greatly aid in the reduction of this "drag out." (Ibid.; Shannon, 1991; and Judd et al., 1987) For further rinsing some shops use multi-tank counterflow rinses (Shannon, 1991) that can increase rinse efficiency tenfold. (Foecke, 1989) Conductivity sensors and flow regulation further reduce water waste. (Shannon, 1991; Cal EPA, 1992)

Using many of the above solutions, Acteron Corporation, a high tech plating company in Redwood City, California with about 40 employees, cut its water use by two-thirds and cut nickel releases to the public sewer by approximately 90%. (Shannon, 1991; Burt, per. com., 1992)

Closed loop recycling -- putting water and metal back into the process instead of down the drain -- is more cost-effective after the above actions reduce the volume and number of impurities in the mixtures to be recycled. By supplying water purer than tap water, it further improves process efficiency and product quality. (Foecke, 1989; and Judd et al., 1987) Three printed circuit board facilities used ion exchange and electrowinning to recycle water in-process and sell copper sheets to other industries. (Hulbert and Fleet, 1989; and Crane, 1989) Three metal finishers used evaporation and/or distillation to essentially close the loop and return chromium and nickel to the same processes. (Civil Engineering ASCE, 1982; Foss, 1989; and Wavrock, 1989) A circuit board firm, a metal plater, and 150 other facilities used reverse osmosis to return nickel and copper for processing. (Rich and von Kuster, 1989; and Cartright, 1984) These solutions reduced water use by an estimated 80% to 90%, recaptured significant

Conceptual diagram of improved efficiency/reduced waste for a printed circuit board or metal plating/finishing process (not an exhaustive review of options).



1. TOXICS USE REDUCTION.
   - 1.a Substitute a nontoxic or less toxic chemical.
   - 1.b Change the process to create less toxic byproducts.
2. WASTE REDUCTION.
   - 2.a Filter the process bath to extend bath life and increase product quality.
   - 2.b Maximize the drip of process liquid back into the process bath.
   - 2.c Use spray rinses to reduce the amount of contaminated rinse water.
   - 2.d Position tanks and splash boards to reduce drips and splashes down the drain.
   - 2.e Use multi-tank countercurrent rinsing to improve rinse efficiency.
   - 2.f Use conductivity sensors to better regulate process and water inputs.
3. RECYCLING AND REUSE. (Segregate streams and separate the reduced volume of spent process and rinse with osmosis, evaporation, distillation, ion exchange and/or electrowinning.)
   - 3.a Close the loop: reuse purified water and metals in the same process.
   - 3.b Transport the metal for reuse in a different industrial process and recycle the water in the same process.
4. DISPOSAL. (Separate some toxic chemicals from waste water and dispose of wastes in a hazardous waste landfill, municipal sewage sludge, and S.F. Bay – avoid this option.)
   - 4.a Reduced waste techniques are still partly effective since most conventional treatment systems are equally or more efficient at smaller throughputs.

amounts of metals, and reduced metal waste by an estimated 90% or more. (Judd et al., 1987; Cal EPA, 1992; Hulbert and Fleet, 1989; Crane, 1989; Wavrock, 1989; Rich and Kuster, 1989; and Foss, 1989)

These waste reduction efforts saved these firms money. Acteron estimates water, sewer, and deionized water saved them more than $2,000 per month. (Burt, per. com., 1992) Closing the loop at another metal finishing shop saved an estimated $2,000 to $3,000 per month. (Foss, 1989) A U.S. Navy electroplating facility in Florida found closed loop recycling was cheaper than treatment. (Civil Engineering ASCE, 1982) The closed loop system at Aeroscientific Corporation in Anaheim, California appeared to cost the same as conventional waste treatment and disposal in 1987, and was projected to save money as the cost of sludge disposal to landfills increases. (TRSI, 1990)

Other estimates of cost savings can be expressed in terms of how long it takes to start making money on the firm's initial investment. Cray Research anticipated a two-year pay back for the closed loop copper recovery system at its printed circuit board facility. (Rich and von Kuster, 1989) A one year pay back was estimated for a copper recovery system for a plating facility. (Ibid.) Closed loop recycling of about 150 various nickel baths took an average of a year and a half to pay back for the firms. (Cartright, 1984) Reverse osmosis and recycling of nickel rinse and bath water was estimated to pay back in about ten months. (Rich and von Kuster, 1989) In Italy a distillation system that cut up to 95% of nickel waste from a plating shop was reported to pay back in less than three months. (Wavrock, 1989) Water savings alone are estimated to pay back within five years for metal finishers making extensive use of new rinse methods. (JRB, 1982) Cal EPA projects one year pay back periods for a sequence of measures to attain 90% reductions in metals discharges from metal finishers. (Cal EPA, 1992)

According to the National Association of Metal Finishers Waste Minimization Committee, firms that reduce waste may realize cost benefits through improved quality control, lower chemical cost, lower inventory, less storage area, better product quality, lower water bills, lower sewer bills, lower material usage and chemical storage for waste treatment, lower hazardous waste disposal and liability costs, improved company standing in the community, and other benefits. (Cal EPA, 1992)

These economic benefits may become even more important as raw materials and waste disposal costs increase (Judd et al., 1987), and more hands-on experience is gained in smaller shops. For example, several printed circuit board and metal finishing firms use low-cost, "home-made" ion exchange and electrowinning to recycle metals and water (Ibid.; and Cal EPA, 1992). The California Environmental Protection Agency believes that these solutions may be achievable for less than $10,000 per shop.

Ironically, the economic significance of these improvements in efficiency may be one reason why they have been a well-kept secret in a competitive industry. Cal EPA writes:

> "Within the last ten years, metal finishers have made substantial expenditures for waste treatment equipment. Competitive companies were eager for all other companies to incur this cost so that no one would have a competitive advantage. ... [M]any basic process techniques and equipment improvements are being developed that provide substantial cost savings through energy efficient waste reduction technologies and strategies. Several of these techniques and improvements are low cost and easy to implement. ... However, as mentioned earlier, there is little incentive for the sharing of this technology within the industry." (Cal EPA, 1992. pages 11 and 12)

Those who most clearly recognize the direct relationship between increasing industrial efficiency and decreasing industrial waste will be most competitive.

• *The costs and benefits of increased efficiency/reduced waste can be broadly estimated for industry and environment, and techniques exist to predict specific costs and pay backs for individual shops.*

INDUSTRIAL COSTS AND BENEFITS

Adequate data are available to suggest reduced waste solutions are affordable for the industry overall. This is true despite accounting practices that hide the costs of industrial waste (TRSI, 1990; and OTA, 1986), and important differences between individual facilities.

The table below summarizes nine estimates of the capital costs of 90% waste reductions ranging from approximately $10,000 per facility to $ 1.3 million per facility, and several estimates that these investments will pay back within three months to five years. (See Table for literature cited) The 100 companies causing the biggest copper and nickel discharges have total annual revenues of more than $ 2 billion, and at least some of these firms already spend an estimated one percent to four percent of revenues on waste management. According to this crude, simplified cost analysis, when spread over a seven year financing period, these capital improvements cost less than one percent of revenue, cost less than present waste practices, and begin making money in three months to five years.

ENVIRONMENTAL BENEFITS

In South San Francisco Bay, reductions in the pounds of copper and nickel wastes that industry puts into sewers are one crucial measurement of the

environmental benefits of these industrial actions.[3] The graph on the facing page shows the present total industrial copper and nickel discharge to the San Jose/Santa Clara sewage treatment plant on the left, and the deep cuts in this pollution that can be achieved by increased efficiency/reduced waste actions. The downward curve of reduced pollution is calculated by projecting that each industrial facility, starting with the biggest discharger, will reduce the number of pounds of copper and/or nickel it puts in the sewer by an average of 90%, using the proven, cost-effective solutions described in this report.

This calculation shows that deep pollution cuts can be made quickly. A 90% cut in the biggest twenty discharges could cut total copper and nickel to nearly 8,000 pounds per year. *In other words, immediate action by the biggest 5% of industrial polluters would quickly cut more than 40% of total industrial pollution.* Similarly, if the 100 biggest dischargers make the 90% metal waste reductions discussed in this report, total industrial copper and nickel pollution will be cut by 75%. If all 350 monitored industrial dischargers take these 90% waste reduction actions, their total discharge will, of course, be cut by 90%.

POLLUTION PREVENTION AUDITS

Unfortunately, there is too much variation in the initial costs shown on the facing page for firms to act with confidence based on the experience of other firms without first assessing their individual situations. Site-specific differences in process chemistry, limited floor space (Foecke, 1989), and the potential availability of new floor space as firms streamline operations or specialize (Burt, per. com., 1992) may drastically affect cost and pay back figures for an individual facility. This long-recognized need to explore such in-plant factors at specific facilities led to the development of pollution prevention audit techniques (OTA, 1986) that are now well demonstrated. (See eg., CBE, 1989; Kennedy/Jenks Consultants, 1991; and Rosenblum Environmental Engineering, 1991) The basic audit technique pinpoints the causes of waste in a specific shop, evaluates solutions like those discussed above, and provides specific cost, engineering, and cost-savings analysis to improve processes and operations, attract financing for capital improvements, and involve workers in waste reduction.

In recent years a consensus has emerged in the Bay area. Industry and citizen groups now agree that these pollution prevention audit techniques should be applied. At the San Francisco Bay Estuary Conference convened under the Clean Water Act, industry, government and citizen groups agreed that industry should be required to perform pollution prevention audits. (San Francisco Estuary Project, 1992)

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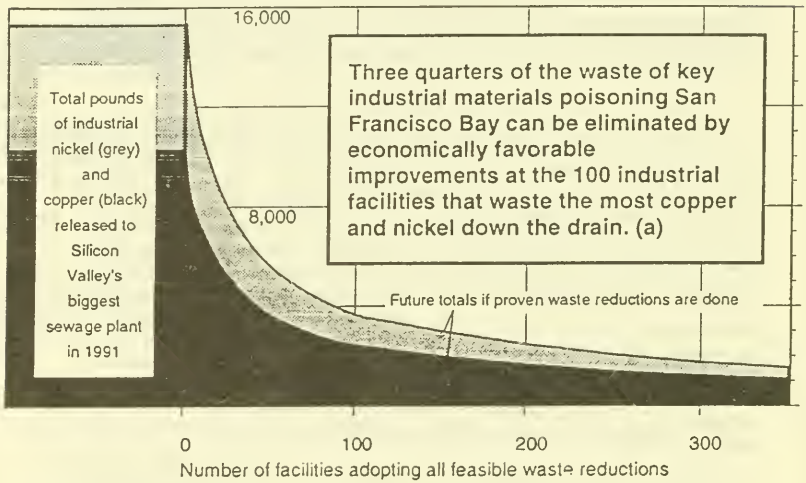
[3] These actions would also reduce toxic pollution of municipal sewage sludge, increase options for sludge recycling, and reduce other environmental emissions and exposures as less toxic materials are transported, handled, and processed, among other environmental benefits. .

A simplified analysis suggests that capital for industrial efficiency should cost industry less than managing waste.

	Min. estimate	Max.
Capital cost of 90% waste reduction [b]	$ 10,000	$ 1,300,000
Annual cost of seven year no-interest loan	1,430	186,000
Annual cost of these loans for 100 firms	143,000	18,600,000
Total revenues for biggest 100 dischargers [c]	2,168,000,000	Not available
Annual cost of loans as a % of revenue	0.005%	0.9 % [d]
Present waste mgt. cost as a % of revenues [e]	1 %	4 %
When waste savings pay for investments [f]	3 months	5 years



(b) TRSI, 1990; Cal EPA, 1992; Wavrock, 1989; Crane, 1989; and Judd et al., 1987.
(c) Business Information Systems Inc., 1990; Database Publishing Co., 1992; and Gale Research Inc., 1992. Actual totals include data for only 75 of 100 companies.
(d) Based on minimum revenue and maximum capital cost.
(e) Judd et al., 1987. Based on a printed circuit board manufacturing survey.
(f) Rich and von Kuster, 1989; Cartright, 1984; Wavrock, 1989; JRB, 1982; and Cal EPA, 1992.
(a) Based on waste reduction levels that have been demonstrated by industry, and San Jose/Santa Clara Water Pollution Control Department pretreatment records.

• *Many wealthier firms can afford to, but have not, financed increased industrial efficiency/reduced waste improvements.*

Some of the biggest companies that are also big dischargers can clearly afford closed loop recycling in the short term, with cost savings in a few months or years.

The pie chart on the facing page breaks down the 100 biggest copper and nickel dischargers by annual revenues based on economic data reported in standard references. (Business Information Systems Inc., 1990; Database Publishing Co., 1992; and Gale Research Inc., 1992) The chart shows that many of these companies have revenues in excess of $10 million per year. For these firms, even the maximum[4] pollution prevention investments shown in the table above would cost less than two percent of revenues, a cost that is comparable with the lower end of the range of existing waste management costs reported by Judd et al. (1987). Many of these firms may be polluting only because of short-sighted economic analyses.

For these firms, the failure of environmental law enforcement is an important factor discouraging investment in the environment and the economy. The U.S. Environmental Protection Agency has found that the City of San Jose is violating a second provision of the Clean Water Act (in addition to its violations of effluent limits and water quality standards as discussed in the introduction of this report) because the City has failed to adequately enforce the Clean Water Act "pretreatment program" requirements against industrial sewer dischargers. (EPA, 1991) San Jose has failed to impose proper "local limits" on individual industrial facilities, and instead allows too many of its dischargers to put too many total pounds of copper, nickel, and other toxics into its public sewers. (CBE, 1989; and CBE, 1990)

Lack of firm limits on pollution encourages business to ignore the waste that signals the need to improve industrial efficiency. Even if those firms that can afford to invest in pollution prevention are aware of the cost savings that are going down the drain, without proper environmental law enforcement, they have apparently chosen to delay these investments. Failures in environmental law enforcement are a major barrier to investments in efficiency upgrades that could strengthen the local economy and protect the Bay.

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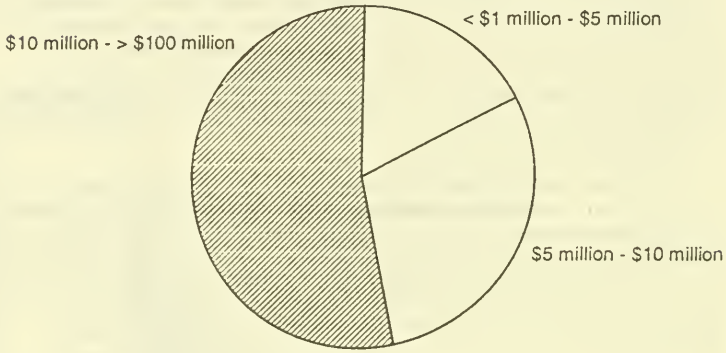
[4] Since costs are almost certainly smaller than the maximum capital cost for smaller firms (Judd et al., 1987; and Cal EPA, 1992), many or most smaller firms may be able to afford increased efficiency and reduced waste improvements as well. The data in the table above show costs may be smaller than the maximum cost by two orders of magnitude, and positive pay backs may exceed costs quickly.

Economic reports on 75 of the 100 companies with the biggest copper and nickel discharges show that roughly half of these companies have annual revenues greater than $ 10 million.



Source: Business Information Systems Inc., 1990; Database Publishing Co., 1992; and Gale Research Inc., 1992. Note that this breakdown is based on the most recent annual revenue or sales records that were found for 75 of the 100 companies: many of the 25 financial records that were not retrieved may be for small businesses.

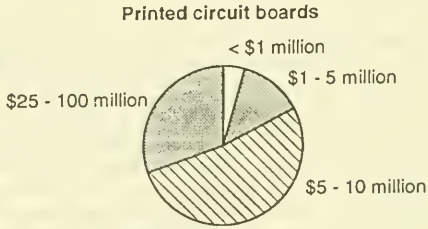
• *Environmental investments that increase the industrial efficiency of smaller firms supplying local high-tech "building blocks" will save jobs and increase competitiveness.*

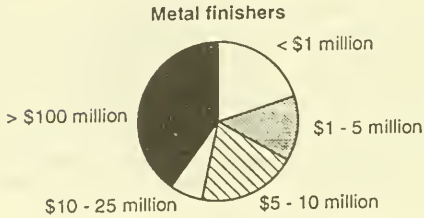
A closer look at the 100 high-waste facilities reveals a dramatic split between big business and small business. The pie charts on the facing page show that two thirds of the printed circuit board firms and more than half the metal finishers report less than $10 million in annual revenues, but more than three quarters of the semiconductor firms report more than $10 million. None of the printed circuit board firms reported revenues in excess of $100 million, but 40% of the semiconductor and metal finishing firms did. None of the semiconductor firms reported revenues of less than $1 million, but nearly a quarter of the metal finishers did. In the printed circuit board and metal finishing industries, the market is split between "captive" shops owned by bigger companies and smaller independent "job" shops. (Judd et al., 1987)

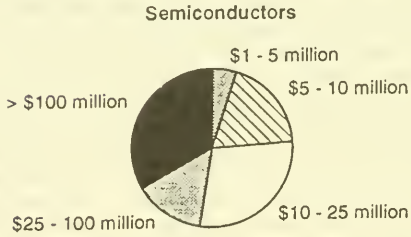
The full picture thus reveals a startling opportunity for environment and industry. As the biggest buyers of high tech "building blocks" manufactured by the printed circuit board and metal finishing firms (Ibid.), wealthy computer and communications companies depend upon these smaller firms. Yet in spite of their importance to the business community, these smaller business sectors face a combination of stiff competition and small margins, and waste is particularly costly to them. Therefore, a program to increase industrial efficiency and reduce waste in smaller metal finishing and printed circuit boards firms could not only protect the environment, but significantly contribute to the economic health of Silicon Valley industry as a whole.

Three factors interact to make the cost savings of pollution prevention most important to smaller printed circuit boards and metal finishing firms. First, saving the same ton of raw materials such as water and metals means more to a smaller firm with smaller revenues. Pollution prevention saved one such firm about $2,000 per month through water and sewer savings alone, an amount equal to 3% of revenues for nearly a quarter of the metal finishers on the chart, and equal to what these firms are estimated to spend on waste management according to Judd et al. (1987). Second, cutting the waste of raw materials improves margins to a greater extent for these firms because raw materials are a relatively large portion of their total costs. (Ibid.) Third, these large fixed costs combine with the boom-bust cycles of the printed circuit board and metal finishing industries to put the squeeze on smaller firms. (Ibid.; and Center for Neighborhood Technology, 1990) When sales drop, the printed circuit board industry's fixed costs (45%) and materials costs (40%) have drastic effects on small firms. (Judd et al., 1987)

Annual revenues for 75 of the 100 biggest copper and nickel dischargers show that small and mid-sized businesses with high-waste are concentrated in the printed circuit boards and metal finishing industries.







Source: Business Information Systems Inc., 1990; Database Publishing Co., 1992; and Gale Research Inc., 1992. Note that these breakdowns are based on financial records found for 75 of the 100 companies: many of the 25 financial records that were not retrieved may be for smaller businesses.

Improved industrial efficiency will protect local jobs at these metal finishing and printed circuit boards firms by reducing waste of costly raw materials and improving margins in these highly competitive industries. The high-waste printed circuit board and metal finishing shops assessed in this report employ about 5,000 people. (Business Information Systems Inc., 1990; Database Publishing Co., 1992; and Gale Research Inc., 1992) Yet the firms' labor costs are reported to be as low as 15% of total costs. (Judd et al., 1987.) These firms are further clustered advantageously near the major computer and communications buyers of their products. With all this going for them, there is no reason to let these jobs go down the drain.

As discussed above in this report, the capital improvements that could make deep cuts in water and metals waste at these high-waste metal finishing and printed circuit boards firms are affordable to Silicon Valley industry overall. In addition, savings from reduced materials costs, improved product quality, reduced waste management costs and the like should recoup these investments and start making firms money in a matter of months to five years. Further, the economic benefits *to big business* of healthy local high tech building block manufacturing should not be underestimated. For example, computer and communications firms buy about 65% of all printed circuit boards (Judd et al., 1987), and need new board designs integrated into their new products before these products can be marketed. Independent prototype shops, such as Trend Circuits in Fremont, California, clearly play a local role in getting new high tech innovations to market quickly. These interdependent parts of Silicon Valley's electronics industry cannot afford to fail to work together, and cut waste for their own competitiveness.

Retaining these manufacturing jobs would also avoid negative economic and social repercussions on the overall community. (Center for Neighborhood Technology, 1990) Cutting industrial toxic waste would help to protect commercial and sport fishing jobs that depend upon a healthy San Francisco Bay, protect public health, and save declining species of aquatic life and wildlife. Additional jobs would be created in constructing the process improvements needed to maximize industrial efficiency. Investments to increase industrial efficiency and reduce toxic raw materials wastes in metal finishing and printed circuit board manufacturing firms are good investments overall.

CLEAN SAFE JOBS *A CBE REPORT*

A four-point technical and financial assistance proposal to prevent pollution and retain jobs in South San Francisco Bay.

We urgently need substantial reduction of toxic metal releases from the South Bay metal finishing and printed circuit board manufacturing industries to stop poisoning San Francisco Bay, improve the economy, and retain local manufacturing jobs. CBE recommends the following technical and financial assistance proposal for clean safe jobs in South San Francisco Bay:

• **1. Fund pollution prevention audits and business plans that recommend the best process changes to eliminate waste water pollution at the source.** Cities operating sewage treatment plants ("cities") should fund pollution prevention audits and business plans that recommend a sequence of pollution prevention and closed-loop recovery actions. These actions will help firms reduce copper and nickel releases to sewers and attain costs savings that provide positive pay back on investments. This service should be offered to all metal finishing and printed circuits board manufacturing firms that discharge process wastes to sewers with a focus on firms with larger copper and nickel mass discharges.

• **2. Provide technical experts to help ensure that the pollution prevention business plans are successfully carried out.** The cities should fund technical experts agreed to by industry, government and the public to conduct the audits and develop pollution prevention business plans that attract the investments firms need to implement these recommendations and achieve these benefits.

• **3. Help smaller firms finance their pollution prevention business plans through loan guarantees, buy down of interest rates, or other actions.** The cities should establish and organize funding for a "loan guarantee pool" to provide firms that qualify with loan guaranties, interest rate buy-downs, rebates on water bills, and/or other assistance designed to provide low- or no-cost financing to implement the pollution prevention business plans. Firms that qualify must promise to stay in town or reimburse the community for the assistance. Firms in the top 20% of industrial copper or nickel mass dischargers will implement 90% cuts in these metals releases to qualify.

• **4. Ensure worker retraining and involvement in industrial efficiency/waste reduction improvements.** Firms receiving assistance will help assure successful pollution prevention and jobs retention by providing worker retraining and involvement in the development and operation of new practices.

Please ask your Mayor and City Council and any professional organizations or trade associations that you belong to to endorse this proposal. Call CBE at 415/243-8373 to help us win jobs and environmental health in the South Bay.

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Citizens
for a
Vehicle Free Nipomo Dunes
1040 Cielo Lane
Nipomo, CA 93444

Inspirational Chairman
Jan Hc Hillan
Executive Director
Bill Denneen
Birgit Schäfer
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Arthur Van Rhyr
Dennis Sheridan
Bill Malone, Cambi
Dr Nell Langford
Carl Samuelson
Alex Abela

Re: "An Amendment in the Nature of a Substitute to H R 3948 Offered by Mr. Mineta.

We urge that the wetlands be protected. Calif. has already lost 90% of our wetlands. Mr. Mineta's bill would weaken Section 404(B)(1) guidelines. Wetlands need protection not "reclammation" as we have so often done in the past.

Protect our wetlands

Bill Denneen

Citizens
for a
Vehicle Free Nipomo Dunes
1040 Cielo Lane
Nipomo, CA 93444

Jennifer von Rei
Bruce Bennet
Melinda Forbes
Edith Schrader
Ann Freeman
Shirley Bianchi
Nancy Bast
Lindsay Hamptor
Alden F. Shiars
Charles J. Gulya
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John H. Gragg
Bill Hills
June Theriot
Sue Sundevland
Kevin Doyle
Larry Wright
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Irv. Hc Hillan
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Marsha Benso
Yolanda Wack
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Bonnie Walter
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Diane La Pado
Lucinda Grayu
Jeannie Laird
Jan Marx
Will Alexande
Sally Piersalo
John Gustafso
Jaime Chave
Marie Van Ba
August Van De
Bonnie Wum
Jeff Stephen
Nancy Koren
Nuthan Kove
Pat Connolly
Ann Batterso
Judith A. Whi
David N. Smi
David Chippi

"Perhaps the time has come to reevaluate the desirability of offroad vehicle use on state-owned property."

-- Eric Seastrand

CITY of PERRY
"Working Together To Serve You"
FLORIDA

P.O. DRAWER 1907, PERRY, FLA 32347 904-584-7161

June 1, 1994

Honorable Douglas Applegate
Chairman
Water Resources & Environment Subcommittee
Committee on Public Works and Transportation
Suite 2165 - Rayburn House Office Building
Washington, D. C. 20515

Dear Congressman Applegate:

I have recently read the testimony presented by Joy Towles Cummings as presented to the U. S. House of Representatives Public Works & Transportation Committee.

This testimony states on page two "Required chemical tests have never been completed to show whether or not the city water is safe for human consumption." This statement has been made in the past at various hearings and each time I have provided a copy of the enclosed letter from The Florida Department of Environmental Regulation.

I call your attention to page two of the letter from the Florida Department of Environmental Regulation which states, "In overall all the data available in our office indicates that the treated water supplied by the City of Perry Waster System is satisfactory and meets federal and state standards. This data does not indicate any contamination at their wells."

Also, enclosed is a letter dated March 1, 1994, to Senator Graham (D) Florida, which discusses several serious concerns if chlorine was eliminated from use by businesses, cities, and the public.

Please have this information become part of the testimony received during the hearing where this information was presented.

Respectfully,

William E. Brynes

William E. Brynes
City Manager

WEB/aa

enclosures

cc: President Bill Clinton
Senator Bob Graham
Senator Connie Mack
Congressman Pete Peterson
Governor Lawton Chiles
Senator Charles Williams
Representative Allen Boyd
Ms. Marion Thompson, Engineering & Analysis Div., U. S. EPA
Ms. Carol Browner, Administrator, U. S. EPA
The Honorable Mayor and Members of City Council
City of Perry, Florida
Dan Simmons, Buckeye Florida

Florida Department of Environmental Regulation
Northeast District • Suite B200, 7825 Baymeadows Way • Jacksonville, Florida 32256-7577
Lawton Chiles, Governor Carol M. Browner, Secretary

TO: Interested Persons

FROM: Blanca R. Rodriguez BRR
Environmental Administrator - Potable Water

Date: July 28,1992

SUBJECT: Evaluation of the Water Quality supplied by the City of Perry Water System - Taylor County

Our office and the Tallahasse-Drinking Water office received various calls the last month regarding the water quality of the drinking water served by the City of Perry Water System. The persons calling were concerned about the quality of drinking water and the possible effect of the industrial activities of Proctor & Gamble Co. in the ground water of this area.

Ms.Joan Stevens called from Illinois on July 10,1992 to investigate the water quality of the wells in this area and any possible contamination because she was planing to move to this city. Ms. Joan Johnson, receptionist of Proctor & Gamble called Van Hoofnagle (DER Tallahassee) on July 24,1992 and complained about bad odor and color of the water at her home, which is served by the City of Perry Water System. She lives at Pine Valley Mobile Home Park which was connected to the City of Perry Water distribution System in 1989 due to complaints from their residents regarding ground water contamination. Mr.Ernest Frey (DER Jax) also received a call from a news reporter regarding this issue. Vince Seibold (DER- JAX) also has received various calls regarding this situation.

Due to this concern, our office reviewed our files to evaluate better the water quality of the treated water at the City of Perry Water System (PWS ID - 2620208) and to investigate any possible problem at their wells. Vince Seibold is visiting some of the people complaining and he is taking samples.

The City of Perry Water System consists of three wells (wells No. 1,2 & 3), pre-chlorination, a settling/chlorine contact chamber, sand gravity filters, polyphosphate for corrosion control, ground and elevated storage and pumping facilities. The raw water from well No.2 is high in iron, color and turbidity and it is treated at the filters. Wells No.1 & 3 have a good water quality and the raw

MEMO
CITY OF PERRY
PAGE TWO

water from these wells are only disinfected and treated with polyphosphate prior to distribution. Well No.4 is out of service.

A review of our files indicates that the quality of the treated water served by the City of Perry Water System is satisfactory and it is consistent since 1984. The data available indicates that the Primary Inorganics, Secondary Standards, Primary Organics, Volatile Organic Chemicals, Unregulated Contaminants, Turbidity and Radionuclides are below the Maximun Contaminant Level (MCL) allowable in drinking water. The only parameters that exceeded the MCL were iron, turbidity and color which are very high in well No. 2, (color=30 C.U., iron=0.946 ppm, and turbidity > 1). Due to this fact the Department requested in 1988 by Consent Order to correct the water quality problem and the city reactivated the filtration system at this plant. The analysis of the treated water after filtration dated Sept.9,1991 indicates that the problem was corrected . The iron level was 0.13 - 0.19, the turbidity level was 0.14 - 0.20 and the Coliform bacteria was absent.

In two occasions during this year this facility had two positive bacteria samples in the distribution system during a month. But all the rechecks analyses required by rule were completed and came absent for bacteria, indicating satisfactory quality. In both occasions they issued Public Notice, as required.

In overall all the data available in our office indicates that the treated water supplied by the City of Perry Water System is satisfactory and meet [illegible] the State standards. This data does not indicate any contamination at their wells. Attached is a copy of the last analysis [illegible] for this system.

Mr. Vince Seibold from this office is inspecting the Pine Valley Mobile Home today to investigate any possible cross connection or any unusual situation in this area.

Please contact this office if you has any questions or need additional information regarding this matter.

cc: Mr. Van Hoofnagle - DER Tallahassee
Mr. Phil Coram - DER Tallahassee
Mr. Ernest Frey - DER Jacksonville
Mr. Robert Leetch - DER Jacksonville
Mr. William E. Brynes - City manager, City of Perry
Taylor County Health Unit

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P.O. DRAWER 1907, PERRY, FLA 32347 904-584-7161

May 27, 1994

Ms. Blanca R. Rodriquez
Florida Department of Environmental
Protection - Northeast District
7825 Baymeadows Way Suite B200
Jacksonville, Florida 32256-7577

Re: Updated Evaluation of the Water Quality supplied by the
City of Perry Water System - Taylor County

Dear Ms. Rodriquez:

Please send an updated evaluation of the water quality supplied by the City of Perry Water System.

I am enclosing a copy of a Water Quality Evaluation from your office dated July 28, 1992.

If you have any questions, please call me.

Sincerely,

Annette Anderson
secretary for

William E. Brynes
City Manager

WEB/aa

enclosure

CITY of PERRY
"Working Together To Serve You"
FLORIDA

P O DRAWER 1907, PERRY, FLA 32347 904-584-7161

March 1, 1994

Honorable Bob Graham
United States Senate
241 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Graham:

Enclosed is an article that recently appeared in the Tallahassee Democrat concerning the reduction or elimination of chlorine in water treatment discharge. Also enclosed is a resolution passed at the February 22, 1994, City Council meeting of the City of Perry, Florida.

Senator Graham, a cost benefit analysis might show increased costs outweigh the benefits received by the elimination of chlorine or chlorinated compounds.

Three areas of concern are as follows, but there could be many more:

1. Swimming pools - What will be the substitute and cost to not only municipal facilities but what will be the substitute and cost to residential pool owners.

2. Drinking water and sewerage - Chlorine is used by the City of Perry in processing drinking water and at its sewerage treatment plant. What will be the increased costs and will the substitute work as well as chlorine presently works. My understanding is that chlorine in drinking water and sewerage is used to protect the public health. If chlorine is eliminated, this should be considered another unfunded mandate.

3. Pulp and paper industry - The pulp and paper industry, as well as municipalities, might suffer severely if the proposed cluster rules are enacted. If the pulp and paper industry cannot compete in the United States, it will probably relocate to other countries as a survival measure; thereby, costing many jobs and sources of revenue.

Senator Bob Graham
March 1, 1994

Senator, I respectfully urge you to carefully evaluate the proposed cluster rules and the proposal to prohibit the use of chlorine as proposed by the U. S. Environmental Protection administrator.

Respectfully yours,

William E. Brynes
City Manager

enclosures

cc: The Honorable Mayor and Members of City Council
City of Perry, Florida
Ms. Marion Thompson, Engineering & Analysis Div., U. S. EPA
Ms. Carol Browner, Administrator, U. S. EPA
Senator Connie Mack
Congressman Pete Peterson
Senator Charles Williams
Representative Allen Boyd
Governor Lawton Chiles
President Bill Clinton
Dan Simmons, Buckeye Florida

THE ENVIRONMENT

Groups back plan to reduce chemical use

Florida environmentalists favor an administration proposal to cut or halt chemical use in pulp and paper mills and drinking-water treatment.

THE ASSOCIATED PRESS
GAINESVILLE

Florida environmentalists are asking Sen. Bob Graham to back a Clinton-administration proposal to reduce or eliminate chlorine use in pulp and paper mills and in drinking water treatment.

U.S. Environmental Protection administrator Carol Browner recently announced the proposal for developing a strategy for "substituting, reducing or prohibiting the use of chlorine and chlorinated compounds."

Chlorine use in bleaching by pulp and paper mills is blamed by scientists for producing dioxin, a deadly, toxic chemical that is thought to disrupt the reproduction processes of certain wildlife species.

The administration's proposed reauthorization of the federal Clean Water Act includes developing the strategy for reducing chlorine. The act regulates the discharge of waste and treated waste water to rivers, lakes and other water bodies.

Graham, chairman of the Senate Subcommittee on Clean Water, Fisheries and Wildlife, is being asked by environmental groups to support the administration's proposal.

"I think he needs to take a leadership role. His state is suffering from the repercussions of chlorine in the environment," Linda Young, president of Planet Well, an environmental group, said Wednesday.

"Senator Graham needs to understand the damage to our health and environment from chlorine-bleaching pulp mills and other uses of chlorine in Florida and follow Carol Browner's lead on this phase-out."

Mary Byrne, a spokeswoman for Graham's office, said Wednesday that Graham hasn't yet had time to review the issue, but would be up to speed by Feb. 23 when the bill will be considered.

"It is just an issue we need to work up," Byrne said, adding that Graham would be briefed on the concerns of the environmental groups.

The reauthorized Clean Water Act would establish a task force of various federal agencies to study environmental effects of chlorine and consider possible alternatives.

A representative of Florida's pulp and paper industry said he cannot comment on the administration's proposal, but he thinks the idea of eliminating the use of chlorine is "overkill."

Woman vows to head for court after losing appeal on paper-mill pollution

THE ASSOCIATED PRESS
PENSACOLA

An environmentalist vows to go to court after losing an administrative appeal against a $50-million project that a paper company contends will clean up pollution from its Pensacola mill.

Champion International's project will not go far enough to remove pollutants, Jacqueline Lane said Tuesday.

A state hearing examiner, on procedural grounds, last month dismissed a challenge to the Department of Environmental Protection's announced intent to issue permits for the project.

The challenge had been filed by Lane, the Perdido Bay Environmental Association, and other residents who live along the bay, which is part of the border between Alabama and the western end of the Florida Panhandle.

Hearing Officer Michael Ruff found the petitioners had no right to challenge the permits because they failed to show they would suffer injuries greater than or more specific than the general public.

WETLANDS

1449

RESOLUTION NO. 94-3

WHEREAS, the U. S. Environmental Protection Agency has proposed Cluster Rules that relate to the dissolving kraft sub-category for pulp mills, and

WHEREAS, the Cluster Rules, as written today would require extremely costly technology changes such as oxygen delignification and screen room closure, and

WHEREAS, the oxygen delignification process is unproven technology for dissolving kraft pulp mills and reliability, quality, and customer issues are of a great concern with this unproven technology, and

WHEREAS, any ban on chlorine or chlorine dioxide use across the nation would have a devastating effect on the pulp industry and would result in major increases in public drinking water costs; and

WHEREAS, there are other technologies available that can obtain essentially the same environmental benefits at substantially less cost than those proposed in the Cluster Rules, and

WHEREAS, if these proposed Cluster Rules are not modified, there is a very serious economic threat to the pulp industry in the United States which could close down many mills and move significant jobs to other countries, and

WHEREAS, Buckeye Florida, a dissolving kraft pulp plant, is located in Taylor County, Florida, and is the major employer and is the major source of the tax base for the County, and

RESOLUTION NO. 94-3

WHEREAS, the closure of this plant would have a devastating effect on the economy of Taylor County and surrounding counties and would add to the high unemployment rate which is already considerably higher than the state and national rate.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Perry, Florida, is opposed to the Cluster Rules as currently written and urges the U. S. Environmental Protection Agency to modify the air and wastewater portion of these rules so they will improve the environment by using some proven technology that will accomplish virtually the same environmental goals but at substantially less cost so that the pulp industry and local governments can economically afford to comply rather than be forced to close down plants and lay off thousands of employees and cripple the economies of many communities around the United States.

DONE AND ORDERED in regular session at Perry, Florida, this 22nd day of February, A.D. 1994.

THE CITY OF PERRY

Thomas Demps

Thomas Demps, Mayor

ATTEST:

William E. Brynes

William E. Brynes
City Manager

POLLUTION

Lobbyists wage furious fight against chlorine phaseout

The Clinton administration has been talking about banning chlorine because of its health dangers.

By H. Josef Hebert
THE ASSOCIATED PRESS
WASHINGTON

From vinyl siding to shower curtains and from toilet paper to water pipes, chlorine is in thousands of products. So it's no wonder industry lobbyists sprang to life when the Clinton administration began talking about banning the chemical.

An intense lobbying war in recent weeks has centered on Capitol Hill, where lawmakers are working to overhaul a law that protects lakes and streams from pollution, including highly toxic releases of chlorine-compound byproducts.

The industry won an early battle by keeping out of the legislation an administration proposal that the government develop a long-term strategy to phase out the use of chlorine in manufacturing and elsewhere because of health concerns.

The Clinton administration plans to re-examine a "firmly established chlorine phaseout as the future direction" of U.S. environmental policy, maintains Greenpeace lobbyist Rick Hind.

Environmentalists, especially Greenpeace, have fought for years to curtail chlorine use, especially in the making of paper, where it is blamed for contaminating water and fish with cancer-causing dioxin and other toxins. They argue there are substitutes readily available to bleach paper.

EPA Administrator Carol Browner proposed a detailed study into chlorine's health effects, followed within three years by "a national strategy for substituting, reducing, or prohibiting the use of chlorine and chlorinated compounds."

Suddenly lawmakers and reporters were bombarded with an avalanche of information touting the benefits of chlorine, and the economic costs of phasing it out.

Chemical-industry lobbyists cited reports suggesting elimination of chlorine could adversely affect a $100-billion-a-year chunk of the economy ranging from pharmaceuticals to pesticides, and jeopardize 1.3 million jobs.

"When you consider the number and scope of products that potentially could be eliminated, the concept (of phasing out chlorine) is almost dumbfounding," said Robert Burnett, executive director of the Vinyl Institute.

Vinyl used to make windows, flooring, siding and other items is 57-percent chlorine-based. In the plastics industry, chlorine is found in everything from automobile parts to shower curtains and food packaging.

It also purifies 98 percent of the country's drinking water; is used in heart-disease and pneumonia medicines; is important in making pesticides and herbicides for agriculture; and whitens toilet paper, writing paper and paper towels.

• Driver A
• Anti-Lock
• Power W
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TALLAHASSEE DEMOCRAT KNIGHT

PETE V. DOMENICI
NEW MEXICO

COMMITTEES
BUDGET
APPROPRIATIONS
ENERGY AND NATURAL RESOURCES
BANKING
INDIAN AFFAIRS

United States Senate
WASHINGTON DC 20510-3101

May 20, 1994

Honorable Douglas Applegate, Chairman
Subcommittee on Water Resources and Environment
Public Works and Transportation Committee
2165 Rayburn House Office Building
Washington, D. C. 20510-6256

Dear Mr. Chairman:

As you prepare to mark-up the Clean Water Act, I want to provide you with additional background on the needs of the South Valley of Bernalillo county, New Mexico. It is a dire situation that I hope your Committee will be able to help correct. I spoke to you last November when the Senate passed S. 1685, a bill authorizing $25 million for wastewater treatment in the South Valley. At that time, you indicated your desire to deal the South Valley at the same time you authorized funding for Boston harbor and other high priority needs.

I want to make you aware of a long standing need for the Bernalillo South Valley community in New Mexico. I am asking for your help in finding a way to improve their neighborhood, the quality of life and the housing stock. This community needs a wastewater treatment system. Its residents need safe drinking water and yards not contaminated by overflowing septic tanks.

The South Valley is more than fifty percent Hispanic, and qualifies as one of the poorest of the poor communities in our country. Yet, because it is in close proximity to Albuquerque, it does not qualify for many of the existing programs designed to help rural communities.

For almost thirty years this community has suffered the health hazard of inadequate sewer and water facilities. Drinking water wells and septic tank leach fields are practically on top of each other. I am sure you can appreciate the tremendous health hazard this represents.

In the meantime, the population of the South Valley has continued to grow. The situation is so critical that there is now a moratorium on building desperately needed multifamily housing units. These are units that could greatly improve the housing stock of the area.

Two elementary schools and a community center in the area have to pump their septic tanks daily in order to avoid sewage rising to the ground surface. Bacteria were found in the well of one of the schools about two years ago. Since then, bottled water has been used for drinking and food preparation at the

school. This is the situation throughout much of the South Valley. While a new school with access to the Albuquerque water and sewer system will be built in the near future, the problem will remain for many living in the South Valley.

This community has been untiring in its efforts to help itself. So many times, its efforts have been ignored or rejected. They tried to finance a replacement for the septic tank waste treatment system themselves only to have the county reject the referendum for issuing bonds. They lobbyied to create their own county, but the bill was vetoed.

Nevertheless, its leaders should be commended. They never gave up, and I want to do everything I can to help them make an effective waste treatment project a reality. Because of the conditions of the soil, the community is going to use technology that may prove useful in other communities. They need about $25 million dollars to provide the sewer hook-ups and other infrastructure that is needed to make this a healthy community. So far, none of the EPA programs have been able to help these people.

Its leaders and I have been meeting on a regular basis for nine and one-half years to develop an action plan to address this problem. The New Mexico legislature appropriated $4 million in 1992; $5 million in 1993; and $8 million in 1994 demonstrating the seriousness of the problem and the state's commitment to a solution. Clearly the legislature is doing its part in this worthy partnership which would use both state resources and federal resources. Even with the state appropriations the South Valley still needs $35 to $40 million to meet its water and sewer treatment needs--$25 million for the waste water portion which falls within the jurisdiction of your committee.

Last year, the Senate passed S. 1685 which authorized this project. That bill is being held at the House desk. Your committee could include Section 3 of that bill in your Chairman's mark. On May 12, 1994, the Chairman of the Senate Environment and Public Works Committee stated on the Senate Floor that he understands the plight of the residents of the South Valley and stated that "[i]t is a problem that is particularly deep to New Mexico. It is one that must be addressed." When the Senate takes up the Clean Water bill the Chairman made a commitment to "try and find accommodation."

I know that your committee will be holding hearings and a mark-up soon on the Clean Water bill. I ask that you include an authorization for the South Valley in New Mexico and other small communities with special needs. The Appropriations Committee set

aside $500 million for this purpose, but the funds are not available until an authorization is passed.

I am including a few news clippings about the South Valley and one small subdivision, the Kinney Brick development, which is part of the South Valley. They describe in more detail the problem and its urgency. I would appreciate your help in authorizing the South Valley waste water treatment project at the earliest possible date. In my career in the Senate, I don't know of a more worthy project.

It at all possible, I would like to testify before your Subcommittee when it holds hearings in late May.

Warm personal regards,

Pete,

Pete V. Domenici
U.S. Senator

Residents learn to live in sewage

By BRENT HUNSBERGER
Staff reporter

A1
T-10-18

Everyone's learned to live with the murky pools dotting the yards of the forgotten neighborhood of Kinney Brick.

Even if it means curbing their shower time.

Or digging a hole to accommodate a neighbor's overflowing sewage.

Or turning their head late at night when someone pumps septic tank effluent onto the ground.

But what residents can't live with is the possibility that a 2-year-old is critically ill because of the sewage problems that persist in the neighborhood where public sewer lines are more than six months away.

Tamara Tarrazas has been hospitalized for a month and has been placed on a dialysis machine to support her kidneys, a family member said.

Well-water tests taken at the home last week might provide clues to the girl's illness, county health officials say.

Family members suspect she may be suffering from Escherichia coli, or E. coli, bacteria contamination from the sewage. Health inspectors found pools of "gray water" around the girl's mobile home. Those pools could contain liquid waste with harmful bacteria, inspectors say.

"Gray water" pools are commonplace in Kinney Brick, south of Rio Bravo between Second Street and Broadway Boulevard, in the shadow of Albuquerque's industrial corridor.

"To be neighborly, we can't report each other because we've all got problems," said 32-year-old resident Joaquin Altamirano. "We've had this problem for so long already we've learned to live with it.

"And if it requires not reporting anybody, hey, we'll hold our nose and bite our tongue."

Many likely won't hold their tongues tonight when city and county officials hold a neighborhood meeting about a delayed public sewer-line project.

Residents once were told that sewer

Please see SEWER/A6

KINNEY BRICK MEETING

- Tonight, 6:30 to 8:30 at Bernalillo County District 8 Fire Station, 4401 Broadway S.E.
- Health and public works officials will be on hand with the project's engineering firm and local lawmakers.

SEWER From A1

lines would wind their way down to the area this fall. County officials now put the project's start date at April 1994.

Some locals aren't too happy about that.

The 400 people who live in this working-class area put up with a lot — noise from Duke City Raceway, sewage-scented well water and a smelly sewage treatment plant they can't tap into.

Only a mile away, Albuquerque's Southside Wastewater Reclamation Plant handles sewage from the city's entire west side. But no Kinney Brick home is hooked up to that plant. The neighborhood falls outside city limits.

This year, area lawmakers got $1.6 million in state and county funds to rid the neighborhood of septic tanks and cesspools. Officials suspect such home sewage systems are contaminating water throughout the South Valley.

But Kinney Brick's clay-caked soil is so saturated it won't absorb the liquid waste that spectic tanks regularly discharge. Unless tanks are pumped twice a month, liquid effluent can back up into homes.

One man living on Prosperity Avenue said his shower filled with dark liquid and solids soon after he moved into his rented, one-bedroom home four months ago. The man, who refused to give his name, says he drinks bottled water, not his well water.

Another resident, Nicholas Robles, 45, has dug a 10-yard-long trench behind his Valplano Road mobile home to drain his shower. The blue-gray water stands murky and motionless. His three children, he says, pay mind not to fall in.

Robles points to several holes in which he says large rats live. He says he often shoots rats with his .22 to protect his baby chicks.

Previous tests have found nearby groundwater tainted with nitrates, which can cause life-threatening health problems in newborns. A 1992 survey identified dozens of failing septic systems.

"We clearly have an environmental health problem in that area," said Bernalillo County Environmental Health Director Richard Brusuelas. "And anything we can do to shortcut the process, which we already have, we will do.

"Many of these things take days of study and design," Brusuelas said, adding that laws require that the county bid for work. "And we don't want to get involved in a lawsuit."

But residents such as Altamirano are tired of doing their laundry elsewhere or regulating their toilets.

"We keep the pee water a long time," Altamirano said. "We call it selective flushing."

> **"I get so frustrated and upset when I think that anybody in the United States should have to live like this."**
>
> Quintana Martinez
> Kinney Brick resident

And word of the 2-year-old girl's illness has exacerbated residents' fears.

"I think it's real important that we find out what happened to that child," said Evelyn Quintana Martinez, chairwoman of Kinney Brick Impact Committee.

"The little girl has taken a turn for the worse. They have had to move a large intestine and they just don't know if she's going to make it. It may be because of the sewage on the ground," Quintana Martinez said.

"If that indeed is true, my God, how many other children have gotten ill because of the hazardous waste on the ground?"

Quintana Martinez will demand tonight that county officials speed sewer-line construction. She tells a story to illustrate why.

"Today I had a baby shower," Quintana Martinez said late Sunday. "I had a relative over and she had a grandson with her. She said, 'Does it smell like sewage in here?' I said, 'Yes, welcome to Kinney Brick.'"

"She said, 'Oh, that's good, I thought it was my grandson.'

"Isn't that crazy? You'd think this was the Third World.

"I get so frustrated and upset when I think that anybody in the United States should have to live like this."

City offers South Valley sewer plan

Trib.

By BRENT HUKSBERGER
Staff reporter

A-10 9/30/93

City officials have unveiled plans to bring sewer lines to all South Valley doorsteps by the turn of the century.

The plans, presented at a public meeting Wednesday in the South Valley, would provide sewer service to 3,900 homes at a cost of $22.7 million.

About 700 homeowners could hook up by the end of 1994, thanks to the $6 million state-funded project now under way, city officials said.

State and local environmental experts have said public sewer lines would relieve septic-tank pollution problems that might be threatening Bernalillo County's entire underground water supply.

The city wants to build a technologically advanced system that would be easier to install, leak-proof and not as smelly as most of Albuquerque's sewers.

The city's plans evolved through years of cooperation from community residents and county, state, school and water conservation officials.

State Rep. Kiki Saavedra, a South Valley Democrat who has helped secure funding for South Valley lines, stood up at Wednesday's meeting and promised to request $7 million for sewer lines from the 1994 Legislature. That would be enough to hook up another 1,000 homes, according to city estimates.

Saavedra also challenged New Mexico's congressional delegation to find federal money for South Valley water and sewer lines. Few federal dollars have been spent recently on sewer lines.

"You've got to pressure your U.S. congresspeople to get on the ball," Saavedra told an audience of about 120.

Local government officials, however, worry that too few people will hook up to the lines to rid the valley of its groundwater pollution problems, make the new sewer system run efficiently and convince legislators across the state to siphon more money the South Valley's way.

Government officials are studying incentives to get people to hook up. They include:

- Waiving the city's $919 Utility Expansion Fee if the homeowner hooks up 90 days after the system is up and running.
- Waiving the $919 hookup fee for low-income residents.
- Offering materials for residents to convert from septic tanks to the city's air-vacuum sewer lines.

Some residents were concerned about finding more immediate cures to failing septic systems and bad wells. But others said they were impressed with the idea of hooking up the valley by 2000.

"I think it's a reasonable approach," said Julie Stephens, member of the Rio Grande Community Development Corp., and longtime advocate of clean groundwater. "And I think sewer first is absolutely right on."

BAD WATER? FAILING SEPTIC?

- If you fear you're drinking polluted water or have a failing septic system, contact the Bernalillo County Environmental Health Department, 768-4390.

Note:

1458

ABQ Journal 10/16/93

S. Valley Residents Blame Water for Girl's Illness

Neighborhood Wants Quick Action on Sewer Project

By Robert Rodriguez

JOURNAL STAFF WRITER

Some South Valley residents are concerned that a critically ill 2-year-old girl may have gotten sick because she drank water they fear is contaminated with sewage.

Bernalillo County Environmental Health officials tested the drinking water in the child's home Thursday, but results were not available Friday.

Richard Brusuelas, county environmental health director, said inspectors did find a pool of household wastewater behind the home, but he could not say whether any raw sewage was found.

"People do not realize the health hazard we are facing," said Evelyn Quintana Martinez, a longtime resident of the Kinney Brick neighborhood and an advocate for city sewer service.

The 2-year-old's aunt, Rhonda Guerin, said the girl became ill about a month ago. Children's Hospital of New Mexico officials said the girl is in critical condition but would not discuss her illness.

The child's parents, who could not be reached for comment Friday, live in a rented trailer home in the 4300 block of Prince SE.

Guerin said doctors have been unable to determine the cause of the child's illness. The child's large intestine has already been removed and she is now on a kidney dialysis machine, Guerin said.

"The doctors are not sure if the water was the cause of what's making her sick," she said. "They suggested it may have been something she ate or drank."

Guerin said she suspects it was contaminated water.

"When they turn the water on in their house, it smells like sewer water," she said. "It is awful."

Martinez said the child's illness comes at a time when residents have become increasingly frustrated with the progress of a state- and county-funded sewer hook-up project.

In 1992, the state Legislature funded $1 million and Bernalillo County chipped in $600,000 to provide sewage line extension to the estimated 350 to 400 homes in the Kinney Brick neighborhood.

A third of the homes in the area have failing sewage systems, according to a survey the county did last year.

However, work on the sewer project is not expected to begin until April 1994 with completion the following December.

"When we went to the state to get funds for sewer service in our area, we told them it was an emergency," Martinez said. "This little girl's illness should prove that."

Brusuelas said the county did not receive the state's portion of the funds until this summer, after which the county had to put the project out to bid.

Kinney Brick residents will get their chance to grill state and county officials and representatives of Avid Engineering, the engineering contractor for the project, Monday night on the status of the project.

A meeting has been scheduled from 6:30 p.m. to 8:30 p.m. at District 8 Fire Station, near the southwest corner of Prosperity and Broadway.

[illegible] according to a so-called "drive-by" shooting nine days earlier at the home of Krien's girlfriend, who previously had dated Niewiadowski. Krien and Kirby claimed Niewiadowski had fired those shots.

Niewiadowski, who surrendered about 6½ hours after Krien was shot, told Wyne that, as he was leaving for school about 1 p.m. that day, a person he didn't know approached him and asked if he was Arthur, according to a passage Wyne read.

Niewiadowski told Wyne that one of the attackers took his jacket, according to the statement. He also said one had a gun in his pocket, but which one had the gun was not clear.

Niewiadowski said he got his own gun — a sawed-off .22-caliber rifle — from his car and shot three or four times into the air as the other two youths ran across the street, and he then fired the remaining rounds from his weapon. Meanwhile, someone had fired at him.

The claim of firing into the air does not match the testimony of eyewitnesses who said Niewiadowski was pointing the gun straight in front of him.

Water and Sewer Project

Southwest Valley of Bernalillo County, New Mexico

Briefing Paper for Committee Hearings

February 23, 1993

The Southwest Valley is an area of approximately 16.5 square miles (of which 5.5 square miles are vacant) located just south of the City of Albuquerque on the west side of the Rio Grande. Approximately 12,000 people now live in this unincorporated portion of Bernalillo County, comprising around 4,000 households. The area has been settled since the 1700's and includes at least three historic village centers. Land use is primarily agricultural and residential, although relatively small commercial and institutional uses are located along the two major north-south roads.

The sole source of water supply is ground-water, which is supplied largely by private, on-site wells in addition to very small, privately-owned water systems. Liquid waste disposal is accomplished through on-site systems, almost entirely septic tanks with leach fields. Ground-water contamination has been documented in the area for decades. The heavy septage contribution and shallow ground water levels have produced a water supply which is at best unpleasant and, at worst, threatening to public health. The situation continues to worsen as the population and density increase over time, increasing the septage loading.

Two elementary schools and a community center in the area have to pump their septic tanks daily in order to avoid sewage rising to the ground surface. Bacteria were found in the well of one of the schools about a year ago. A new school will be built on a site which has access to the Albuquerque water and sewer system. In the meantime, bottled water is used for drinking and food preparation at the school. The second school, at the southern end of the area and therefore far from the City's system, has obtained appropriations from the state and the county to construct a wetlands system.

The clear solution to the problem for the majority of the 12,000 residents is provision and distribution of water from a regulated source and collection and treatment of liquid waste. A study funded by the state in the late 1980's identified four different levels of water and sewer service to provide adequate service, minimize costs, and discourage urbanization. Different levels of service were recommended for different areas, depending on the extent of the problem, the density of the subarea, and the proximity to urban level services. This study was managed by the City and included extensive collaboration with County staff, state staff, and residents of the area. Brown & Caldwell Engineering was the consultant for the effort. Estimated cost for provision of the water and sewer services was $29 million.

The entire South Valley in Bernalillo County has historically suffered from the same problems. City water and sewer service has been provided to the more northern portion through federal (in the mid-70's) and state appropriations (from the 70's through the present). State legislators from the area continue to request and receive appropriations which have been used to extend City services farther south. In 1992, the state legislature appropriated $3.75 million for provision of City water and sewer service in the subarea designated highest priority in the Brown & Caldwell effort. Bills for additional appropriations are pending in the current legislative session, but are not expected to be of comparable size to the 1992 appropriation.

The Bernalillo County Board of Commissioners adopted a 1/8 cent gross receipts tax in 1991 dedicated to solid waste, water, and sewer purposes. In the two years of appropriations of this approximately $1.5 million annual revenue, $900,000 has been designated to assist residents in hooking up to water and sewer systems already in place or in upgrading substandard on-site wells or septic systems.

Users of the new systems will also bear a portion of the burden for the improvements. If the City is the provider, total user fees may total almost $3,500 for hookup to both water and sewer service. These costs do not include the cost to extend lines from the house to the water meter and sewer stubout. While average incomes range from $18,000 to over $40,000 per household, it will be difficult for most homeowners to pay these substantial costs "out-of-pocket" to ensure a safe drinking water supply and liquid waste disposal.

A separate study of funding and management options was completed by the Institute of Public Law at the University of New Mexico following completion of the Brown & Caldwell engineering analysis. It was hoped that half of the required amount, $14.5 million, might be obtained from federal sources while the remaining $14.5 million would be obtained from state and local sources and user fees. This study identified a number of federal programs that typically fund the type of improvements needed in the Southwest Valley. However, the federal programs identified, such as CDBG grants or FmHA loans, are not appropriate to the Southwest Valley due to either income level, size, or existing commitment to use the available money for other problems. As a result, the area has "fallen through the cracks" of available programs, being neither an urban area which has means available to fund major projects or a rural area which can avail itself of existing federal problems. The size of the project, serving a population of 12,000 people, is larger than many rural projects of this type.

The Colonias Program approved by Congress last year addresses the type of problems evident in the Southwest Valley. This area's liquid waste disposal situation and resulting water supply issues closely resemble those of the Colonias. The Southwest Valley has also been inhabited continuously for hundreds of years. However, the Southwest Valley is too far from the Mexican/American border to be eligible for these funds. As a result, residents of the area, local agency staff, and elected officials continue to seek specific federal appropriations to fund implementation of the Brown & Caldwell recommendations.

The Southwest Valley offers an excellent opportunity for federal contribution to address problems faced by unincorporated communities on the urban fringe. Water and wastewater planning for the area has already demonstrated the necessary components of a solution:

- intergovernmental cooperation
- community involvement, education, and support
- local and state financial support
- a service plan wich combines both traditional and innovative systems to keep costs as low as possible and maintain the semi-rural character of the area while solving major environmental problems.

Federal funds appropriated for this effort would address the need of existing residents of historical communities who are living with potentially health-threatening conditions which continually deteriorate. This need cannot be adequately met by state and local sources over a reasonable period of time.

Using the New Mexico Wastewater Facility Construction Loan Program for Southwest Valley Sewer Infrastructure

The State's Wastewater Facility Construction Loan Program was investigated as a source of funds to implement the recommendations for providing sewer service in the Southwest Valley in Bernalillo County, New Mexico. The Program has not been utilized as a source of funding, however, since: 1) given the magnitude of the costs, grants and direct appropriations were needed in order to keep rates from being prohibitive, 2) the County is the logical applicant for funds but has not pursued a loan to-date, 3) the Loan Program cannot make a long-term commitment for future funding of a phased or segmented project, and 4) funds to address both water and sewer problems are needed.

The County has been reluctant to pursue a loan partially because they do not want to dedicate a revenue source for the loan. Rates and fees for the existing system extensions would be collected by the City, not the County. Issues concerning County involvement in utility planning and implementation have not been addressed, although possible solutions were described in the IPL management and funding study published in December of 1991.

The County has indicated that they would like to manage some of the construction projects, as they are now doing in the Kinney Brick area with a State appropriation. They are also considering extensive use of alternative systems such as wetlands. Issues of management of these systems have not been resolved, but using the Loan Program is apparently only viable (from the County's point of view), if they're recovering water and sewer rates for the loan payments.

Recent State Appropriations:

The $4,000,000 appropriated by the Legislature in 1992 is being used to install water and sewer lines in the area of first priority (U-1), which includes approximately 300 homes.

The $5,000,000 appropriated in 1993 is being used to construct lift stations, vacuum collector lines, and a force main to the City's existing lift station on Lakeview. None of this appropriation will be used for water. The new service extensions will provide sewer service in the Gun Club area (U-3), the Los Padillas area (S-5), and the areas around the new and old Pajarito Schools (portions of S-1 and S-3).

Future Needs:

Sam Cummins, who is overseeing these projects, estimates that it will cost $19-20 million to finish providing sewer and $25-27 million to finish providing water to the Southwest Valley, if provided through the City's system. The State just appropriated an additional $7-8 million in the 1994 Session. That leaves $35-$40 million still needed by Sam's more recent estimates! Higher costs are the result of: 1) the original plan did not recommend City service in the entire area, 2) inflation of costs since the Brown & Caldwell projections were done, and 3) the need to install

lift stations for sewage and a new trunk line and reservoir for water. Given the large amounts still needed, it is clear that a significant federal appropriation would be very helpful.

Relative to use of the Revolving Loan Fund, the County's desire to use City water and sewer revenues as the dedicated revenue source is the apparent stumbling block. Historically, the City has not even wanted to talk about this option since most City utility people believe that the City is already subsidizing the system in the County. Water and sewer system customers in the unincorporated area pay the same rates and expansion (impact) fees that City residents do, but do not pay a "rate of return" as is typical in many places. The lines constructed through State monies are usually put in by the developer within the City and recovered through the cost of the house. The City has always managed the projects at no cost, estimated at 11% of the appropriations, but the City system benefits from this since getting Valley residents off septic tanks decreases the potential for contamination of the City's supply.

City staff are now looking at revisions to our Line Extension Policy and have, preliminarily, reached the conclusion that we should not provide water service in areas where the sewer issue isn't satisfactorily resolved. At the same time, the County is "getting into the sewer (construction) business" and wants the City to provide water in some portions of the unincorporated area.

The conclusion, such as it is, is that a federal appropriation would still help address the contamination problems and that, even though the State has been appropriating large amounts over the last three years, there is still a substantial cost remaining to serve the remainder of the area. While the Revolving Loan Fund may be an avenue for meeting a small portion of these costs, it cannot provide adequate funds over a reasonable period of time to solve the problem and cannot deal with the water issue at all. And major issues surrounding the source of the dedicated revenue for the loans would need to be resolved.

JW
2/28/94

103D CONGRESS
1ST SESSION

S. 1685

To amend the Federal Deposit Insurance Act to permit the continued insurance of deposits in minority- and women-owned banks by the Bank Deposit Financial Assistance Program.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 19 (legislative day, NOVEMBER 2), 1993

Ms. MOSELEY-BRAUN (for herself, Mr. DOMENICI, Mr. PACKWOOD, and Mr. BINGAMAN) introduced the following bill; which was read twice, considered, read the third time, and passed

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A BILL

To amend the Federal Deposit Insurance Act to permit the continued insurance of deposits in minority- and women-owned banks by the Bank Deposit Financial Assistance Program.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "The DOE Minority Bank Preservation Act of 1993".

1 **SEC. 2. AMENDMENT RELATING TO THE INSURANCE OF DE-**
2 **POSITS BY THE BANK FINANCIAL ASSIST-**
3 **ANCE PROGRAM.**

4 Section 7(i)(1) of the Federal Deposit Insurance Act
5 (12 U.S.C. 1817(i)(1)) is amended by striking "shall be
6 insured" and all that follows through the period and in-
7 serting ", or funds deposited by an insured depository in-
8 stitution pursuant to the Bank Deposit Financial Assist-
9 ance Program of the Department of Energy, shall be sepa-
10 rately insured in an amount not to exceed $100,000 for
11 each beneficiary of an irrevocable trust or insured deposi-
12 tory institution depositing such program funds.".

13 **SEC. 3. MINORITY COMMUNITY DEVELOPMENT GRANTS**
14 **FOR COMMUNITIES WITH SPECIAL NEEDS.**

15 (a) There are hereby authorized to be expended from
16 sums appropriated for water infrastructure financing and
17 other wastewater activities for cities with special needs,
18 no more than $25,000,000 for wastewater treatment
19 projects, including the construction of facilities and related
20 expenses in minority communities with special needs to—
21 (i) improve the housing stock infrastructure in
22 the special needs communities; and
23 (ii) abate health hazards caused by groundwater
24 contamination from septage in arid areas with high
25 groundwater levels.

(b) Treatment projects must include innovative technologies such as vacuum systems and constructed wetlands.

(c) For purposes of this section—"cities with special needs" includes minority communities with special needs.

(1) A "minority" means an African-American, a Hispanic-American, an Asian American or Native American.

(2) A "minority community with special needs" means—

(i) an unincorporated community that, based on the latest census data, has a minority population in excess of 50 percent;

(ii) has been unable to issue bonds or otherwise finance a wastewater treatment system itself because its attempt to change its political subdivision has been rejected by the state legislature; and

(iii) that the state legislature has appropriated funds to help pay for the project.

○

WRITTEN TESTIMONY OF
THE EDISON ELECTRIC INSTITUTE
ON H.R. 3948
THE WATER QUALITY ACT OF 1994
BEFORE THE SUBCOMMITTEE ON WATER
RESOURCES AND ENVIRONMENT OF THE
HOUSE COMMITTEE ON PUBLIC WORKS AND ENVIRONMENT

The Edison Electric Institute ("EEI") is pleased to have this opportunity to present its views on the Substitute Amendment to H.R. 3948 (referred to as "H.R. 3948"), "The Water Quality Act of 1994." EEI is the association of investor-owned electric utilities. EEI members generate approximately 78 percent of the electricity in the country and provide service to 76 percent of all ultimate customers in the nation. EEI members are committed to assuring consumers a reliable, economic, and environmentally sound supply of electricity. This paper describes EEI's principal concerns regarding the amendments to the Clean Water Act ("CWA" or "Act") proposed in H.R. 3948.

I. ANTIDEGRADATION

H.R. 3948 amends CWA § 303 to add a new provision on antidegradation. Section 302 of the bill would require each state to develop and implement an antidegradation policy which would be subject to the EPA Administrator's review and approval. The policy would have to include certain minimum requirements, and would be even more restrictive in some respects than EPA's existing antidegradation rule (40 C.F.R. § 131.10 (1992)). In particular, the bill would require each state to implement

its antidegradation policy by designating "outstanding national resource waters" ("ONRWs"). The fact that H.R. 3948 now specifies that states must "evaluate" for designation as ONRWs waters in national parks and wilderness areas, and waters of "exceptional recreational or ecological significance," does not make the ONRW provision of the bill any less mandatory, because the remaining portions of that provision suggest that States may decline to designate such waters **only** if they obtain permission from EPA. EPA's current regulation encourages the designation of certain waters as ONRWs, but it allows the states discretion in actually making these designations.

Under the proposed amendments, if a state failed to submit an approvable antidegradation policy within two years of the bill's enactment, EPA would have to prepare a conforming policy for the state within six months. Each state's list of ONRWs would have to include all waters within a national park or national wilderness area, as well as any other waters of exceptional recreational or ecological significance, unless the state could demonstrate to the Administrator's satisfaction that such designation would result in "important social and economic harm."

In addition, antidegradation review would be required at the time an NPDES permit is issued or reissued if the permit "authorizes any new, expanded, or increased discharge of a pollutant into receiving waters." With respect to existing discharges, a review is required if the discharger is proposing to increase an existing effluent

limitation, or if a new effluent limitation is required for a pollutant that was not previously subjected to an effluent limitation in the discharger's permit. See Proposed Amended § 303(f)(2)(G) of H.R. 3948.

EEI believes that the antidegradation provision of H.R. 3948, is far more restrictive than necessary to preserve and protect appropriate water quality goals. It would unduly limit a state's ability to authorize new or increased discharges, and would act as a disincentive to dischargers who might otherwise attempt to improve effluent quality using pollution prevention or innovative wastewater treatment techniques. Once a discharger improves its effluent quality by using such techniques to reduce discharges of a given pollutant, the antidegradation policy could preclude the discharger from increasing its discharge in the future, regardless of any circumstances that might justify such an increase (i.e., the need to increase production). Similarly, the antidegradation policy would discourage process changes or chemical substitutions that result in increased discharges of some pollutants, yet reduce a source's total loadings of all pollutants.

Assuming that any statutory requirement for state development of antidegradation policies can be justified, such policies should include an appropriate "trigger" for antidegradation review. EEI believes that an antidegradation review should be required in the case of permit reissuance for an existing discharge only in appropriate circumstances. In particular, the bill's current provision which requires

antidegradation review when a new effluent limitation is required for a pollutant that was not previously subjected to an effluent limitation in the permit, is very problematic. A new limitation may be necessary because of new regulatory requirements (e.g., the adoption of new technology-based effluent guidelines or new water quality criteria for a given pollutant), not because a discharger proposes a new or expanded discharge. Because of the dynamic nature of the toxic pollutant program, an antidegradation review effectively would be required for all existing permits, which would impose an unmanageable and unnecessary burden on permittees and permit writers alike. Rather than requiring formal antidegradation review so broadly, EEI believes that any antidegradation provision should require review for an existing discharge where (1) the discharger is proposing to increase an existing effluent limitation; or (2) the discharger has engaged in a specific activity (e.g., modifying its facility or equipment, or using a new substance which is likely to be discharged) which is reasonably likely to give rise to a new or increased discharge.

In addition, the antidegradation provision established in H.R. 3948 goes well beyond EPA's current regulation with respect to the designation of ONRWs, of which no degradation, no matter how de minimis, is allowed. H.R. 3948 would deprive the states of necessary discretion in determining which waters should be designated as ONRWs. Although the bill provides an exception to its ONRW designation requirements -- if the state can demonstrate to EPA's satisfaction that an ONRW designation would result in "important social and economic harms" -- this exception

will in practice be of little value. EPA will have the ultimate authority to decide whether any particular state's concerns really represent an important enough social or economic harm. What the EPA Administrator may consider to be important may be very different from the needs and concerns of state governments. An ONRW designation is effectively a no-growth mandate, which will have significant effects in any locality where it is imposed. Such decisions involve inherently local values and considerations, and should remain with the states.

Although the Federal Government may have some legitimate interest in the quality of waters in national parks and wilderness areas, the concerns of the affected states still should be taken into account in determining whether ONRW designations are appropriate for these waters. For example, in many states, particularly in the West, millions of acres of land are set aside as national parks. Designation of waters (including, presumably, wetlands) within such parks as ONRWs could cut off new development and ongoing activities of all kinds in the area, whether involving point or nonpoint sources. Moreover, the effect of the designation on the parts of a designated water that fall outside of a national park, for example, are very unclear.

In addition, the provision also requires that waters of "exceptional recreational or ecological significance" be designated as ONRWs. These terms are inherently vague, and it is impossible to predict exactly which waters would ultimately be affected. Given the impacts of an ONRW designation for state land development and

management decisions, states should not have new federal mandates imposed on them without a showing of significant existing environmental problems. Overall, the bill's approach to ONRW designations would likely retard economic growth in many of the affected areas in ways that are currently difficult to quantify.

II. MIXING ZONES

H.R. 3948 would amend CWA § 303 to add a new subsection dealing with mixing zones. H.R. 3948 would require EPA to establish by regulation a list of persistent, acutely toxic, or bioaccumulative chemicals or "classes of compounds" that pose a sufficient threat to human health or the environment that the use of mixing zones for such pollutants should be restricted or prohibited. Moreover, the bill would authorize EPA to issue federal regulations restricting or prohibiting the use of a mixing zone for such pollutants. Presumably, these regulations would be binding on the states.[1/] In addition, the bill now specifies that the mixing zone amendment does not limit EPA's ability to restrict or prohibit mixing zones.

EPA and the states have long recognized the appropriateness of allowing "mixing zones" when applying water quality criteria. Mixing zones are limited, defined areas within which mixing of effluents and receiving waters occurs. Applicable water

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1/ In addition, the provision would also provide that (1) that any restrictions established may not take effect until 5 years after enactment of the bill; and (2) specifying that the provision does not limit or otherwise affect federal or state authority on the use of mixing zones. EEI has no objection to these provisions.

quality criteria must be met at the edge of the mixing zone, but do not apply within the zone, (although other safeguards, such as a requirement that the discharge not be acutely toxic to organisms present within the mixing zone, typically are imposed). EPA has acknowledged that properly defined mixing zones do not present unacceptable risks to organisms exposed to waters within the mixing zone, and do not interfere with the overall integrity of a waterbody or achievement of designated uses. EPA's current water quality standards regulations and related guidance give states discretion to grant or deny mixing zones (40 C.F.R. § 131.13 (1992)), and recommend guidelines that states should apply to define acceptable mixing zones and to ensure that unacceptable conditions do not occur within those zones. *See* U.S. EPA, "Water Quality Standards Handbook" (Sept. 1993) p. 5-1; U.S. EPA, "Technical Support Document for Water Quality-based Toxics Control" (Mar. 1991) ("TSD") pp. 69-92.

EPA's guidance recognizes that defining appropriate mixing zones, from which appropriate NPDES permit limits and other regulatory requirements are calculated, requires highly site-specific information and judgments. For instance, EPA's mixing zone policy acknowledges that exceedance of an acute criterion (in EPA's nomenclature, the "criterion maximum concentration" or "CMC") within the mixing zone will not necessarily result in lethality or other unacceptable impacts. *See* TSD at 71-72. Thus, regulators may safely apply less restrictive requirements to prevent unacceptable effects within a mixing zone. EPA's guidance also contemplates the use of various hydrologically and biologically based instream flows, which vary depending

upon the nature of the waterbody and the criteria to be implemented. *See* TSD at 73-74, and Appendix D. Such flows may differ from the minimum stream flow. For instance, it would be inappropriate to use a minimum stream flow value to derive a mixing zone for a storm water discharge that would only occur during a rainfall event, when instream flows would tend to be high.

Without mixing zones, point source dischargers and other regulated sources (such as hydroelectric facilities, to which state water quality standards are applied via CWA § 401) would be forced to meet extremely restrictive water quality criteria at the point of discharge. In many cases, this would prove technically infeasible, because the water quality criteria are well below the level achievable by any existing technology. Even where compliance is technically feasible, it would impose a crushing economic burden that many sources could not bear. If applying standards at the end of the pipe produces technically or economically infeasible limits, regulators face a choice between shutting down facilities or changing the standards. Using reasonably defined mixing zones avoids this result, while assuring protection of the water body as a whole.

EEI believes that EPA's existing mixing zone guidance is adequate to protect water quality, and imposing additional requirements on the Agency with respect to mixing zones is unnecessary. If any statutory change is necessary, it is a formal authorization for EPA to issue additional scientific guidance on the factors which

should be taken into account in determining the impact of particular pollutants in different types of waterbodies. Such guidance could be used by the states to establish appropriate mixing zones, taking into account site-specific biological and hydrological factors.

III. CITIZEN SUIT AND ENFORCEMENT PROVISIONS

A. Citizen Suits

Section 503 of H.R. 3948 would allow citizens to sue for past violations that occurred during the 180-day period preceding the citizen's 60-day notice letter. This amendment would overrule settled Supreme Court jurisprudence and allow citizen groups to sue for wholly past violations -- even though the violations have been remedied and are not likely to be repeated-- where no legitimate citizen interest is at stake.

Citizens already may bring enforcement suits to address ongoing CWA violations. Under the current law, as interpreted by the United States Supreme Court in *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), a citizen may bring an enforcement suit where it can make a good faith allegation that a violation is ongoing or, if past, is reasonably likely to recur. This is an extremely liberal standard and one under which numerous citizen suits have been brought. It only precludes citizen suits for violations which are wholly past (that is, for which the underlying cause has been remedied and which are unlikely to recur). Moreover, to

get into court, the citizen need only make a *good faith allegation* that a violation is ongoing -- it need not prove its allegation by submission of facts. *Gwaltney,* 484 U.S. at 64-66. It is disingenuous to suggest that such a liberal standard truly hampers legitimate private enforcement efforts.[2/]

The existing, albeit narrow, limitation on citizen suits under CWA § 505(a)(1) is necessary to ensure that citizen suits do not undermine the government's ability to exercise its prosecutorial discretion in the public interest. In *Gwaltney*, the Court recognized that this might occur if citizens were allowed to sue for wholly past violations. The Court gave this example:

> Suppose that the Administrator identified a violator of the Act and issued a compliance order under § 309(a). Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably.

2/ It is important to note that the *Gwaltney* standard has been interpreted liberally by the courts, and has not brought an end to citizen suits under the CWA. *See e.g., Public Interest Research Group of New Jersey v. Elf Atochem North American, Inc.,* 817 F. Supp. 1164 (D.N.J. Mar. 31, 1993) (allegation of ongoing violation of any one parameter can be used to establish jurisdiction over all past permit violations); *North Carolina Wildlife Federation v. Woodbury*, No. 87-584-CIV-5, 19 Envt'l L. Rep. (BNA) (E.D.N.C. Apr. 25, 1989) (failure to remove improperly discharged material constitutes a continuing violation); *Sierra Club v. Union Oil Co. of California,* No. C84-3435 SC (N.D. Cal. Dec. 16, 1988) (finding ongoing violations from evidence that exceedance of permit limit recurred and defendant had not eliminated risk of future exceedances in spite of modifying plant to address problem).

Gwaltney, 484 U.S. at 60-61.

In other cases, the government may choose not to enforce against dischargers for past violations which are deemed minor, because all of the available information suggests that the discharger is making all reasonable, good faith efforts to attain and remain in compliance. In such cases, allowing citizens to second-guess these judgments would do little but add to court dockets and divert the discharger's resources to defending itself against unwarranted attack.

Most important, allowing citizens to sue for wholly past violations does absolutely nothing for the environment. Under the current scheme, citizen suits are precluded only where the citizen is unable to allege an ongoing violation, usually because the discharger has taken effective steps to address the underlying cause of the violation, and those steps have succeeded in improving compliance. This means that, by definition, the citizen suit will not induce any greater measure of compliance, since the discharger already is in compliance. Nor will the citizen suit serve as a deterrent to future noncompliance, since the action necessary to address the problem already has been taken. In short, no environmental benefit would be gained. Allowing citizens to sue for wholly past violations simply will lead to unnecessary litigation, in an already overburdened court system, and could impede the ability of state and federal authorities to formulate environmentally beneficial settlements with dischargers. The

current requirements on citizen suits impose a necessary discipline and ensure that only forward-looking suits of real public benefit are brought.

The driving force behind proposals to overrule the Supreme Court's *Gwaltney* decision is the incorrect perception that significant noncompliance is widespread and that enforcement by EPA and the states is inadequate. Yet, as reported by Senator Graham, chairman of the Senate Committee on Environment and Public Works, at a July 14, 1993, hearing on nonpoint sources, EPA estimates that 87 percent of industrial and 85 percent of municipal sources are in substantial compliance with CWA permit requirements.

Moreover, in evaluating the extent of non-compliance, it is critical to understand how EPA develops technology-based permit limits. No technology can effectively perform 100% of the time. Consequently, it is not possible to meet either technology-based, or water quality-based, limits 100% of the time. EPA has acknowledged this in its development of technology-based discharge limits -- by setting standards using a "confidence interval". The Agency sets daily maximum pollutant discharge limits that it estimates can be met 99 percent of the time, and monthly average limits that can be met 95 percent of the time. Violations can be expected to occur from 1 to 5 percent of the time by the very nature of EPA's limits. As the Ninth Circuit explained in a decision dealing with EPA's adoption of "best practicable control technology currently available" ("BPCTCA") for oil drilling platforms.

> even a facility that employs BPCTCA can be expected to be in violation of the standards at least a percentage of the time. It would be impossible and impracticable to set a standard that could be met 100 percent of the time assuming BPCTCA is employed in an exemplary fashion. This would require an accurate prediction of the innumerable types of upsets that could plague BPCTCA systems. Furthermore, such a standard would probably be so liberal as to be worthless as a control standard. It is better to set a standard by using a 97.5 or 99 percent "confidence interval" and then to address the expected one percent or more of "excursions" when they actually occur, by determining whether exemplary use of BPCTCA could have avoided the excursion. This has been the method adopted by the EPA.

Marathon Oil Co. v. EPA, 564 F.2d 1253, 1272-73 (9th Cir. 1977).[3/]

Thus, occasional noncompliance events are inevitable, and EPA has taken this into account both in setting discharge limits, and in incorporating an "upset" defense into its NPDES regulations. Under those regulations an "upset" is defined as "an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee," and constitutes an affirmative defense to a compliance action. 40 C.F.R. § 122.41(n)(2).

If *Gwaltney* were overturned, however, the "upset" defense alone would be insufficient to protect dischargers that experience occasional noncompliance events, immediately remedied, from unwarranted litigation. To begin with, the defense is very

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[3/] Although EPA recognized that facilities using BPCTCA would not meet the applicable standards 100% of the time, the Agency had failed to include upset provisions in the applicable permits. The court remanded the permits in question to EPA with instructions to include such provisions, allowing for such upsets.

imited, restricted to instances where the discharger can demonstrate that the upset occurred and that its causes can be identified; the facility was being properly operated at the time; proper notice was given to EPA of the upset; and any remedial measures were complied with. The burden of proof is on the discharger. 40 C.F.R. § 122.41(n)(3-4).

More importantly, the defense can only be used for violations of technology-based limits and does not apply to violations of water-quality based limits. Permit writers set water-quality based permit limits using very conservative water quality criteria and using the data reflecting the permittee's long term average discharge. The permit writer does not specify how the discharger is to meet the water-quality based limits; unlike technology-based limits, the standard dischargers must meet is not set considering the available technology. A discharger must find and install the necessary technology to meet the limit. Again, no technology can perform perfectly 100% of the time. Unlike with technology based limits, however, no confidence interval is used in setting the limit, and there is no provision for an upset defense.

Finally, even where the "upset" defense is available, it is only a defense -- not a bar to litigation. Thus, if *Gwaltney* were reversed, a citizens group could bring such a suit and force the discharger to choose between litigating the suit so as to assert its affirmative defense, thereby incurring its own attorneys' fees, or settling with the citizens group and paying a penalty and the citizens group's attorneys' fees. In either

case, if the discharger is already in compliance, the attorneys will benefit but the environment will not. In sum, allowing citizen actions for wholly past events will lead to unnecessary litigation, and ultimately will result in no additional environmental benefits.

B. Recovery of Economic Benefit

In addition, section 309 of the bill would mandate the recovery of the economic benefit associated with a violation in any type of enforcement action, even where the economic benefit exceeds the maximum penalty otherwise assessable (except in an administrative penalty action, in which case the penalty cap still applies). This provision is likely to lead to unintended and inequitable results.

The enforcement provisions of the CWA essentially establish a system of strict liability for compliance with all provisions of the Act or a permit. A discharger may be held liable for a violation of the Act's requirements regardless of specific intent and regardless of the measures it may have taken to ensure compliance. If the measures taken fail to meet the required standard, the discharger must install new or additional technologies to ensure that the standard will be met, or shut down. At the same time the discharger can be held liable, even though it may have reasonably believed that the original technology would suffice.

This provision of H.R. 3948 would also require that the discharger be fined whatever "economic" benefit it got from the violation. This economic benefit, however, is very speculative. Assuming that the purpose of the CWA's penalty scheme is not merely to punish, but to create incentives for compliance, the application of an economic benefit measure for penalties is a very blunt instrument. Its application as a deterrent assumes that a certain level of intent to profit from a violation is involved, and that a discharger did indeed profit. This may or may not be the case. The actual "benefits," if any, of a failure to comply may have been passed along to the public (for example, to utility ratepayers in the form of lower electricity costs). If economic benefit is to be recoverable without a cap reflecting the relative seriousness of the violation, then a discharger may be required to pay a penalty far in excess of any benefit actually enjoyed -- and that has no real deterrent value.

Moreover, to the extent that the economic benefit test looks at whether a discharger could or should have installed a different technology, it will have very different effects on different industries, again without any relationship between the amount of the penalty and the seriousness of the violation. Under EPA's current "BEN" model, used in calculating the economic benefit of noncompliance, the benefit of delayed compliance is calculated to be the sum of the net present value of delayed capital investment, one-time, non-depreciable expenditures, and avoided operating and maintenance expenses. In an industry where control technologies are relatively inexpensive, the economic benefit calculated may have a minimal impact -- regardless

of how serious the violation may have been. On the other hand, in an industry where control technologies are costly, the penalty may be far in excess of the actual seriousness of the violation. The results are likely to be very inequitable, and to have little benefit to the environment.

C. Other Enforcement Provisions

There are a number of other enforcement provisions of H.R. 3948 that EEI believes to be very problematic. These are discussed briefly below:

- Section 309(h) would authorize courts to pay a bounty from fines collected in criminal actions to citizens or state/local government entities that provide information or material support, respectively, for an action leading to a conviction. Citizens could collect the lesser of $50,000 or 50% of any penalty imposed, while state or local governments could collect up to 50% of any penalty imposed. EEI believes that this provision is both unnecessary and presents a serious danger of unfounded allegations being made in an attempt to provoke enforcement litigation.

- Section 309(d) would amend CWA section 309(b) giving courts specific authority to issue injunctions requiring "remedial" action or environmental audits. EEI believes that this provision is unnecessary, and that it will vest the courts with vast new authority to tailor environmental remedy programs -- an area in which they are not equipped with the necessary resources or expertise.

- Section 309(k) would amend the CWA to allow the creation by EPA of a field citation program. This field citation program is unnecessary, because EPA already has ample authority to assess penalties administratively and has exercised that authority vigorously. Indeed, there is no evidence that the current requirement to issue public notice of a proposed administrative penalty has impeded in any way the effectiveness of this program. Equally important, a field citation program which would give individuals (who may or may not have the requisite training) virtually unfettered authority to issue citations based on their own, often-subjective judgments, has the potential for great abuse. A discharger faced with such a citation may have little choice but to pay the fine, even if it believes the fine is not merited, because the cost of exercising the right of appeal is too great in comparison to the fine.

- Section 309(o) of H.R. 3948 would allow EPA to issue administrative subpoenas for any information -- including oral testimony -- EPA is authorized to collect under CWA § 308. This provision is both unnecessary and would be open to serious abuse. It could be used even where there is no reasonable evidence of a violation, for purposes of "fishing expeditions." There is no evidence that EPA's current CWA subpoena authority is inadequate, and this provision will have the effect of undermining the dischargers right to appropriate process and to be free from unwarranted harassment.

IV. DISCHARGES TO GROUND WATER

Section 404 of H.R. 3948 amends CWA § 402 by adding a major new provision specifying that discharges to the *ground* or to *ground water* are point sources subject to the NPDES program if (1) the there is a "reasonably foreseeable" and "demonstrable direct" connection with surface water, (2) a greater than *de minimis* quantity of the pollutant is present in surface waters, (3) the pollutant is reasonably and demonstrably able to reach surface water, and (4) the activity is not directly addressed by any other federal law. No penalty may be assessed for such a discharge unless the discharger knew or should have known of the hydrological connection; however, permitting authorities will have to require that permit applicants report any known or suspected sources of pollution to the ground or ground waters that are hydrologically connected to surface waters.

Discharges to ground water are not now covered by the CWA's NPDES permit program, which is limited to the "addition of a pollutant to navigable waters from a point source." 33 U.S.C. § 1362(12). Congress wisely limited the CWA's requirements to "navigable waters."[4/] It recognized the connection between ground

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4/ A few courts, through judge-made law, have extended the scope of the NPDES program to encompass discharges to ground water, in spite of the fact that Congress declined to do so. See McClellan Ecological Seepage Situation v. Weinberger, 767 F. Supp. 1182, 1196 (E.D. Cal. 1988). Cf. New York v. United States, 620 F. Supp. 374 (E.D.N.Y. 1985) (assumed that CWA applied to tributary groundwater); Inland Steel Co. v. EPA, 901 F.2d 1419, 1422 (7th 1990) (acknowledged in dictum that the legal concept of navigable waters might include ground waters connected to surface waters).

and surface waters (given that in most cases ground and surface waters at some level of analysis might be said to be hydrologically linked) and determined to apply the Act's requirements only to discharges into surface waters. See generally S. Rep. No. 414, 92d Cong., 1st Sess. 73, 1972 U.S.C.C.A.N. 3739. The task of regulating ground water quality was left to the states.

Accordingly, discharges to ground water generally are regulated under state law -- state water quality statutes generally define "waters of the state" to include both surface and ground waters. See e.g., Cal Water Code § 13050(e); N.J. Stat. Ann. § 58:10A-3(t); N.Y. Envtl. Conserv. Law § 17-0105(2); Tex. Admin. Code tit. 2, § 26.001(d). In addition to state regulation of discharges to ground water, a number of other federal statutory schemes address any concerns regarding the effects of "spills" and other accidental discharges to the ground that might contaminate ground waters. For example, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992, requires facilities that treat, store, or dispose of hazardous wastes to obtain permits, and imposes a number of management standards to protect the environment. RCRA also contains detailed requirements for corrective action for releases of hazardous waste. Another example is the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j, which includes a program for regulating the underground injection of wastes in order to ensure protection of drinking water supplies.

Overall, discharges to ground waters are now being regulated on both the state and federal levels. The provisions of H.R. 3948 treating the discharge of a pollutant into the ground or ground waters as a discharge to navigable waters is unnecessary. This program will merely add additional administrative burdens, and will displace already effective state regulation of ground water. EEI believes that groundwater protection and regulation is best accomplished on the state and local, as opposed to the national, level. At a minimum, we urge the Committee to undertake a thorough analysis of the need for this new program, along with funding issues and its affect on existing state and federal programs, before proceeding further.

V. WATER QUALITY CRITERIA

Section 308(d) of H.R. 3948 provides that, if EPA establishes by regulation chemical-specific numeric water quality criteria for toxic pollutants under section 304(a) of the CWA, and if a state fails to adopt chemical-specific numeric water quality criteria for such pollutants within a 3 year period, the federal criteria will be treated as if they had been adopted by the state. EEI is pleased to see that this provision has been revised to clarify that states need not adopt the same criteria issued by EPA, but instead retain the flexibility to set site-specific criteria tailored to specific waterbodies. Nonetheless, EEI believes further changes are necessary.

First, EEI believes that the phrase "where the pollutant would reasonably be expected to interfere with designated uses" be added to at the end of proposed

section 303(c)(5)(A)," after the word "waters" and before the semicolon. This will conform the section to current practice.

Second, EEI believes that a provision should be added to the proposed section providing that, if a state subsequently adopts a numeric water quality criterion for a designated use, the state's criteria shall be considered the initial criterion, and not be considered a change in designated uses under the Act. This will relieve the state of having to go through procedures for changing a use designation simply because the federal criterion -- which may or may not have been the appropriate or optimal standard for the affected waters -- was automatically applicable. Once the state sets an appropriate water quality criterion, those standards should simply replace the federal criterion, as if it had been adopted within the 3 year period. This is consistent with the application of federal criteria being merely a stopgap measure until the states can act. A similar provision is included in section 202(b) of the Senate bill. Although this version of the House bill includes a provision specifying that "[n]othing in this paragraph shall be construed as limiting or otherwise affecting the authority of a State to establish or revise water quality standards . . . including revision of criteria being treated as a water quality standard for such waters" under this amendment, this provision does not go far enough. While it clearly would ensure that the statute is not read to restrict a state's ability to revise water quality criteria, it does not clearly provide that such revisions are not subject to existing EPA rules restricting the

circumstances under which such revisions may occur. Thus, a clearer statement, such as that included in Section 202(b) of the Senate bill, is needed.

In addition, EEI urges the Committee, in developing any amendments on water quality criteria and standards, to keep in mind the important role that analytical detection and quantitation issues play in developing and applying standards. Now that water quality-based effluent limitations are being imposed routinely at extremely low concentrations, these analytical issues are particularly significant. The issue arises because the instream water quality criteria for many pollutants have been set at levels well below the measurement capability of available analytical methods. Even where state mixing zone policies allow for mixing with receiving waters, the effluent limitations calculated to ensure that criteria are met will oftentimes turn out to be too low to be reliably measured. Permit limitations set below the level at which reliable measurement is possible can lead to "false positives," with harsh and unjustified enforcement consequences.

VI. WATERSHED MANAGEMENT PROGRAMS

Section 322 of H.R. 3948 would authorize states to establish, subject to federal oversight, watershed management programs. It is similar to the corresponding provision in S. 2093 and suffers from a number of the same problems. In particular, the provision is ambiguous in a number of areas. It could, for example, be read to authorize a state to develop a watershed plan for a watershed extending into other

states. Although the bill's language requires cooperation between the state submitting the watershed program and other affected states, it is unclear whether the submitting state would ultimately be authorized to regulate activities taking place beyond its boundaries.

An approvable watershed management program also must identify the state environmental objectives to be adopted and achieved under the program, "including attainment of water quality standards and other environmental goals and requirements." It is unclear whether, pursuant to this provision, these goals and requirements will be limited in any manner, and what impact they might have.

In addition, section 314 would authorize a state with an approved watershed program to extend NPDES permit terms (1) on a one-time basis from 5 years to a maximum of 8 years "for purposes of having the same termination year for all permits issued . . . for discharges into waters in such watershed," and (2) from 5 years to a maximum of 10 years "if the receiving waters are meeting applicable water quality standards . . . and if, throughout the term of the permit, such water quality standards will be maintained." Proposed § 322(h)(2) of H.R. 3948. However, these provisions do not specifically authorize the extension of applicable compliance schedules, which are a critical component of the Senate bill.

On the positive side, this version of H.R. 3948 now includes a provision (section 315(h)(3)(C)) designed to authorize and encourage the transfer or trading among sources of responsibilities for achieving pollutant load reductions within a watershed. While this is, overall, a positive change, some aspects of the new provision require improvement. For instance, the amendment currently specifies that any NPDES permit under CWA § 402 or site-specific management plan under CWA § 319 must specify that any person transferring his pollutant load reduction responsibilities via an agreement with another party is "responsible for enforcement of the agreement." This requirement is not unreasonable; however, such a transferor should not be held liable for the transferee's failure to achieve required reductions if the transferor has taken all reasonable steps to vigorously enforce the agreement. A provision specifying that, under such circumstances, transferors are not subject to enforcement, is needed.

VII. NATIONAL GOALS AND POLICIES

As introduced, H.R. 3948 includes a number of sweeping new policy statements which ultimately could be used by EPA to support development of unanticipated substantive requirements. These include provisions establishing national policies calling for (1) reliance on source reduction, (2) protection of all waters for human consumption, following treatment, (3) protection of ground water that is hydrologically connected to surface water, (4) encouragement of water use efficiency, and (5) no overall net loss of wetlands acreage and functions, and restoration and creation of new wetlands. For example, H.R. 3948's statement that "it is the national policy that

the nation's waters achieve a level of quality appropriate as a source of water for human consumption" might be used by EPA as the basis of rules inappropriately limiting the states' ability to determine which waters are suitable for such a high standard of protection and which are not.

The fact that these statements are to be inserted into the "Congressional declaration of goals and policy" section of the Act does not mean that they will be treated as merely non-binding statements of purpose. Such policy statements have been used by both federal agencies and the courts in construing congressional enactments. For example, in its regulations governing state water quality standards under the CWA, EPA specifically requires that states adopt water quality standards to "serve the purposes of the Clean Water Act . . . as defined in Section 101(a)(2)" of the Act. 40 C.F.R. § 131.2 (1993). See also 48 Fed. Reg. 51400 (Nov. 8, 1983). Indeed, EPA has based its antidegradation policy on the statements of goals and purposes for the CWA. In addition, Courts also use the purposes of goals Congress has indicated for the CWA in its interpretation. See e.g., American Petroleum Institute v. EPA, 540 F.2d 1023, 1028 (10th Cir. 1976) (In interpreting the CWA "the guiding star is the intent of Congress to improve and preserve the quality of the Nation's waters. All issues must be viewed in light of that intent.").

Therefore, additional sweeping statements of goals and purposes should not be added to the CWA. If Congress wishes to create new substantive programs or

requirements in the Act, or to strengthen existing ones, it should consciously and deliberately do so by amending the relevant substantive provisions. Sweeping statements of goals and policies may result in Agency or litigation driven results neither intended nor desired by Congress.

In any case, if the statements proposed in H.R. 3948 are to be incorporated into the CWA, EEI believes that section 101(e)'s provision providing that "it is the national policy that water use efficiency be encouraged to the fullest extent possible," should be modified. With regard to water use efficiency considerations, we believe that a fundamental distinction should be made between consumptive water use, and non-consumptive water use. If minimizing water consumption is the concern, then uses that actually consume the water should be distinguished from those that do not. In this regard, the electric utility industry is virtually unique in that it uses a high-volume of water, but returns virtually all of that water to the receiving waterbody. Accordingly, EEI suggests that the work "consumptive" be inserted between "that" and "water" in section 201(b)(3). Also, the goal of protecting ground water as part of the focus of the CWA raises concerns already discussed..

VIII. INTAKE CREDITS

The CWA specifically defines the "discharge of pollutants" as "any addition of any pollutant to navigable water from any point source." By crafting this definition to cover only the "addition" of pollutants, Congress expressed its clear intent that an

individual point source discharger covered by the NPDES permit program may be held responsible only for those pollutants, or for that portion of a pollutant load, which the discharger is responsible for contributing. There is no indication that Congress ever intended that point source dischargers would be required to treat pollutants contributed by other point sources, nonpoint sources, or natural sources (or causes) but which are present in the discharger's effluent by virtue of their presence in intake waters.

Ignoring the plain language of the Act, EPA has argued that permit writers have authority to regulate effluents based on the total, or "gross," amount of pollutants present at the discharge point when setting water quality-based limits. See, e.g. Proposed Water Quality Guidance for the Great Lakes Systems, 58 Fed. Reg. 20953, Cols. 1-2, 20956-20657 (April 16, 1993) (stating, inter alia, that "EPA believes that the return of intake water pollutants to the waters of the United States . . . is an addition of pollutants subject to regulation under Section 402 of the CWA."). EPA has acknowledged only limited exceptions to this policy. Moreover, although EPA has issued regulations, requiring permit writers to afford intake credit under certain circumstances when imposing technology-based effluent limits (an action it took only after a court ruled that the Act so required), those rules do not apply to water quality-based permit limits. See 40 C.F.R. § 122.42(G) (1993). Although Administrator Browner stated in her May 26 testimony before the House Water Resources and Environment Subcommittee that EPA believes it has authority to afford intake credits where setting water quality-based limits, she did not acknowledge the Agency's

obligation to do so. Indeed, the Agency's recent proposal, in the context of its Great Lakes guidance, for taking into account pollutants in intake waters imposes so many unwarranted conditions that its applicability is severely limited. Equally important, the Administrator's testimony may not reflect settled EPA policy; indeed, in previous communications Agency officials have questioned their authority to apply intake credits.

Setting water quality-based limits on the total amount of a pollutant in an effluent makes dischargers responsible for the entire amount of any pollutant in the effluent, even if all or part of the total amount present comes from other sources over which the discharger has no control. For instance, a steam electric plant which draws its cooling water from a waterbody in which pollutant concentrations already are high due to contributions from nonpoint sources, other point sources, and natural causes, could be required to remove these pollutants even though the plant itself contributes little or no additional pollutant mass to the cooling water discharged. A study of the technological feasibility and cost of removing just one intake pollutant (copper) from once-through cooling water showed that the technological feasibility of achieving such limits is speculative at best. Even if gross limits were achievable on a reliable basis, the study indicated that the cost would be astronomical, ranging from $195 million to $517 million in capital costs alone for a single 600 megawatt power plant located on fresh waters, and from $325 million to $729 million for a seawater plant. Operating

and maintenance costs, power requirements, land requirements, and quantities of sludge generated also would be substantial for the technologies evaluated.

Point source dischargers should not be responsible for pollutants added by other sources or attributable to natural causes. Requiring dischargers to take responsibility for contaminants they have not added to water is inequitable and is not in keeping with the intent of the Act to control discharges (*i.e.*, additions of pollutants) into the nation's waterways.

Requiring point sources to remove pollutants that do not originate from their operations is also inconsistent with pollution prevention principles, and ultimately is unlikely to result in improved water quality, since the point source can do nothing to predict or prevent the presence of such pollutants in intake water. Thus, the source which actually is responsible for the pollutant may continue to add it with impunity, while the discharger with limits based on gross pollutant levels must continue to remove or treat pollutants originating from activities over which it has no control.

Requiring point sources to remove intake pollutants they do not add unfairly places such sources in jeopardy of noncompliance. Because the intake pollutants do not originate from their processes or activities, point sources subjected to gross limits cannot predict or control the amount of pollutants they must treat. Thus, they have no

way of properly designing and operating treatment facilities to meet anticipated treatment needs.

The "gross" approach to setting permit limits is particularly unfair when used to set limits based on extremely restrictive water quality standards. Requiring point source dischargers to remove amounts of pollutants that do not originate in their facilities renders these water quality-based limits vastly more burdensome and difficult to achieve.

H.R. 3948 includes an amendment to the Great Lakes Critical Programs Act which would give EPA and States authority to "consider the presence of pollutants present in intake waters" in setting effluent limitations. This language could be read to give permit writers new authority to require point sources to treat or remove pollutants in intake waters. For all the reasons discussed above, such a provision is inconsistent with the current terms of the Clean Water Act, is fundamentally unfair, and will not advance any legitimate environmental goal. Thus, this amendment should be deleted.

Instead, EEI believes that Congress should bring fairness and rationality back to the CWA by:

(1) clarifying that dischargers are responsible only for their own additions of pollutants to a waterbody;

(2) clarifying that EPA and that states must take background levels of contaminants into account when setting permit limits, so that dischargers are held accountable only for their net additions of pollutants to a waterbody.

IX. UTILITY LINE STRUCTURES IN WETLANDS

In addition, EEI believes that the CWA reauthorization legislation should include provisions addressing the treatment of utility line structures located in or near wetlands. Electric utilities provide a public benefit and service by supplying continuous and reliable electric power to industries, businesses and homes. In order to provide this service, it is inevitable that transmission and distribution lines and corridors, as well as access roads to those lines and other critical facilities, must sometimes cross wetlands. Moreover, continued access to utility structures and facilities in wetland areas for routine maintenance and emergency repairs is imperative in order for utilities to meet their service obligation for an uninterrupted flow of electricity. Modern best management practices, such as those set forth in 33 C.F.R. § 323.4(A)(6), are used to minimize the environmental impacts of such access, installation, and maintenance while allowing utilities to continue reliable service to their customers.[5/]

[5/] These BMPs include such measures as limiting number and size of roads as much as feasible, locating roads sufficiently far from streams or other waterbodies to minimize discharges, the proper stabilization of fill material to prevent erosion, and the construction of roads in a manner that minimizes the encroachment of heavy equipment. See 33 C.F.R. § 323.4(a)(6).

Currently, section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for the discharge of dredged or fill material into waters of the United States. As currently interpreted, the permit program may encompass the cutting and clearing of vegetation when establishing a right of way for transmission and distribution lines. Under regulations promulgated by the Corps, Nationwide Permit 33 provides for temporary access to permanent facilities previously authorized by the Corps, but requires that all material used for temporary access be removed. Construction of temporary roads and their removal sometimes costs in excess of $2 million per mile, and their removal leaves the utility with no access for future maintenance or repair. This can present a particularly acute problem in the event of a natural disaster, such as a hurricane or earthquake.

In 1977, Congress exempted from CWA oversight a variety of activities, including landclearing for silvicultural purposes, maintenance of currently serviceable structures and emergency reconstruction, and the construction and maintenance of farm and forest roads that are maintained under best management practices. These exemptions are not available if the activities involved limit the flow, circulation or extent of waters.

Maintenance and emergency repair of utility structures is imperative for reasons of safety and system reliability and is necessary for a utility to meet its service obligation to the public. Proper maintenance of existing utility structures and critical

facilities is greatly facilitated by access roads. Utility access roads can be constructed and maintained in accordance with best management practices to assure that flow and circulation patterns are not impaired, and adverse effects on the aquatic environment are minimized. In contrast, removal of access roads from utility corridors, as required by Nationwide 33, would expand impacts to wetland areas and would necessitate rebuilding access to transmission corridors whenever routine or emergency maintenance is required.

Accordingly, EEI urges the addition of language to clarify that the exemption from Section 404 permitting requirements for maintenance and emergency repairs of existing structures includes utility transmission and distribution lines and that the construction and maintenance of associated access roads is exempt from the Section 404 permit program provided that this activity continues to be performed consistent with best management practices for minimizing adverse impacts to wetlands as set forth in 33 C.F.R. § 323.4(a)(6).

X. FEDERAL PROCUREMENT PROVISIONS

EEI believes that a provision should be added to the CWA specifically supporting the use of coal fly ash as a mineral admixture in concrete used in federally funded projects. Federal agencies recently were directed by executive order to develop affirmative procurement programs for a variety of recycled products, and to produce annual updates regarding their actions in this area. See Executive Order No.

12873, "Federal Acquisition, Recycling and Waste Prevention" (Oct. 22, 1993). The use of coal combustion byproducts ("CCBP") such as coal fly ash in concrete products is fully consistent with federal goals of recycling, reuse and reduction of waste materials. Moreover, the use of CCBPs as a partial replacement for Portland Cement can reduce carbon dioxide (CO_2) emissions (CO_2 may contribute to an enhanced greenhouse effect and climate change) associated with the manufacture of Portland Cement.

In particular, H.R. 3948 would increase federal funding for construction of sewage treatment facilities, resulting in significant procurement of concrete and other materials subject to EPA procurement guidelines. In its present form, H.R. 3948 does not ensure that Clean Water Act grant and loan programs encourage the utilization of recovered materials in construction projects for sewage treatment construction projects. We believe that the bill should be amended to require EPA to condition funding of construction projects for sewage treatment facilities in compliance with the Agency's own guidelines for federal agency procurement of recovered materials.

XI. RISK ASSESSMENT

EEI believes that a provision should be added to H.R. 3948 amending the Act to require that EPA perform risk assessments implementation when implementing CWA programs. Although EPA has acknowledged the value of risk assessment in

certain contexts,[6] there are no generally applicable EPA regulations or guidance requiring the performance of risk assessments in the implementation of all CWA programs. Indeed, the Agency has never developed a consistent approach to risk assessment, nor has it consistently applied the principle in its enforcement of the Act. Moreover, where EPA has applied a risk analysis of sorts, it typically has not measured the costs and benefits associated with a particular requirement, but has applied a "wholly disproportionate" test, under which the costs of a requirement cannot be wholly disproportionate to the pollutant reduction gained.

For example, in setting technological effluent limits for point sources under the Act, EPA must require the application of the "best practicable control technology currently available" ("BPT"). 33 U.S.C. § 1314(b)(1)(B). In determining what constitutes BPT, the courts have ruled that EPA must consider the "'costs and benefits of a proposed technology in its inquiry.'" Rybachek v. EPA, 904 F.2d 1276, 1289 (9th Cir. 1990) (quoting Assoc. of Pacific Fisheries v. EPA, 615 F.2d 794, 805 (9th Cir. 1980)). However, the Agency can only determine that a particular technology is not BPT based on a cost/benefit analysis "only when the costs are 'wholly disproportionate' to the potential effluent-reductions benefits." Id. This standard does not constitute an adequate risk assessment balance between the likely social and ecological harm involved in a particular pollutant discharge, and the likely social and ecological benefits to be achieved from a particular control strategy. Indeed, the

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[6] See Framework for Ecological Risk Assessment xiv (USEPA Feb. 1992).

relevant inquiry is not even what benefits will accrue to society in general, or to the environment or human health in particular. The relevant inquiry is whether the costs of a technology are wholly disproportionate to the likely effluent-reductions benefits.

To ensure that the social, economic and environmental costs of a particular control strategy are consistently and uniformly balanced against its social, economic and environmental benefits, a risk assessment provision like that proposed in the Bipartisan Alternative to H.R. 3948 should be added to the Act.

XII. HYDROELECTRIC FACILITIES

Finally, in addition to all of the above comments regarding the general effects of H.R. 3948, EEI, the American Public Power Association, the National Hydropower Association, and the National Rural Electric Cooperative will separately submit comments on the concerns raised by H.R. 3948 for hydropower facilities. To summarize EEI's key concerns about the bill's effects on hydropower, under current law and regulation, state authority under the Clean Water Act, together with the hydroelectric power licensing process administered by the Federal Energy Regulatory Commission (FERC), provides strong protection for water quality and for all resources affected by hydroelectric projects. However, various provisions of H.R. 3948 could have serious negative impacts on the ability to license hydroelectric facilities across the country. In particular, the bill's provisions regarding non-point sources and watershed management could unnecessarily duplicate and interfere with existing,

effective regulation through the FERC licensing process. Clarification is needed to ensure that these provisions do not apply to hydroelectric projects already subject to FERC's jurisdiction.

In addition, a recent decision by the U.S. Supreme Court calls into question FERC's role in balancing all impacts of hydroelectric projects, as mandated under the Federal Power Act. Based on this decision, the Clean Water Act and the Federal Power Act clearly are in conflict. Congress must act to resolve this conflict to avoid devastating results for an important component of the Nation's energy supply.

FRIENDS OF REDWOOD CITY

3720 Country Club Drive Redwood City, California 94061 (415) 365-0675

ATTN: Ken Kopocis, Counsel
House Subcommittee on Water Resources and Environment
B370A Rayburn House Office Building
Washington, DC 20515-6262

Subj: Request that Congress not pass a Clean Water Act bill this session unless it includes the Edwards bill, HR350, or equivalent as its wetlands component

Dear Mr. Kopocis:

Our organization, the Friends of Redwood City, strongly opposes the Clean Water Act bill before you called, "An Amendment in the Nature of A Substitute to HR 3948 Offered By Mr. Mineta", and also the bill recently introduced by Congressman Bud Shuster.

These bills would drastically alter and weaken current regulatory protection for wetlands.

In our nation, 800 acres of wetlands are being lost every day. In California we have lost over 90% of our original wetlands. Recent flooding in the Mississippi River Valley provides ample evidence of the results of the loss of wetlands. The fact that 55% of California's and 43% of the nation's endangered and threatened species are wetland-related species clearly indicates the severity of our wetland losses. Wetlands play a critical role in preserving our nation's water quality and are also essential for our nation's multi-billion dollar fishing industry.

Wetlands should be receiving increased protection, yet the bills under discussion would, instead, seriously weaken existing protections which are themselves inadequate.

Mr. Mineta's bill strikes at the heart of wetland protection by weakening the Section 404(b)(1) guidelines. This is completely unacceptable. These guidelines must not be weakened. The bill would also expand the definition of prior converted croplands. The Clean Water Act bill should make no reference to prior converted croplands. The bill also has an unfair appeals process that allows landowners to challenge an Army Corps decision, but the public has no such right. The public must also be allowed to take part in the appeals process. The inclusion of a "Categories of waters" general permit would legalize permits such as Nationwide Permit #26 which has been shown to be the cause of significant wetland losses in California.

The Shuster bill contains most if not all of Congressman Hayes' bill, HR 1330. This bill clearly undermines the entire concept of wetlands protection and should be dismissed by your Committee.

The only bill which provides acceptable wetland land protection is Mr. Edwards' bill, HR350. We strongly urge that Congress not pass a Clean Water Act bill this session unless it encompasses the Edwards bill, HR 350, or equivalent as its wetlands component.

We request that this letter be included in the May 24-26 Clean Water Act hearing record.

Sincerely yours,

Ralph Nobles

Ralph Nobles

President, Friends of Redwood City
Member, San Mateo County Planning Commission
June 22, 1994

JUN- 9-94 THU 12:27 GLENN COLUSA IRR. DIST. FAX NO. 9169343287 P.02

GLENN-COLUSA
IRRIGATION DISTRICT
WATER RIGHTS SINCE 1883
MEMBER ASSOCIATION OF CALIFORNIA WATER AGENCIES
POST OFFICE BOX 150 • 344 EAST LAUREL STREET
WILLOWS, CALIFORNIA 95988
TELEPHONE (916) 934 8881

June 8, 1994

The Honorable Norm Mineta
Chairman, Committee on Public
Works and Transportation
U.S. House of Representatives
2165 Rayburn Building
Washington, DC 20515

Dear Mr. Chairman:

The Glenn-Colusa Irrigation District (GCID) would like to provide the following brief comments to be included at the hearing in regard to the "Water Quality Act of 1994", H.R. 3948 and the bipartisan alternative. GCID serves 140,000 acres of farmland and over 20,000 acres of wildlife refuges in the Sacramento Valley.

The GCID Canal has provided water from the Sacramento River for 90 years and the intake channel must be routinely dredged. The U.S. Army Corps of Engineers is authorized by regulations at 33 CFR 325.6(e) to issue ten-year permits for such maintenance activities, but since 1986 has failed to issue a multi-year permit. Instead, permits have been issued for varying, shorter periods of time with increasingly onerous conditions, often completely unrelated to the maintenance dredging activity.

The application, review and issuance of the permit is time consuming and can often extend to a year or more, which is entirely inappropriate considering the fact that annual maintenance must be performed in order to deliver water to farmers and wildlife refuges. As a practical matter, it is very difficult to operate a project where the water supply has become entirely dependent on the maintenance dredging of the supply channel and where a permit to dredge is uncertain and can take nine months or more to secure.

The permit conditions have often been imposed very late in the process in such a manner as to prevent scientific review of the conditions imposed and without consideration for the economic or

environmental impact on the applicant and the people dependent on the water supply who need to plan and obtain financing for planting. In addition, twenty-one sensitive, threatened or endangered species thrive in the habitat provided by this district. The delay and uncertainty of the 404 permit process also jeopardizes the habitat for those species.

RECOMMENDATION

GCID is not asking for an exemption from the Section 404 permitting process, but rather a reasonable regulatory program and a predictable schedule that water users can depend on. Economic viability of farming operations and the sustainability of wildlife refuges depend on a predictable source of water which only the GCID canal can provide. We recommend that the legislation clarify that 10 year permits for maintenance dredging be standard procedure for the U.S. Army Corps of Engineers and that any permit conditions be related directly to the maintenance activity itself.

We welcome the opportunity to work with the Committee to draft the appropriate legislative or report language. If you have questions or comments please feel free to contact us.

Sincerely,

Robert D. Clark

Robert D. Clark
Manager/Secretary

cc: The Honorable Vic Fazio
The Honorable Wally Herger
The Honorable Diane Feinstein
The Honorable Barbara Boxer

Clean Water Fund *of North Carolina*

Asheville Office. 29 1/2 Page Ave. • Asheville, NC 28801 • 704-251-0518
Raleigh Office: P.O Box 1008 • Raleigh, NC 27602 • 919-832-7491

ATTN: Karen Rose
Re: HR 3948 / Control of Radioactive Discharges to Surface Waters

10 June 1994

In order to more effectively protect and promote the quality of navigable waters in North Carolina and across the United States, the Clean Water Fund of North Carolina urges members of the US House Committee on Public Works and Transportation to amend HR 3948 by adopting the definition of radioactive materials (and related supporting language) proposed by the National Association of Attorneys General in a memorandum dated 20 April 1994.

The Clean Water Fund of North Carolina remains concerned that the current legal theory relating the federal Clean Water Act [CWA] and the Atomic Energy Act of 1954 [AEA] could prevent the Environmental Protection Agency, the State of North Carolina, and North Carolina citizens from addressing important water quality issues related to the discharge of radioactive pollutants in North Carolina.

The CWA was designed to restrict and then eliminate the discharge of pollutants (including radioactive materials) which bioaccumulate, persist in the environment, or exhibit carcinogenicity, mutagenicity, or teratogenicity.

However, the CWA does not define "radioactive materials," and the Supreme Court held in the 1976 case Train v. Colorado PIRG (426 U.S. 1) that the CWA did not apply to AEA-regulated radioactive materials.

But the AEA was not designed to promote the public health or safety or on the protection of the environment, and -- as noted in the NAAG memorandum -- serious incidents of radioactive pollution have already resulted from the deregulation effected by Train v. PIRG.

The Clean Water Fund of North Carolina is concerned that language in the CWA reauthorization bill HR 3948 now before the US House Committee on Public Works and Transportation explicitly excludes from CWA coverage radioactive materials licensed by Nuclear Regulatory Commission [NRC], as well as materials associated with the naval propulsion program.

The Clean Water Fund of North Carolina believes that the historical record clearly demonstrates that the AEA is entirely inadequate to protect the quality of waters, including the Cape Fear River.

In particular, continuing exclusion of some AEA materials from CWA coverage could limit efforts to prevent radioactive pollution of North Carolina's Cape Fear River (an important drinking water source) by an eight-state landfill proposed for radioactive Southeast Compact wastes on the shore of Harris Lake in the Cape Fear basin, and there are reasons for related concerns across the nation.

It is irrational and inconsistent to continue to exclude any AEA materials (including those licensed by the NRC) from CWA coverage.

Because the AEA provides the statutory authority for the Agreement State program under which the NRC cedes some regulatory powers to various states, including North Carolina, the explicit exclusion of NRC-licensed materials from CWA coverage might later be interpreted as similarly excluding Agreement State licensees (such as the contractor for the proposed radioactive regional landfill at Harris Lake), an interpretation which might be reinforced by the fact that -- although the CWA does forbid the discharge of "high-level" waste into navigable waters -- the Act contains no explicit prohibition on the discharge of "low-level" waste.

To whatever degree the AEA preempts existing state authority, the continuing exclusion of any AEA-regulated materials could prevent North Carolina from setting standards more stringent than NRC standards for the discharge of various radionuclides to surface waters: however, North Carolina's long-term interests will be better served if the state is clearly able to set stricter-than-federal standards.

Moreover, the right of citizens under the CWA to file suit for enforcement of radionuclide emissions limits will remain inappropriately restricted if NRC-licensed materials continue to be excluded from the CWA.

The Clean Water Fund of North Carolina considers that the language proposed by NAAG for HR 3948 could resolve many of these concerns.

Carl Rupert, Ph.D. C L Rupert

Golden Gate Audubon Society

2530 San Pablo Avenue, Suite G • Berkeley, CA 94702 • Phone: (510) 843-2222 • Fax: (510) 843-5351

Americans Committed to Conservation • A Chapter of the National Audubon Society

June 6, 1994

House Committee on Public Works and Transportation
2165 Rayburn House Office Building
Washington, D.C. 20515-6256

Dear Chairman Mineta and Committee Members:

The Golden Gate Audubon Society asks that the following testimony be entered into the Hearing Record for the Hearings held on the Clean Water Act, on May 24 and 26, 1994.

The Golden Gate Audubon Society urges members of the Committee to reject both the recent bill introduced by Congressman Shuster (unnumbered as of the time of this writing) and also the Amendment In The Nature Of A Substitute To H.R. 3948 Offered by Mr. Mineta.

Both bills would significantly weaken federal law concerning wetlands and, if enacted, would lead to drastic wetland losses throughout our nation.

Mr. Shuster's bill evidently incorporates HR 1330 (Hayes). This bill, which would completely alter the present system of wetlands regulation would prove devastating to our nation's wetlands.

HR 1330 includes a redefinition of wetlands that is very similar to the definition proposed by the previous Administration under President Bush. As we all learned from the debate over the definition proposed by then-Vice-President Quayle, the scientific community was essentially unanimous in opposing this unscientific definition.

HR 1330 would base wetland regulation on the perceived value of each individual wetland. We are strongly opposed to this ranking of wetlands. Wetlands serve many function s and provide values in many different ways. Some may be essential for flood control but offer little wildlife value. Some may be critical for water quality functions but have little other immediately obvious value.

In South San Francisco Bay, for example, there are several thousand acres of diked historic baylands, or seasonal wetlands. These areas are dry in the summer and look like moonscapes (although this dry habitat actual provides

nesting sites for the endangered bird, the snowy plover). Compared to tidal wetlands they may look totally valueless. Yet during the winter, these seasonal wetlands collect rainwater and are wet for months at a time, providing essential habitat to over 750,000 shorebirds, hundreds of thousands of waterfowl and many endangered species.

On a valuation system these wetlands may well be found to be far inferior to a "pristine" tidal wetland. If so found, under the Hayes bill these wetlands would be developable with, or even without, mitigation depending upon how they are valued.

An example of how such a ranking system is open to abuse is shown in a report recently issued by an "environmental consultant" who performed an analysis of the value of our Bay's diked Baylands for a pro-development organization.

The same South San Francisco Bay seasonal wetlands that are important for wildlife, also provide important flood control benefits to our communities. They act as large basins that collect and hold millions of gallons of water during storms. This same water would otherwise be swelling our streams and flooding our streets.

However, this consultant used a definition of flood control values that considered only non-seasonal wetlands. Non-seasonal wetlands provide flood control values because they absorb water as it passes through them and because their wetland vegetation slows up flood surges.

By using this restricted definition of flood control, in which water must flow through and then leave a wetland in order for it to provide flood control benefits, this consultant concluded that the Bay's seasonal wetlands, which collect flood waters, provide no flood control values, whatsoever.

Thus because a seasonal wetland collects flood water instead of having water run through it, it was found to provide no flood control benefits. This is a sad abuse of science and it demonstrates that how one determines the value of a wetland is dependent upon how one defines those values.

A regulatory system based upon ranking or categorization is open to such abuses. Inevitably valuable wetlands will be lost because of a ranking or categorization system.

While the Shuster/Hayes bill is based on such valuation or ranking, the proposed Amendments to HR 3948 also introduces ranking into the very heart of the federal regulatory program. In the proposed Amendment to HR 3928, the 404(b)(1) guidelines are amended so that the value ("relative importance") of a wetland must be considered when determining whether there is a practicable alternative upland site available for the project. No longer will there be the presumption that there is an alternative upland site. Now such a presumption apparently will exist only if it is a "good" or "important" wetland that is at stake.

Furthermore, the Amendment to HR 3948 would require the consideration of the elements of a "wetlands management plan" when applying the 404(b)(1) guidelines. Such "wetlands management plans" are a critical component of the Amendment to HR 3948 and these "plans" are to include the creation of "mitigation banks". Thus, through "wetlands management plans" the existence of mitigation banks would be an element to be considered during the 404(b)(1) guideline's alternatives analysis.

The 404(b)(1) presumption that there is an alternative upland site would now be vitiated by the concept of mitigation. Presently mitigation is considered only after it is shown that no practicable alternative upland site is available for the general purpose of the project. The proposed Amendment would require the 404(b)(1) analysis to incorporate the concept of mitigation as part of the analysis.

Is this bad? We believe so. And our thoughts are seconded by the National Research Council. The National Research Council, in *Restoration of Aquatic Ecosystems*, clearly states that "Wetlands restoration should not be used to mitigate avoidable destruction of other wetlands..."

Wetland restoration/creation projects are rarely, if ever, completely successful. Few, if any, have successfully replicated all the values of a naturally functioning wetland. The National Academy of Science's research arm, the National Research Council in 1992 stated that, "It has not been shown that restored wetlands maintain regional biodiversity and recreate functional ecosystems..." [See publication, *Restoration of Aquatic Ecosystems*, National Academy Press, 1992.]

The Amendment to HR 3948 is proposing to trade our nation's richest natural resource, its wetlands, for an unproven concept. A concept, in fact, that our nation's highest scientific body has said is essentially not going to work.

Wetlands mitigation banking is inappropriate for many reasons. One is that the creation of wetlands rarely succeeds. A second reason is that the function of wetlands are often site-specific. For example, the seasonal wetlands in the southern part of San Francisco Bay support an endangered species, the southern race of the salt marsh harvest mouse, that is not found in the North San Francisco Bay.

Furthermore, of the one million shorebirds that depend on the Bay Area wetlands every year, 750,000 are found in South San Francisco Bay because of its unique mudflat/seasonal wetlands habitats. A mitigation bank in Napa County, 30 miles to the north, will not help either the mouse or the shorebirds. Nor will it help provide the South Bay's flood control and water quality benefits which are presently provided by the South Bay's existing wetlands. A move of only thirty miles would eliminate both the habitat and health benefits that South Bay wetlands provide. Yet this is just what a mitigation bank is all about.

Wetlands are valuable because of their location. Their flood control, water quality and habitat values are site specific. A mitigation bank ignores this fact.

Wetlands' restoration/creation is a useful concept if we are to increase our wetlands' acreage. How else could it happen? But we must be cognizant that such efforts will not provide the same values as natural wetlands. Wetlands restoration should not be used to excuse the avoidable destruction of existing wetlands. Wetlands restoration should not be used in a regulatory context. Mitigation banks should not be offered as an alternative to the 404(b)(1) guideline's presumption that no existing wetland should be destroyed if there is a practicable alternative upland site available for the purpose of the project.

The Army Corps of Engineers and the EPA recently issued a joint Memo to the Field in which it was explained that there is flexibility in the 404(b)(1) guidelines. For a project of little impact on wetlands the amount of alternative site analysis required can be minimized. Other flexibilities are discussed, but one fact was stressed; mitigation should not be considered in the alternatives site analysis itself. The Amendment to HR 3948 would undermine this concept and bring mitigation into the analysis. Again, this undermines the very concept behind the guidelines. It is simply not acceptable.

The proposed Amendment to HR 3948 (Mineta) weakens wetlands protections in many other ways. These I will simply enumerate for lack of time.

1) It includes an unfair appeals system that allows only landowners to appeal decisions and removes the public from all appeal opportunities.

2) It greatly expands both the definition of agriculture and the Prior Converted Cropland definition. The combination of these two provisions would insure the loss of millions of acres of wetlands.

Prior converted croplands should be defined only as those lands on which commodity crops have been grown and which have been so altered by agriculture that they would not return to wetland status if farming ceased. Any other definition of prior converted croplands is clearly designed to allow development to take place on wetlands.

3) By offering General Permits to States to allow them to take over many wetland regulatory functions from the Army Corps you introduce the great possibility of having such regulatory decisions made more susceptible to political influence. We urge you to reject state general permits. If they are maintained in the bill, we urge you to include the Administrator as one who must review permits granted under this general permit. The Administrator should also be given the authority to order a full individual permit review by the Army Corps for any permit granted under the state general permit program that would lead to more than insignificant impacts.

In conclusion, we urge you to reject and vote against both the Shuster bill and the Amendment In The Nature Of A Substitute To H.R. 3948 Offered by Mr. Mineta. Both will lead to an unacceptable loss of wetlands in a nation that has already lost over 50% of its historic wetlands.

The value of our nation's wetlands has been made clear by several recent studies. Wetlands support a multi-billion dollar fishing industry supplying over 1.1 million jobs to this nation. The flood control, water quality, recreation, fishing and hunting value of 450,000 acres of wetlands in California has been shown to be worth over $10 billion yearly.

These are values that cannot be ignored, the flooding of the Mississippi River provides ample evidence of the dangers of such ignorance. Wetland creation is not the answer. Wetlands are important because of their location, mitigation banks will not truly replace the functions of existing wetlands except on paper.

We urge you to reject these bills and, instead, look to the Don Edwards bill, HR 350 as a reasonable approach to a reauthorization of the wetlands component of the Clean Water Act. Thank you for your consideration of our views.

Sincerely yours,

Arthur Feinstein
Program Coordinator

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NORMAN Y. MINETA, M.C.

May 13, 1994

The Honorable Norm Mineta
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Mineta:

All the members of Grateful Dead have asked me to write this letter to you on their behalf in support of a renewed and strengthened Clean Water Act and Safe Drinking Water Act in the 103rd Congress.

We strongly believe that clean and safe water is a basic right due all persons. Far too much of our nation's water is not safe for drinking, fishing or swimming. Nearly one in five of the largest facilities is in serious violation of the Clean Water Act; and the nation's water companies committed over 250,000 violations of the Safe Drinking Water Act, affecting more than 100 million Americans.

We urge you to renew and strengthen the Clean Water Act and the Safe Drinking Water Act to ensure that they:

- Strengthen Enforcement - by expanding citizens' right to sue polluters, increasing penalties to prohibit profits from polluting, requiring mandatory minimum penalties for the worst offenders and expanding citizens' rights to know about violations.
- Prevent Toxic Pollution - by reducing the use of toxic chemicals such as lead and chlorine, requiring pollution prevention plans and stopping poison runoff.

Your leadership on these issues can make the critical difference on the quality of the water we drink, swim in and fish from, and for our future generations. We look forward to knowing your thoughts on these issues.

Sincerely,

R Cameron Sears

R. Cameron Sears
Manager

on behalf of Bob Weir, Mickey Hart, Bill Kreutzmann, Jerry Garcia, Phil Lesh, Vince Welnick and the entire staff of Grateful Dead Productions, Inc.

Grateful Dead

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THE IZAAK WALTON LEAGUE OF AMERICA

TESTIMONY OF THE

IZAAK WALTON LEAGUE OF AMERICA

before the

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION COMMITTEE,

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

CONCERNING THE POLLUTED RUNOFF AND WETLANDS PROVISIONS OF H.R. 3948, AND AN AMENDMENT FOR THE DESIGNATION OF THE MISSISSIPPI RIVER TO THE CLEAN WATER ACT

Paul Hansen, Midwest Director
Ann Robinson, Agricultural Specialist
Jennifer Snoddy, Agriculture Associate

June 8, 1994

National Office: 1401 Wilson Boulevard Level B Arlington, Virginia 22209-2318 Phone (703) 528-1818
Midwest Office: 5701 Normandale Road Suite 210 Minneapolis, Minnesota 55424 Phone (612) 922-1608

Printed on Recycled Paper

Mr. Chairman and members of the Subcommittee:

We appreciate the opportunity to submit the views of the Izaak Walton League of America (IWLA) on the polluted runoff and wetlands provisions of H.R. 3948, the Water Quality Act of 1994 (introduced by Chairman Mineta and Representative Boehlert; hereinafter termed H.R. 3948), and the inclusion of a special designation for the Mississippi River in the Clean Water Act (CWA).

IWLA is a national wildlife and natural resources conservation group whose 50,000 members are dedicated to the preservation of the nation's wildlife and the natural resources necessary for both human and wildlife existence. "Clean water" is at the center of IWLA's conservation policies as we strongly believe the people of the United States are entitled to wholesome surface and groundwaters, usable for all human and wildlife needs. Strengthening the CWA, especially its polluted runoff and wetland provisions, is a foremost priority of IWLA.

INTRODUCTION

Although the Clean Water Act has been in effect for over 20 years, our nation's waters still do not meet the "fishable and swimmable" goals set in 1972. The Environmental Protection Agency (EPA) recently released a report on the condition of our waterways which shows that four out of every ten water bodies in the U.S. remain badly polluted. The Mississippi River, the dominant watershed in North America, suffers from polluted runoff, industrial

pollution, municipal wastes, and loss of wetlands. Nationwide, wetlands continue to disappear at a rate of almost 300,000 each year.

The CWA, designed to prevent and reverse these very water quality problems is riddled with weaknesses and loopholes which has rendered it ineffective at substantially improving the quality of our surface and groundwater. Of special concern to IWLA are weaknesses in Section 319's polluted runoff and Section 404's wetlands programs. A major weakness in current polluted runoff policy is the lack of a watershed management approach in state runoff prevention programs. Experts agree a more ecosystem approach is essential to most effectively address the full range of polluted runoff sources which effect bodies of water.

Provisions are needed to strengthen the polluted runoff and wetlands sections of the CWA, as well as the need for the inclusion of a special designation for the Mississippi River. Our comments on these provisions follow.

POLLUTED RUNOFF PROTECTION

Current State polluted runoff programs under Section 319 are highly inconsistent, underfunded, and based on unenforceable, voluntary measures which have rendered them ineffective. Polluted runoff continues to be responsible for the failure to meet water quality standards or designated uses in more than half of our nation's impaired waters. Specifically, agriculture is the number one leading

source of water quality impairment for our nation's waterways and lakes.

H.R. 3948 falls short of addressing most of the weaknesses inherent in the CWA's Section 319 polluted runoff provisions. In fact, many of the bill's provisions would not ensure an effective polluted runoff prevention program, and in some cases would even weaken current law. These include: weak enforcement provisions; optional watershed based polluted runoff plans; inflexible criteria for management measures used in site-level water quality plans; and a broad exemption for land-use categories in state runoff prevention programs.

Alternatively, H.R. 2543, the Nonpoint Source Pollution Prevention Act of 1993 (introduced by Representative Oberstar; hereinafter termed H.R. 2543), would strengthen Section 319, and we strongly support many of this bill's provisions.

Provisions we think are necessary for successful polluted runoff programs and the degree to which H.R. 3948 and H.R. 2543 incorporate these provisions are listed as follows.

1) Require states to develop and implement mandatory enforceable polluted runoff prevention programs that have national oversight.

States have relied on voluntary compliance for landowners to adopt water-sensitive practices and have been unsuccessful at achieving sufficient participation rates.

The EPA's 1990 evaluation of its Rural Clean Water Program concluded that enforceable mechanisms are needed to ensure comprehensive participation in watershed clean-up programs. Water Quality 2000, a broad-based coalition of industry, academic, environmental, and agency representatives also recognized the need to go beyond voluntary runoff control: "...(T)he purely voluntary nature of many (agricultural) runoff and leachate pollution prevention programs have clearly hampered implementation efforts." (WQ 2000 1993).

In order for polluted runoff programs to be effective, mandatory measures to control polluted runoff must be incorporated into Section 319. H.R. 3948 provides that EPA require states to establish mandatory polluted runoff prevention programs. However, the bill's lax runoff enforcement provisions weaken the state's ability to assure compliance. Section 319 needs strong enforcement provisions in which EPA reviews, approves, and enforces polluted runoff prevention programs when the states fail. H.R. 3948 does not provide for sufficient EPA backup of state enforcement and EPA oversight of state implementation of the Section 319 program. In contrast, H.R. 2543 contains these provisions, which we support. Further, H.R. 3948 does not set minimum penalties, prevent profit from violating permits, or protect citizens' rights to sue - all of which are essential for effective enforcement.

2) Require polluted runoff programs to be watershed based.

The health of a body of water is affected by the full range of events that occur within a watershed. To have any chance of preventing the degradation of a waterbody runoff prevention programs must restore the important attributes of the watershed as a whole. Although H.R. 3948 includes watershed based management plans, these plans are optional, leaving it open for states to choose not to use watersheds as the basis for these plans. H.R. 2543 is currently the only proposal that would make watershed runoff plans mandatory, which we consider critical to effectively prevent the degradation of our waterways from polluted runoff.

3) Require mandatory, flexible, site specific water quality plans for all landowners in land-use categories identified as major contributors to pollution problems in threatened or impaired watersheds.

Flexible, site-level water quality plans are essential to the successful adoption of plans by landowners. Landowners need to be able to tailor the plan to the specific needs of his operations. Although H.R. 3948 does allow landowner and states to choose site-specific plans, the bill does not allow for the use of alternative management measures not developed by EPA. We believe these measures are not flexible enough to meet individual needs. Alternatively, H.R. 2543 does allow for the use of other practices <u>as long as they can prove they are as effective as</u>

EPA-developed management measures. We support the more flexible provisions of H.R. 2543.

The inclusion of all land-use categories regardless of their contribution to runoff degradation in polluted runoff programs would be uneconomical and impractical. However, all landowners in land-use categories identified as significantly contributing to pollution should be required to develop water quality plans. H.R. 3948 allows states to broadly exempt any land-use category regardless of it's contribution to the impairment of waterways. Exemptions should serve the purpose of targeting runoff programs to major causes of water impairment. H.R. 2543 accomplishes this by requiring states to show that potentially exempted land-use categories are causing minimal degradation before exemption status is granted. All surface and groundwaters (threatened, impaired, and pristine) should be protected from polluted runoff. We support H.R. 3948's provision which requires the states to implement mandatory, phased-in management measures for all waters throughout the state.

4) Increase funding for state polluted runoff programs

Section 319 programs have historically been underfunded and this has seriously hampered states efforts to control nonpoint pollution. From 1989 to 1993, total Section 319 appropriations were only $200 million, which are severely inadequate when compared to program needs and the tens of billions of dollars spent on sewage treatment programs during that same period.

We support the funding levels proposed in both H.R. 3948 and H.R. 2543. Both provide for substantial additional funding for implementation of the new Section 319 program.

WETLANDS PROTECTION

Maintaining and restoring wetlands is an essential component of a watershed-based approach to protection of the nation's waterways and lakes and drinking water. Wetlands provide many critical ecological functions and values that are vital to the health, safety, economic and psychological welfare of all Americans, including: helping to maintain water quality; reducing flood peaks and storing water during periods of excess rainfall; providing habitat for fish and shellfish, and other wildlife, including endangered and threatened species; and providing recreational and aesthetic opportunities.

It is critical that revisions to the Clean Water Act include a stronger approach to protecting the wetlands we have left, and restoring a portion of those that have been degraded or lost. The Section 404 program in the current Act, administered by the U.S. Army Corps of Engineers (the Corps), represents a sensible approach to wetlands protection by emphasizing avoiding unnecessary damage to wetlands. However, despite the important role that the Section 404 has played in reducing wetlands losses, the law is too weak to do the job that is needed, and contains limitations and loopholes that allow continued destruction of valuable wetland resources.

The proposed wetlands amendments to H.R. 3948, not only fail to strengthen the current wetland protection provisions of the Clean Water Act, but would weaken the law significantly. IWLA has serious concerns about wetland protection in H.R. 3948, and urges Congress to substantially revise the proposal to strengthen, rather than weaken, existing protections so that we can restore and maintain the integrity of our nation's wetlands and waters.

We are especially concerned about provisions of H.R. 3948 that:

* limit the scope of the alternatives analysis required for permits, based on questionable assessments of wetland function and "relative importance";

* base the 404 permit schedule on local wetland management plans that would not necessarily have reasonable wetlands protection safeguards;

* redefine and expand exemptions for "prior converted" cropland;

* expand general permits, deregulating certain wetland categories deemed to be of less importance;

* establish a new, unfair appeals provision that is only available to wetland despoilers; and

* promote mitigation banks that will foster natural wetlands destruction, particularly by allowing permit applicants to gain wetland "improvement" credits before those improvements have even materialized.

These weakening changes would gut the Section 404 Program, resulting in increased wetlands losses. They would also once again throw the decisionmaking process on wetlands permits into an uproar, fostering litigation and uncertainty, resulting in more, rather than less, costly delays to permit applicants.

Comments listing our major recommendations for reform of wetland provisions within the Clean Water Act are listed as follows. We suggest that you refer to other pending legislation, H.R. 350 and S. 1195, the Wetland Reform Acts of 1994, introduced by Representative Don Edwards and Senator Barbara Boxer respectively for much more balanced solutions to wetlands protection issues.

1) Establish wetlands protection and restoration as an explicit goal of the Clean Water Act, and base definitions and assessments of wetland values on the best science available.

We need a strong, clear statement of national policy to preserve the quantity and quality of the nation's wetlands and to restore those that have been degraded, reaffirming Congress' commitment to protect wetland and water resources. H.R. 350 not only accomplishes this, but also requires that any changes to the Wetlands Delineation Manual consider the findings of the National Academy of Sciences study now underway - a proposal we feel is necessary to ensure wetlands are assessed based on sound scientific criteria.

2) Authorize federal agencies to regulate a broader range of wetlands-destroying activities.

The major activity regulated by Section 404 is the discharge of dredged or fill material. This means that many other wetlands destroying activities are not covered by the law. H.R. 350 would finally close many of the existing loopholes in the scope of Section 404 by specifically regulating the main types of activities that destroy and degrade wetlands.

3) Require the EPA and the Corps to monitor more closely the general permits authorized under section 404 to reduce cumulative losses.

Section 404 allows the Corps to issue general permits that give blanket authority to conduct certain activities that can harm wetlands. However, there is currently insufficient monitoring and oversight to determine if these permits are leading to substantial cumulative damages to wetlands. More oversight of wetland altering activities is needed, particularly those that taken as a group are causing major cumulative losses and degradation of wetlands. To this end, agencies that have technical expertise in evaluating wetland resources, such as the Environmental Protection Agency and the U.S. Fish and Wildlife Service (FWS) should be given a stronger role in commenting on permits issued by the Corps.

H.R. 350 retains the general permit program, but improves accountability by requiring the corps to track

wetlands losses from general permits and intermittently review each general permit to determine whether the permit has had more than minimal individual and cumulative adverse effects on the environment. In addition, to curtail further abuses under general permits, H.R. 350 improves oversight by requiring EPA concurrence and a strengthened role for the FWS.

As well as responding to the need for more environmental protection, H.R. 350 is a balanced bill that addresses the concerns of the regulated community. For example, H.R. 350 would expedite permit processing and completion of wetland maps, and would provide funds to implement the Corps wetlands delineation training and certification program. It would also reaffirm exemptions for normal, ongoing farming, ranching and silvicultural activities, and create much-needed tax incentives for landowners who agree to preserve wetlands.

MISSISSIPPI RIVER PROTECTION

The Mississippi River is the dominant watershed in North America. With its tributaries, the Mississippi drains more than a million square miles and includes all or parts of 33 states and two Canadian provinces. This great river is a national historic and ecologic treasure and one of the most rare and complex riverine ecosystems in the world. However, despite its great ecologic, economic and cultural importance, this world-class waterway has long been neglected and degraded.

The Mississippi River suffers from polluted runoff into surface water and infiltration into groundwater, industrial pollution, municipal wastes, loss of wetlands, spills of hazardous chemicals and oil, invasion of toxic species, and impacts from navigation and energy development. Many stretches of the river do not meet the basic national goal of fishable and swimmable established by the Clean Water Act. In 1991, five of the states along the Mississippi River ranked in the top 15 nationally for releases of toxic discharges to surface waters. Five mainstem states also ranked among the top 15 dischargers to publicly owned sewage treatment facilities.

The Izaak Walton League of America urges Congress to include measures in this revision of the Clean Water Act that would target the Mississippi River for special attention to stop the river's further decline and begin its restoration. One of the most important actions this Congress could take on behalf of the water resources of this country would be to provide a special designation for the Mississippi. Such a designation has proven effective for the Chesapeake Bay and the Great Lakes, which were recognized in the 1987 revisions to the Clean Water Act. A similar designation would focus national attention on the Mississippi and facilitate a more coordinated watershed approach to its protection and restoration. To accomplish this goal, we recommend you consider language in Section 1006 of the Senate Clean Water Act reauthorization bill (S.

2093), which addresses the management and restoration of the Mississippi River.

There are also other ways that the nation can better address the multiple threats to the Mississippi through modifications to the Clean Water Act. These include:

* Revising polluted runoff programs to move towards enforceable programs to control runoff from farms and other land, and to enhance pollution prevention efforts that control urban runoff;

* Improving point source policy to strengthen EPA and state authority to achieve pollution prevention and enforce existing law, and to reduce obstacles to citizen suits;

* Increasing protection and restoration of wetlands and riparian areas;

* Expanding citizen involvement in regional water quality efforts, including involving citizens in comprehensive watershed planning and expanding volunteer water monitoring programs; and

* Improving water quality standards to update criteria for toxic pollutants and encourage better coordination of standard setting and monitoring efforts.

CONCLUSION

As written, H.R. 3948 does little to strengthen the CWA's polluted runoff and wetlands sections, and in many cases weakens them. Strong programs under these sections are critical to prevent the further degradation of our surface and groundwater and wetlands. In addition, a

special designation for the Mississippi River is long overdue and is essential for the protection and restoration of this national treasure.

Recent survey's show that water quality is a top priority for many U.S. citizens. Surveys of our members reflect this. Show you represent their interests and work to strengthen the Clean Water Act.

TESTIMONY OF THE LARGE PUBLIC POWER COUNCIL

BEFORE THE

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

OF THE

PUBLIC WORKS AND TRANSPORTATION COMMITTEE

OF THE U.S. HOUSE OF REPRESENTATIVES

June 6, 1994

The Large Public Power Council (LPPC) thanks the Members of the Committee for the opportunity to provide testimony regarding the reauthorization of the Clean Water Act (CWA). For your reference, LPPC is an association of 18 of the largest non-federal, publicly owned electric utilities in the nation. LPPC members are located in diverse regions throughout the nation and serve a total of approximately 15 million consumers.[1] Since member utilities are governed at the local level, their concerns directly reflect the interests of the local community and ratepayers. LPPC members are committed to providing electric power in an environmentally beneficial manner that maximizes the use of our finite resources.

LPPC supports the Committee efforts to craft a CWA bill that will establish sound and practical mechanisms for restoring and maintaining our nation's water resources. This testimony provides a brief summary of LPPC's positions on specific CWA reauthorizing issues of importance to public power systems. LPPC's positions are based on our review of the April 21 draft substitute to H.R. 3948, entitled the "Water Quality Act of 1994" (House bill).

Furthermore, LPPC notes that the Supreme Court on May 31 issued a decision on water quality certification under CWA section 401.[2] Given the extreme importance of this decision for the electric utility industry, LPPC requests the opportunity to submit additional comments for the Committee's consideration once our members have had the opportunity to evaluate fully the many and broad implications of the decision for its power generation operations.

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[1] A list of LPPC members is attached hereto.

[2] PUD No. 1 of Jefferson County, et al. v. Washington Department of Ecology et al., U.S. Sup. Ct. No. 92-1911, Decided May 31, 1994.

Thermal Discharge Variances

LPPC supports the decision not to modify the existing procedures for establishing site-specific thermal discharge effluent limitations pursuant to CWA section 316. Indeed, LPPC believes the existing practice under section 316 is consistent with one of the proposed goals of the Act contained in section 101(e) which states that "it is the national policy that water use efficiency be encouraged to the fullest extent possible." LPPC believes that the current thermal discharge program has worked well to protect our aquatic resources and its elimination would only result in severe economic costs to utility ratepayers with no corresponding benefits. Moreover, the repeal of the existing section 316 procedures would most likely have negative environmental consequences, including increased water consumption for the operation of the cooling towers and the resulting aquatic and habitat destruction.

Mixing Zones

LPPC is pleased that the House proposal on mixing zones is limited to only certain "persistent, acutely toxic, or bioaccumulative chemicals or classes of compounds" to be listed by EPA. (See section 304 of the House bill.) We agree that any prohibition or restriction on the use of mixing zones should only apply to such listed toxic chemicals which pose a significant risk to human health and the environment.

This approach is much preferable to the initial Senate proposal to prohibit states from using mixing zones in "Outstanding National Resource Waters" (ONRWs). Such an overly broad prohibition, if ever adopted, could be interpreted to repeal the thermal discharge program (which uses mixing zones to establish alternate site-specific thermal limitations). Furthermore, such a mixing zone prohibition could even be construed to forbid the discharge of other types of pollutants into ONRWs.

As a general matter, LPPC supports a flexible federal policy which would allow the use of mixing zones whenever there is no ecological or biological threat to the receiving waters. To the extent that restrictions on mixing zones need to be mandated by federal law, LPPC supports the approach proposed in the House CWA bill.

Antidegradation Policies

As a general matter, LPPC supports the goal of protecting and enhancing existing quality and instream uses of our nation's waters. This can be best achieved by establishing a regulatory process that relies on state expertise and preserves state

flexibility in the development and implementation of CWA antidegradation policies. Specifically, we suggest that states be provided broad discretion in implementing any national antidegradation policies mandated under the House CWA bill.

LPPC also has concerns about the consequences which the proposed antidegradation requirements could have for public utility operations. For example, section 302 of the House bill would require states to establish policies that protect all instream water uses which have occurred since November 28, 1975. While LPPC is supportive of the environmental goal of rehabilitating our nation's waters, clarification may be necessary as to the potential retroactive application of the proposed requirement for protecting 1975 instream uses. Specifically, the Committee should clarify that this provision would not require the halting of power generation activities initiated on or after 1975 pursuant to licenses or permits issued by state or federal agencies.

State Designation of ONRWs

The House bill would provide important protection against the degradation of waters designated as ONRWs. As to the definition of ONRWs, LPPC supports the exclusion of those waters within national parks located in "urbanized areas" (as determined by the Census Bureau). We suggest that further clarification is also appropriate regarding the other categories of waters referenced in the ONRW definition (e.g., "waters of exceptional recreational or ecological significance"). Such clarification is essential so long as the House bill imposes a prescriptive definition of ONRWs by statute.

Potential Phasing Out of Chlorine Discharges

LPPC agrees with the decision not to phase out presumptively all uses of chlorine or any other toxic pollutants of particular concern to the general public. We believe that the House bill proposes an effective and environmentally sound approach for regulating the discharge of toxic pollutants. This approach would authorize the restriction or prohibition of toxic chemicals only after considering a wide range of factors relating to the health or environmental risks posed by any toxic discharge, the availability of safe substitute chemicals or processes, and the adverse social or economic impacts resulting from the prohibition or restriction.

As a general matter, LPPC believes that there are many beneficial and benign uses of chlorine. In the case of power plants, utility operators use -- without adverse health or environmental impacts -- chlorine compounds as a biocide for

steam condensers and cooling water. The recognition of such beneficial uses should be factored into the development of any national strategy for regulating the use and discharge of chlorine and chlorinated compounds.

Comprehensive Watershed Management

LPPC supports the establishment of a CWA scheme for watershed management planning. The development of such comprehensive plans is an essential step in the process of restoring and maintaining the water and ecological resources of our watersheds.

Many LPPC members have substantive "hands on" experience in developing comprehensive watershed management plans for their regions. LPPC looks forward to working with the Committee in establishing an effective and practical watershed management program. Areas of particular LPPC interest include the designation of watersheds, the elements of watershed management plans, and the incentives for watershed planning.

Finally, LPPC is pleased that the House bill does not contain any provision requiring federal activities to be "consistent with" the watershed management plan. If not precisely defined, such a requirement could pose significant regulatory impediments for federal activities involving the issuance of federal authorizations, such as Clean Air Act permits or Federal Power Act licenses. Specifically, a consistency requirement could be construed to add a second tier of duplicative or conflicting regulation for these federal authorizations, which already are subject to comprehensive environmental review.

Nonpoint Source Controls

LPPC supports the House proposal to improve existing CWA programs for controlling pollution from nonpoint sources. The strengthening of nonpoint source management measures will provide EPA and states with a valuable tool for enhancing water quality and protecting aquatic and wildlife habitat.

The House bill, however, should be clarified that a "hydromodification" would not constitute a nonpoint source of pollution. The imposition of additional nonpoint controls on hydropower facilities would be unnecessarily duplicative and burdensome since states already are authorized to address water quality issues pursuant to CWA section 401.

Water Quality Certification

Section 401 authorizes states to issue or deny water quality certification for all proposed federal licenses and permits. In many cases, this certification process may involve the imposition

of appropriate conditions for addressing specific water quality concerns that could possibly result from the federally licensed or permitted project. In the recent Supreme Court decision, states' authority for imposing such conditions appears to have been expanded dramatically under the CWA certification procedure. LPPC has great concerns regarding this expansion, which is likely to have substantial impacts on the electric utility industry. In developing a comprehensive CWA legislative proposal, we urge the Committee to evaluate fully the impacts of the Supreme Court's decisions on hydropower projects and other types of power generation facilities.

Enforcement

Industry has moved into a new age of partnership and cooperation with EPA and state agencies in the implementation of federal environmental laws. LPPC urges the Committee to reflect this partnership relationship in the proposed CWA provisions augmenting the enforcement authority of EPA, states, and citizen groups, as opposed to creating new adversarial tensions among all parties. Specific areas of LPPC concern include citizen enforcement suits for certain past violations, the assessment of increased civil and administrative penalties and the imposition of sanctions for all "knowing" omissions of a requisite CWA submission.

* * *

LPPC appreciates the opportunity to present its views on the above CWA reauthorization issues. We look forward to working cooperatively with the Committee in enacting CWA legislation this year that will establish sound and practical mechanisms for restoring and maintaining our nation's water resources. In addition, as previously mentioned, LPPC may be submitting additional comments on the power generation impacts of the recent Supreme Court decision.

Statement of Scott Tucker
on behalf of the
National Association of Flood and Stormwater Management Agencies

before the
Subcommittee on Water Resources and Environment
House Committee on Public Works and Transportation
on the
Reauthorization of the Federal Water Pollution Control Act
May 26, 1994

INTRODUCTION

Mr. Chairman, my name is Scott Tucker, and I am Executive Director of the Urban Drainage and Flood Control District in Denver, Colorado. The District provides both flood control and stormwater management services for the Denver metropolitan area, serving approximately 2,000,000 citizens in 30 municipalities and six counties.

I am submitting this testimony on behalf of the National Association of Flood and Stormwater Management Agencies (NAFSMA), a national organization representing 60 flood control and stormwater agencies serving a total population of more than 50 million citizens. I now serve as Chairman of the organization's Stormwater Committee and as a member of the Board of Directors.

NAFSMA appreciates this opportunity to share our views on the Water Quality Act of 1994, specifically its provisions affecting municipal separate stormwater systems. The association is committed to working with the committee and staff to develop an environmentally-responsible bill, which is at the same time both financially and technologically feasible.

Local Government Commitment

In a survey undertaken by the association in the summer of 1993 to look at the costs associated with the permit application process and well as estimated implementation costs, we determined that cities and counties with municipal separate storm sewer systems serving populations over 100,000 have already expended an estimated $130

million just to prepare the applications for National Pollutant Discharge Elimination System (NPDES) permits as required under the Water Quality Act of 1987. As directed by the EPA regulations carrying out this mandate, approximately 180 cities and counties have filed NPDES applications for their municipal separate storm sewer systems. Based on projections provided by about one third of these jurisdictions, permit compliance costs for these jurisdictions are estimated to range from $1.5 billion to $3.2 billion over the next five years. Not included in these figures are costs attributable to "early permit" programs in several urban counties in California and Nevada or the additional jurisdictions with a population of less than 100,000 that have joined with larger cities and counties as copermittees. It is estimated that some 600 local governments have or will be permitted under the present NPDES program. NAFSMA is submitting a copy of the preliminary findings of this survey, published in October 1993, for the record.

The legislation currently before the committee makes great strides toward recognizing the current limitations of the NPDES as a means of controlling urban runoff in the near term. We applaud the chairman for the efforts undertaken in H.R. 3948 to confront the key issue of the need to delay the imposition of current numeric effluent limits on stormwater discharges and for the strong recognition of the importance of best management practices in achieving a successful and responsible national stormwater management program. In both the bill and the chairman's comments when introducing H.R. 3948, as well as the administration's green book proposal, it seems clear that great progress has been made in recognizing the critical problems associated with imposing current numeric effluent limits, designed for application to discharges from Publicly Owned Treatment Works (POTWs), to urban runoff. In this time of shrinking urban budgets and growing urban needs, the committee has expressed its commitment to provide relief to municipalities by proposing revisions to the national stormwater management program.

What is missing from the chairman's current proposal, however, is a commitment to research for establishing designated uses and developing standards that would recognize the unique nature of urban runoff. NAFSMA feels that a commitment to develop such realistic standards needs to be joined with the proposed delay in compliance with current numeric effluent limits. Mr. Chairman, our cities have been timely and committed with their responses to the stormwater management mandates outlined in the 1987 Act. Our members are not in any way recoiling from this

commitment, but rather are urging that Congress call for the development of realistic, both from a technical and financial standpoint, stormwater quality goals.

The Extent of the Problem

At this time, the impacts of urban runoff are not well understood because the specific effects have been masked by the greater impacts of industrial runoff, agricultural runoff, erosion, point discharges, and wastewater overflow discharges. Defining the urban runoff problem is also complicated by the episodic nature of urban runoff, the variability in quantity and quality of flows from storm to storm at a given discharge point and even more so within a city's system, the vast variability in systems across the nation, and the differing nature of receiving waters ranging from estuaries to dry stream beds. A recent study completed by Montgomery Watson in February 1994 for the National League of Cities and National Realty Committee concluded that the urban stormwater runoff problem has been overstated; that results of recent water quality surveys indicate that urban runoff is a small source of stormwater pollutants compared to other non-point sources; that additional monitoring is needed to identify the extent of remaining urban runoff quality problems and the cost effectiveness of control strategies and measures; and that vast differences exist across the nation in hydrology, soils, vegetation, precipitation patterns, and land uses. All this argues against national urban runoff discharge standards.

The most recent effort completed by EPA (1992) that assesses the water quality problems due to non-point pollution was summarized in *Managing Nonpoint Source Pollution*. As pointed out in the Montgomery report, nine categories were used in the 1992 EPA study to aggregate all water quality problems, one of which was called "urban runoff." The urban runoff category included stormwater runoff from industrial sites, wastewater overflows, shipyards, and marinas, as well as runoff from commercial and residential areas. In addition, due to lack of standard methodology to identify water quality impairment and pollution sources, urban runoff problems in one state included impairment due to leaking septic systems and diversions of water for local water supplies. Based on the reporting states with wide variations in data sources and interpretations, the Montgomery study concluded that only 4 to 10 percent of the water quality impacts resulted from urban runoff, as opposed to 20 to 40 percent sometimes reported.

Also, the Committee should consider that there has been little to no analysis to date of the benefit that will result from the management practices now required by the municipal urban runoff NPDES program, yet some 600 local governments are currently embarking on a multibillion dollar federally mandated effort that is essentially a locally funded demonstration program. For example, street sweeping is a commonly required management practice, yet it is not known how much good the street sweeping will accomplish in terms of improved receiving water quality. The Clean Water Act must provide needed flexibility, standards appropriate for urban runoff, a demonstration and research program to develop cost effective management practices, and must limit the coverage of the program until the extent of the "problem" is defined and the effectiveness of management practices is demonstrated.

Point Vs. Nonpoint Source Issue

Throughout your work to develop a comprehensive clean water renewal package we ask you to keep in mind the fact that the quality of urban runoff is a nonpoint source problem. Although most communities have constructed separate stormwater systems to collect runoff and deliver it as point discharges, this does not change its character. In virtually every other sector, the same runoff is considered non-point pollution. All of the efforts the committee has made to provide changes in the nonpoint source program to increase flexibility, stress pollution prevention and decentralize decision making should be applied fully to urban runoff as well.

In our comments today, NAFSMA will outline specific recommendations to H.R. 3948 that recognize the importance of local control strategies in stormwater management and express our commitment to develop an environmentally responsible and sound approach to addressing the nation's urban runoff needs.

COMMENTS AND RECOMMENDATIONS ON H.R. 3948

Section 402 (p) Municipal and Industrial Stormwater Discharges

Threshold Limits

NAFSMA is concerned about the threshold limits proposed in the substitute version of H.R. 3948 that would require all urbanized areas with populations of 50,000 or greater to be included in the municipal stormwater program thereby requiring NPDES permits.

It is NAFSMA's position that the municipal stormwater program is in effect a large demonstration project, currently being funded by some 600 municipalities and counties, and that any expansion of the program should be delayed until more experience and knowledge is gained on the effects of the Phase I program.

NAFSMA supports a deferral of regulation of municipal stormwater systems beyond the urban areas where permits are now required, until such time as the federal and state regulatory systems are capable of assuming this substantial responsibility and can develop regulatory requirements based on the experience of the Phase I program. NAFSMA members can support the current threshold language in S. 2093, which requires NPDES permits for municipal storm sewer systems serving a population of fewer than 100,000 individuals that are located in urbanized areas in which a stormwater discharge covered by a permit is also located.

Compliance With Current Water Quality Standards

NAFSMA supports the delay to December 31, 2009, for compliance with water quality standards. The association also commends the committee chairman for including the phrase "reasonable progress" in subparagraph (3)(B)(v). This addition helps to make this section more consistent with the bill's desired overall goals and reflects the unique character of stormwater and the documented inability of current technologies to bring stormwater discharges into compliance with water quality standards, that in some cases exceed current drinking water standards.

Development Of Specific Stormwater Criteria

In accordance with the President's Clean Water Act Initiative, NAFSMA feels that it is critical to amend paragraph (3)(D) to require the development, prior to December 31, 2009, of specific stormwater quality criteria and related water quality standards which reflect the physical nature of episodic stormwater flows and the actual risk those flows pose to the designated beneficial uses.

In accordance with this position, NAFSMA urges the inclusion of amendments that: 1) require the development of specific stormwater criteria that recognizes the episodic nature of stormwater, the varying pollutants in stormwater, and the ability of ecosystems to accept temporary stormwater discharges; 2) require the revision of designated uses and water quality standards for permits issued for stormwater to reflect the unique

nature of stormwater; 3) recognizes that other provisions of this Act notwithstanding, neither the Administrator nor the State, as the case may be, may require in a permit issued under this section, compliance with a numeric effluent limitation or a water quality standards prior to the completion of the requirements of outlined above; and 4) in no event shall such numeric effluent limitations or water quality standards be imposed as a condition of a permit issued under this section until after December 31, 2009. If such criteria is not developed by December 31, 2009, then permits should not require compliance with numeric effluent limits or water quality standards until such specific stormwater criteria is developed.

Another one of NAFSMA's concerns with the stormwater section of H.R. 3948 is the exception provided under paragraph (3)(D) line 12. This exception causes confusion and suggests that water quality standards and numeric effluent limits are not waived relative to "management measures."

Consolidation Permits For Municipally Owned Industrial Facilities

NAFSMA urges that the committee provide for municipally owned industrial facilities to be covered under a municipal storm sewer system permit. This provision is included in S. 2093 and the proposed bipartisan alternative in the House.

Development Of Minimum Performance Standards For BMPs

Although NAFSMA endorses language in H.R. 3948 stressing the use of the maximum extent practicable standard, the association is concerned about additional language under Paragraph (5)(B), which requires the Administrator to establish objective minimum performance standards for each management measure identified by regulation. This latter language fails to account for regional variations, which makes it virtually impossible to determine nationally applicable performance standards. The inclusion of such language seems counterproductive to achieving the administration's goal as stated in Administrator Browner's May 24 testimony of creating "a better, more flexible CWA that will result in increased protection for our water resources at a lower cost."

If such language is included to call for the Administrator to develop objective performance standards, then we would urge the following language be incorporated into the proposal.

The administrator, after consultation with states and local government officials may, if practicable and economically achievable, include in the guidance minimum and regionally applicable objective performance standards for each management measure.

Establishment Of Stormwater Demonstration Program

NAFSMA supports the inclusion of a demonstration program, to be funded at the level of $20 million to be set aside annually from Section 319 funding to determine cost-effective, innovative municipal stormwater control measures, as outlined in the bipartisan alternative proposal. We feel that research in this area is absolutely essential and that language needs to be included to ensure that one demonstration program is completed in each of the hydrologic regions of the nation as defined by the Administrator.

Wetlands - Section 405. Permits for Dredged or Fill Material (Substitute H.R. 3948)

It is extremely important that local agencies have the authority to maintain their flood control facilities in the interest of the health and welfare of their citizenry. In light of confusion in the field since the Corps of Engineers August 25 rule expanding the definition of "dredge and fill material," legislative changes are needed to clarify Section 404 permitting exemptions provided under law. NAFSMA urges that Section 405 (e) of the House substitute be amended to clarify exemptions provided under this section for operations and maintenance of flood control channels and engineered flood control facilities.

Section 404(f)(1) (33 U.S.C. 1344(f)(1)(B)) would then be amended to read as follows:

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, <u>flood control channels</u>, <u>engineered flood control facilities</u>, breakwater, causeways, and bridge abutments or approaches, and transportation structures."

(Underlined portion is the addition)

As an alternative, NAFSMA also proposes the following approach to amend the substitute bill:

TITLE IV - PERMITS AND LICENSES

SEC. 405. PERMITS FOR DREDGED OR FILL MATERIAL

(e) Exemptions.–

(1) HAYING AND GRAZING. – Section 404(f)(1)(A) (33 U.S.C. 1344 (f)(1)(A) is amended by inserting "haying, grazing," after "cultivating,".

(2) OPERATION AND MAINTENANCE OF PUBLICLY-OWNED FACILITIES – Section 404(f)(1) (33 U.S.C. 1344(f)(1)n is amended by adding at the end the following:

"(G) for the purpose of maintenance or operation of existing publicly-owned flood control or water conservation facilities, including, but not limited to, dams, reservoirs, sediment retention basins, channels between artificial levees, and groundwater recharge facilities."

(3) EXEMPTED AREAS.– Section 404(f) (33 U.S.C. 1344(f)) is amended by . . .

Other Issues In H.R. 3948

In addition to the issues identified above, NAFSMA has identified the following areas of concern in the current substitute to H.R. 3948, where we urge the chairman and other committee members to direct their attention in any rewrite efforts:

- Although language included under Section 404 of the substitute bill has been revised since the original proposal [(Section 402 (r)], language needs to be added to clarify that the use of stormwater detention or retention is not precluded as a compliance BMP under Section 402(p).

- NAFSMA is strongly opposed to the provisions included under Section 307 of the substitute bill that would establish a citizen water quality monitoring program. To direct federal resources to this effort we feel would be unconscionable. As documented over many years of expert effort in the stormwater areas, the

monitoring and analysis of stormwater is extremely complicated and requires intense quality control efforts. The importance of expert stormwater quality monitoring in this area cannot be overstated. If federal resources are to be directed to monitoring, we strongly urge that all resources be directed to the support of an expert nationwide stormwater quality monitoring and analysis program, with the highest possible level of quality control and assurances.

- NAFSMA supports the proposal included under Section 703, but we feel that it is essential that the provision be broadened to read as follows: " . . . shall conduct a study of pollutants to navigable waters which originate from mobile sources, and a study of the sources of pollution of urban stormwater runoff, which discharges of pollutants impair or threaten water quality."

- In the area of anti-degradation, NAFSMA urges that the anti-degradation policy requirements in Section 303 of the substitute bill be amended to allow downward revisions in previously adopted standards when subsequent scientific data demonstrates such revised standard is appropriately protective. We feel that this approach would not only be based on sound science, but on sound fiscal policy as well.

OTHER LEGISLATIVE PROPOSALS

NAFSMA supports the concepts outlined in the May 17 bipartisan alternative proposal that call for the benefits to the public health, safety and the environment to justify the cost; would establish the practice of carrying out risk assessment for regulatory requirements; and those provisions that would require analysis of costs of implementing unfunded mandates. We urge that these concepts be considered and incorporated into H.R. 3948.

SUMMARY

Mr. Chairman, NAFSMA is encouraged by the statements in recent months indicating the recognition of the unique nature of stormwater and the need to provide relief to municipalities from the current one size fits all approach to addressing urban runoff problems. Our members have been committed throughout this process to working with committee staff to draft approaches that are both technologically achievable and financially feasible. From your substitute, as well as other proposals currently under consideration on the Hill, it is clear that much progress has been made.

What is still lacking, however, is the commitment to develop specific stormwater criteria that recognizes the intermittent nature of stormwater runoff, as well as the varying pollutant loadings of stormwater events and the ability of natural ecosystems to accept these temporary discharges. We are committed to working with you and the U.S. Environmental Protection Agency to develop this criteria.

Our members have already committed great resources to addressing the nation's stormwater needs and will be committing more in the years to come, as evidenced by our attached survey outlining the permit application costs and estimates of compliance costs for what is clearly a national demonstration program in this area. What we are asking from you and your colleagues is the opportunity to sit down at the table with EPA to develop realistic criteria for determining the progress made in this area. To those in the field, it seems that good government would dictate that we use the 15-year compliance delay provided under your legislation to look at the results of the current efforts already underway under Phase I and to develop from this research a set of workable stormwater quality goals for the future.

The importance of this effort cannot be stressed enough. Our members are already seeing unrealistic numbers included in their individual permits. Before any more municipal dollars become tied up in meeting what could be unachievable goals, let's call for a joint commitment between the federal government and the regulated community to sit down at the table and develop realistic goals and standards for this program. This approach has been successful in other programs, such as the development of the CSO guidance. We are only asking for the same consideration for the stormwater issue. We feel that the expenditure of an estimated $130 million for preparing the applications alone for this program, merits this level of attention at the national level and we would be pleased to commit our organization to working with you and U.S. EPA in this effort.

Municipal Separate Storm Sewer System (MS4) Permit Application Costs and Permit Compliance Estimates

Report of Selected Findings

NAFSMA

NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES

October 28, 1993

National Association of Flood and Stormwater Management Agencies (NAFSMA)

MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) PERMIT SURVEY: *Costs, Program Elements and Other Issues*

**** Response Requested by end of June ****

Survey Completed By: _____ Phone: (___)_____

Agency: _____

Address: _____

Jurisdiction Seeking MS4 Permit: ___ City ___ County

Total Population of Jurisdiction: _____

Population Served by MS4 System: _____

1. APPLICATION OF MS4 REQUIREMENTS TO YOUR JURISDICTION

Was your jurisdiction incorrectly listed by U.S. EPA as one that is subject to the Municipal Separate Storm Sewer System (MS4) permit requirements (i.e. separate storm sewer system serving a population of 100,000 or more)?

_____ Yes _____ No

Has your jurisdiction sought or is it seeking an exemption from the MS4 permit requirement due to combined sewer overflows (CSO), population error, etc.?

_____ Yes _____ No

If your jurisdiction is presently covered by a systemwide stormwater permit, please indicate date of issuance.

Date of permit: ___/___/___

If you responded affirmatively to any of the questions above, please go to Part 5 and continue.

2. NPDES PERMIT DATA

Does your jurisdiction now operate under any other National Pollutant Discharge Elimination System (NPDES) permit(s) for waste water treatment, CSOs, etc.?

_____ Yes _____ No

Did your jurisdiction join with any other city/county/jurisdiction in your region in submitting your MS4 permit application?

_____ Yes _____ No

If **yes**, please indicate number of co-applicants: _____

and names of co-applicants:

_____ _____

_____ _____

3. MS4 APPLICATION FILING DATES

Please indicate the status of your jurisdiction's application for your Municipal Separate Storm Sewer System (MS4) permit.

Part 1 filed on: __/__/__ **Part 2 filed on:** __/__/__

If your state or federal permit-writer has set a target date for issuing your MS4 permit, please indicate projected date.

Target date for permit: __/__/__

4. MS4 APPLICATION COST DATA

Please provide final cost* data for preparing and filing Parts 1 & 2 of your application for your MS4 permit.

Costs for Part I: $_____

Costs for Part 2: $_____

Total for Parts 1 & 2: $_____

How extensively did your jurisdiction rely on consultants to support the development of your MS4 permit application.

___ significantly ___ moderately ___ not at all

Please indicate how funds were generated for Parts 1 & 2.

Part 1	Part 2
_____ general fund	_____ general fund
_____ special tax, levy or fee	_____ special tax, levy or fee
_____ other	_____ other

Notes/Additional Comments: _____

_____

5. MS4 PERMIT COMPLIANCE COST ESTIMATES

Please provide your 5-year cost* estimate (as set forth in your permit application) for implementing MS4 permit program and note amount that is net new spending.

5-year Cost Estimate: $_____

5-year Net New Spending: $_____

Please indicate expected source(s) of funds for MS4 permit implementation, estimating by percentage what each funding source contributes to the total cost.

Permit Implementation

_____ % general fund
_____ % special tax, levy or fee
_____ % stormwater utility
_____ % other, *please specify:* _____

*In estimating costs, please include the following: 1) direct costs (i.e. consultants, monitoring/sampling equipment, specialized services, studies, other equipment and outside lab costs); 2) indirect costs (i.e. in-house staff time, overhead, in-house laboratory costs and staff time, and staff time from regional agencies); and 3) include costs only attributable to and required by the NPDES regulations (i.e. do not include costs of highway maintenance, flood controls, MS4 mapping, etc.)

Has your jurisdiction established a surface water or stormwater utility?

_____ Yes _____ No

If **yes**, please describe your utility rate structure for assessing fees/charges:

_____

_____

_____

Is your jurisdiction considering the establishment of a stormwater utility to support your MS4 permit programs?

_____ Yes _____ No

**** responses to Parts 6 - 8 below will not be attributed to your agency ****

6. MS4 PERMIT APPLICATION OVERVIEW

Please list the five most important Best Management Practices set forth in your MS4 permit application **In priority order** based on <u>your</u> estimation of effectiveness in improving water quality (please note if practices are new **(N)**, existing **(E)** or modifications **(M)** to existing ones).

1. _____ **N / E / M**
2. _____ **N / E / M**
3. _____ **N / E / M**
4. _____ **N / E / M**
5. _____ **N / E / M**

Please list the **three most costly** BMPs or other control measures that you have proposed to implement during the first term of your NPDES permit (please note the status of these practices **(N / E / M)** and the 5-year cost estimate for each).

		5-year Cost Est.
_____	**N / E / M**	$_____
_____	**N / E / M**	$_____
_____	**N / E / M**	$_____

Please describe an element of your proposed MS4 program that you believe is particularly innovative or may prove most effective in combating stormwater runoff.

_____

_____

_____

Please describe what you believe are the most significant limitations (i.e. lack of funding, inability to document effects of BMPs on water quality, existing impairments in water quality, unpermitted and interconnected smaller systems, etc.) of your proposed MS4 program over the near-term in controlling stormwater runoff.

_____

_____

_____

7. MS4 PERMIT APPLICATION DETAIL

Management Program

Does your proposed stormwater management program address activities that your jurisdiction has not dealt with in the past?

_____ Yes _____ No

If **yes**, please describe:

_____

_____

_____

Does your proposed stormwater management program call for increases in certain activities over past levels?

_____ Yes _____ No

If **yes**, please describe nature and amount:

_____

_____

_____

Please describe the major activities that would not have been funded were it not for the NPDES requirements?

_____

_____

_____

Field Screening/Illicit Connections

To what extent did you find illicit connections or other sources of contaminated stormwater (e.g. leaking sanitary sewers) during field screening?

___ high problem ___ moderate ___ low amount-not a problem

If a **high or moderate problem,** please note your response.

___ have removed/controlled already ___ will do so under permit

Outreach

Did your jurisdiction have any stormwater outreach efforts prior to the NPDES application requirements?

_____ Yes _____ No

If **yes**, please describe:

_____

_____

_____

Please describe how you will expand your outreach efforts or what you expect to initiate under your NPDES permit?

_____

_____

_____

Legal Authorities

Did your jurisdiction have to expand its legal authorities during the permit application process?

_____ Yes _____ No

Will your jurisdiction have to expand its legal authorities to implement your proposed management programs?

_____ Yes _____ No

Monitoring

Did your jurisdiction have a monitoring program for stormwater before the NPDES requirements for MS4s?

_____ Yes _____ No

Please describe what you learned from the monitoring you conducted for your MS4 application?

_____

_____

_____

Has this application monitoring data helped you identify priority sites or pollutants?

_____ Yes _____ No

Would you be conducting these activities if not for the NPDES requirements?

_____ Yes _____ No

What do you expect to measure with your proposed monitoring program under your stormwater management plan?

_____

_____

_____

Staffing

How many positions are assigned to implement your stomwater progam (show as number of full-time equivalent positions, with actual numbers for pre-application phase and current program and estimated staffing during permit implementation).

___ Pre-application ___ Current Staffing ____ Permit Phase Staffing

Please list types of positions:

_____ _____

_____ _____

_____ _____

8. EXTERNAL RESOURCES

Please suggest ways the federal or state government could assist your local efforts to control stormwater runoff (note **F** for federal, **S** for state next to each suggestion).

1. _____ F / S
2. _____ F / S
3. _____ F / S

If your state were to receive additional federal funds to support stormwater control programs, how would **you** allocate these funds **(please rank 1-5)**.

___ demonstration projects assessing technology, BMPs, etc.
___ expand non-point regulatory efforts
___ grants to implement local programs, finance facilities, etc.
___ industrial facility regulation
___ loans to implement local programs, finance facilities, etc.
___ state capacity-building (research, technical assistance, staffing)
___ water quality assessments and related studies
___ other, *please specify*: _____

Please note the local institutions you are working with on your MS4 program.

___ POTW ___ Flood Control Dist. ___ COG ___ Other

Please describe these efforts.

_____

_____

If you used a consultant(s) to assist your jurisdiction in developing your MS4 application or will use a consultant for implementation of your program, please specify your lead consultant(s).

_____ _____

Please list technical information, studies or research projects that would be most useful to your agency.

_____

_____

_____

Please suggest meeting sessions/workshop topics that would be most useful to you.

_____

_____

_____

Please mail or FAX (202-842-0621) by the end of June if possible to:

NAFSMA Att: Kevin McCarty (tel. #202/682-3761, ext. 228)
1225 Eye St., NW, Suite 300
Washington, D.C. 20005

SIGNIFICANT FINDINGS

Cities and counties with municipal separate storm sewer systems serving populations over 100,000 have expended an estimated $130 million to prepare applications for NPDES permits pursuant to U.S. EPA regulations implementing requirements of the "Water Quality Act of 1987." Based on projections provided by one-third of these jurisdictions, permit compliance costs for the approximately 180 jurisdictions affected by these regulations is estimated to range from $1.5 - $3.2 billion over the next five years for programs and activities set forth in their permit applications. These estimates are based on the preliminary findings of a 1993 survey conducted by the National Association of Flood and Stormwater Management Agencies (NAFSMA). The permit application cost data confirms earlier projections developed by NAFSMA in its 1992 survey, Municipal Separate Storm Sewer System (MS4) Permit Application Costs.

As directed by U.S. EPA regulations, approximately 180 cities and counties have filed applications for National Pollutant Discharge Elimination System (NPDES) permits for their municipal separate storm sewer systems. These estimates do not include costs attributable to "early permit" programs in several urban counties in California and Nevada or the additional jurisdictions with a population of less than 100,000 that have joined with larger cities and counties as copermittees. U.S. EPA has estimated that approximately 600 jurisdictions are now operating under the municipal separate storm sewer system permit program.

This report provides final estimates of permit application costs and initial estimates of permit compliance costs for these jurisdictions, demonstrating the significant costs to cities and counties in complying with the federal mandate to secure NPDES permits for their separate municipal storm sewer systems.

MUNICIPAL SEPARATE STORM SEWER PERMIT PROGRAM

In 1987 Congress successfully enacted amendments to the Clean Water Act (Water Quality Act of 1987) setting forth a new permitting process for discharges by Municipal Separate Storm Sewer Systems (MS4s). These amendments:

- established a tiered program (based on population thresholds) for phasing in new requirements for city and county separate storm sewer systems;
- authorized the issuance of a single, systemwide permit for the discharges from each system; and
- set a new standard of permit compliance, known as the MEP (maximum extent practicable) standard, emphasizing best management practices (BMPs).

U.S. EPA's November 16, 1990 regulations set forth a comprehensive description of issues and specific requirements that the 173 cities and 47 counties, the number of jurisdictions presumed to own/operate separate storm sewer systems serving a population of 100,000 or more, must consider and satisfy in preparing an application for a systemwide permit.

Subsequent to promulgation of these regulations, there has been considerable debate and uncertainty within the regulated community of cities and counties, among federal and state policy-makers and within the Congress on how water quality standards, including the associated limits (i.e. numerical effluent limits), apply to municipal separate stormwater system permits. These larger cities and counties have already submitted their applications for National Pollutant Discharge Elimination System (NPDES) permits, a permit system that heretofore has been used to regulate traditional point sources, such as discharges from municipal wastewater treatment systems and industrial facilities. U.S. EPA and state permit-writers are now reviewing these applications; final permit to these jurisdictions will be issued.

U.S. EPA's November 1990 regulations required listed cities and counties to submit a two-part permit application. The deadlines for filing completed NPDES applications have passed. Cities and counties with a separate storm sewer system serving a population of 250,000 or more (large system) were to have filed Part 1 of their application by November 18, 1991 and Part 2 by November 16, 1992. Cities and counties with a system serving a population of 100,000 - 250,000 (medium system) were to have filed Part 1 of their application by May 18, 1992 and Part 2 by May 17, 1993. Under the Water Quality Act of 1986 federal and state permit-writers are directed to issue final permits for cities and counties with a separate storm sewer system serving a population of 250,000 or more by November 18, 1993. Final permits for cities and counties with a separate storm sewer system serving a population of 100,000 - 250,000 (medium system) are to be issued by May 18, 1993.

SCOPE OF SURVEY

Beginning in May 1993 questionnaires were mailed to officials in approximately 200 jurisdictions that were listed in the November 1990 regulation. More than 80 questionnaires were received by the NAFSMA National Office. The findings of this report are based on responses from jurisdictions – 50 cities, 13 counties and 1 joint city/county application – that provided partial or complete application cost information.

The sample size is significant in that it represents roughly one-third of the affected jurisdictions. While the regulations list 220 jurisdictions, this report concludes that approximately 180 of these jurisdictions will actually seek permits under these regulations.

TABLES

Table 1 provides summarizes information set forth in Tables 2-7. Tables 2-4 information on Part 1 costs, Part 2 costs and Total Application costs. Tables 5-7 provide information on permit compliance estimates.

NAFSMA SURVEY RESULTS:

SUMMARY TABLE
-- Permit Application Costs & Compliance Estimates

	Cities	Counties	Other*	All Respondents
Part 1 Application Costs				
Population:	15,429,896	5,844,757	665,000	21,939,653
Costs:	$12,718,394	$2,831,215	$185,000	$15,734,609
Respondents:	48	12	1	61
Average Cost:	$264,967	$234,350	$185,000	$257,944
Part 2 Application Costs				
Population:	15,429,896	5,844,757	665,000	21,939,653
Costs:	$18,323,836	$4,453,228	$400,000	$23,177,064
Respondents:	48	12	1	61
Average Cost:	$381,747	$371,102	$400,000	$379,952
Full Application Costs				
Population:	16,179,896	6,294,757	665,000	23,139,653
Costs:	$33,880,230	$7,404,443	$585,000	$41,869,673
Respondents:	50	13	1	64
Average Cost:	$677,605	$568,573	$585,000	$654,214
Permit Compliance Estimates				
Population:	14,279,666	5,084,459	665,000	20,029,125
5-year Permit Compliance Estimate:	$847,182,199	$70,051,240	$6,700,000	$923,933,439
(5-year Net New Spending):	($198,855,780)	($17,941,400)	($3,200,000)	($219,997,180)
Respondents:	45	10	1	56
Average Compliance Estimate:	$18,826,271	$7,005,124	$6,700,000	$16,498,811

* Other column refers to the joint application by the Louisville & Jefferson County Metropolitan Sewer District, the administering agency for the City of Louisville and Jefferson County.

Table 1

NAFSMA SURVEY RESULTS: APPLICATION COSTS -- All Respondents*

(shown alphabetically by state)

		Population**		Part 1	Part 2	Total
		jurisdiction	served by MS4			
AL	City of Huntsville	159,789	159,789	$125,500	$80,000	$205,000
AL	Jefferson County	390,126	390,126	$610,000	$975,000	$1,585,000
AR	City of Little Rock	179,795	179,795	$115,000	$236,000	$351,000
AZ	City of Mesa	304,000	304,000	$200,000	$300,000	$500,000
AZ	City of Phoenix	900,000	900,000	$400,000	$600,000	$1,000,000
AZ	City of Tempe	142,000	142,000	$167,000	$200,000	$367,000
AZ	City of Tucson	410,000	410,000	$200,000	$500,000	$700,000
AZ	Pima County	247,000		$250,000	$250,000	$500,000
CA	City of Bakersfield	190,000	88,470	$20,000	$191,118	$211,118
CA	City of Stockton	226,255	226,255	$606,000	$903,750	$1,569,750
CO	City of Aurora	227,280	227,280	$211,270	$313,000	$524,370
CO	City of Colorado Springs	290,000	290,000	$875,000	$575,000	$1,450,000
CO	City of Denver	473,959	473,959	$394,100	$377,000	$771,400
CO	City of Lakewood	128,500	128,500	$368,400	$398,000	$766,400
FL	City of Jacksonville	635,230		$461,426	$66,458	$1,057,884
FL	City of Tampa	283,000	300,000	$27,850	$107,420	$135,270
FL	Hillsborough County	280,015	280,015	$250,000	$150,000	$400,000
FL	Palm Beach County	860,000	860,000	$66,000	$89,000	$155,000
FL	Polk County	405,382	290,071	$209,015	$180,260	$389,275
GA	City of Macon	107,365	107,365	$10,000	$20,000	$30,000
GA	Cobb County	450,000	450,000			$70,000
HI	City of Honolulu	836,000	735,000	$250,000	$280,000	$530,000

Table 2 - page 1

APPLICATION COSTS — All Respondents*

		Population** jurisdiction	Population** served by MS4	Part 1	Part 2	Total
KS	City of Topeka	125,000		$100,000	$430,000	$492,000
KS	City of Wichita	300,000	300,000			$850,000
KY	City of Lexington	225,000	219,168	$180,000	$98,000	$278,000
KY	City of Louisville & Jefferson Co. [1]	665,000		$185,000	$400,000	$585,000
LA	City of Shreveport	198,525		$151,014	$403,986	$555,000
LA	Jefferson Parrish	450,000	390,000	$400,000	$595,000	$995,000
MA	City of Boston	553,712	107,700	$167,000	$295,000	$462,000
MA	City of Worcester	170,000	125,000	$175,000	$375,000	$550,000
MD	City of Baltimore	760,000	760,000	$400,000	$370,000	$770,000
MD	Prince George's County	711,000	670,000	$200,000	$650,000	$900,000
MI	City of Flint	147,000	147,000	$258,000	$451,000	$709,000
MN	City of Minneapolis	368,000	392,000	$250,000	$350,000	$600,000
MO	City of Springfield	145,000	175,000	$194,000	$495,000	$689,000
NC	City of Charlotte	420,000	420,000	$415,979	$328,157	$744,136
NC	City of Durham	137,000	137,000	$433,200	$394,950	$828,150
NC	City of Raleigh	230,000	230,000	$80,100	$130,000	$210,000
NC	City of Winston-Salem	160,000	160,000	$270,000	$511,376	$781,376
NE	City of Lincoln	200,000	200,000	$150,000	$150,000	$350,000
NM	City of Albuquerque	380,000	380,000	$50,000	$300,000	$350,000
OH	City of Toledo	332,940	199,900	$65,000	$80,000	$145,000
OK	City of Tulsa	370,000	370,000	$327,000	$927,000	$1,252,000
TN	City of Knoxville	165,000	165,000	$324,650	$401,100	$725,750
TN	City of Memphis	618,682	618,682	$558,818	$304,365	$863,183

Table 2 - page 2

APPLICATION COSTS — All Respondents*

		Population** jurisdiction	Population** served by MS4	Part 1	Part 2	Total
TX	City of Arlington	261,721	261,721	$204,040	$775,250	$979,290
TX	City of Beaumont	120,000	120,000	$342,000	$384,000	$726,000
TX	City of El Paso	540,205	540,205	$750,000	$890,000	$1,640,000
TX	City of Ft. Worth	450,000				$900,000
TX	City of Lubbock	190,000	190,000	$202,430	$271,468	$473,898
TX	City of San Antonio	940,000	1,076,800	$120,000	$100,000	$620,000
UT	City of Salt Lake	161,000	161,000	$9,800	$112,000	$210,000
UT	Salt Lake County	800,000	270,000	$390,000	$540,000	$930,000
VA	Arlington County	170,936	170,936	$35,200	$110,500	$145,700
VA	City of Alexandria	115,000	90,000	$150,000	$510,000	$660,000
VA	City of Norfolk	260,000	260,000	$580,000	$440,000	$1,020,000
VA	City of Portsmouth	104,000	104,000	$250,000	$600,000	$850,000
VA	City of Richmond	200,000	85,000	$316,000	$737,438	$1,053,438
VA	Fairfax County	800,000		$276,000	$258,000	$534,000
VA	Henrico County	217,000	217,000	$100,000	$190,000	$290,000
WA	City of Seattle	516,259	350,000	$150,000	$250,000	$400,000
WA	King County	513,298	480,000	$45,000	$465,468	$510,468
WI	City of Madison	194,591		$87,817	$411,000	$498,817
WI	City of Milwaukee	628,088	335,919	$575,000	$900,000	$1,475,000

APPLICATION COSTS — All Respondents*

	Population** jurisdiction	Population** served by MS4	Part 1	Part 2	Total
Total Population - 64 respondents:	23,139,653				
Total MS4 Population - 56 respondents:		17,821,656			
Total Part 1 Costs - 61 respondents:			$15,734,609		
Total Part 2 Costs - 61 respondents:				$23,177,064	
Total Application Costs - 64 respondents:	***				$41,869,673

* Respondents shown in table completed MS4 permit applications pursuant to U.S. EPA's November 1990 regulations.

** Respondents generally assigned population data for jurisdiction and system service population.

*** Total application costs for respondents who provided both Part 1 & 2 cost data or total application cost data.

1 Joint application submitted by Louisville & Jefferson County Metropolitan Sewer District, the administering agency for the City of Louisville and Jefferson County (application cost information shown only in Tables 1 and 2).

NAFSMA SURVEY RESULTS:
(shown by population)

APPLICATION COSTS -- All Counties*

		Population** jurisdiction	Population** served by MS4	Part 1	Part 2	Total
FL	Palm Beach County	860,000	860,000	$66,000	$89,000	$155,000
UT	Salt Lake County	800,000	270,000	$390,000	$540,000	$930,000
VA	Fairfax County	800,000		$276,000	$258,000	$534,000
MD	Prince George's County	711,000	670,000	$200,000	$650,000	$900,000
WA	King County	513,298	480,000	$45,000	$465,468	$510,468
LA	Jefferson Parrish	450,000	390,000	$400,000	$595,000	$995,000
GA	Cobb County	450,000	450,000			$70,000
FL	Polk County	405,382	290,071	$209,015	$180,260	$389,275
AL	Jefferson County	390,126	390,126	$610,000	$975,000	$1,585,000
FL	Hillsborough County	280,015	280,015	$250,000	$150,000	$400,000
AZ	Pima County	247,000		$250,000	$250,000	$500,000
VA	Henrico County	217,000	217,000	$100,000	$190,000	$290,000
VA	Arlington County	170,936	170,936	$35,200	$110,500	$145,700

Table 3 - page 1

APPLICATION COSTS — All Counties*

	Population** jurisdiction	Population** served by MS4	Part 1	Part 2	Total
Total Population - 13 respondents:	6,294,757				
Total MS4 Population - 11 respondents:		4,468,148			
Total Part 1 Costs - 12 respondents:			$2,831,215		
Total Part 2 Costs - 12 respondents:				$4,453,228	
Total Application Costs - 13 respondents: ***					$7,404,443

* Respondents shown in table completed MS4 permit applications pursuant to U.S. EPA's November 1990 regulations.

** Respondents generally assigned population data for jurisdiction and system service population.

*** Total application costs for respondents who provided both Part 1 & 2 cost data or total application cost data.

NAFSMA SURVEY RESULTS:
(shown by population)

APPLICATION COSTS -- All Cities*

		Population** jurisdiction	Population** served by MS4	Part 1	Part 2	Total
TX	City of San Antonio	940,000	1,076,800	$120,000	$100,000	$620,000
AZ	City of Phoenix	900,000	900,000	$400,000	$600,000	$1,000,000
HI	City of Honolulu	836,000	735,000	$250,000	$280,000	$530,000
MD	City of Baltimore	760,000	760,000	$400,000	$370,000	$770,000
FL	City of Jacksonville	635,230		$461,426	$66,458	$1,057,884
WI	City of Milwaukee	628,088	335,919	$575,000	$900,000	$1,475,000
TN	City of Memphis	618,682	618,682	$558,818	$304,365	$863,183
MA	City of Boston	553,712	107,700	$167,000	$295,000	$462,000
TX	City of El Paso	540,205	540,205	$750,000	$890,000	$1,640,000
WA	City of Seattle	516,259	350,000	$150,000	$250,000	$400,000
CO	City of Denver	473,959	473,959	$394,100	$377,000	$771,400
TX	City of Ft. Worth	450,000				$900,000
NC	City of Charlotte	420,000	420,000	$415,979	$328,157	$744,136
AZ	City of Tucson	410,000	410,000	$200,000	$500,000	$700,000
NM	City of Albuquerque	380,000	380,000	$50,000	$300,000	$350,000
OK	City of Tulsa	370,000	370,000	$327,000	$927,000	$1,252,000
MN	City of Minneapolis	368,000	392,000	$250,000	$350,000	$600,000
OH	City of Toledo	332,940	199,900	$65,000	$80,000	$145,000
AZ	City of Mesa	304,000	304,000	$200,000	$300,000	$500,000
KS	City of Wichita	300,000	300,000			$850,000
CO	City of Colorado Springs	290,000	290,000	$875,000	$575,000	$1,450,000
FL	City of Tampa	283,000	300,000	$27,850	$107,420	$135,270

Table 4 - page 1

APPLICATION COSTS — All Cities*

		Population** jurisdiction	Population** served by MS4	Part 1	Part 2	Total
TX	City of Arlington	261,721	261,721	$204,040	$775,250	$979,290
VA	City of Norfolk	260,000	260,000	$580,000	$440,000	$1,020,000
NC	City of Raleigh	230,000	230,000	$80,100	$130,000	$210,000
CO	City of Aurora	227,280	227,280	$211,270	$313,000	$524,370
CA	City of Stockton	226,255	226,255	$606,000	$903,750	$1,569,750
KY	City of Lexington	225,000	219,168	$180,000	$98,000	$278,000
NE	City of Lincoln	200,000	200,000	$150,000	$150,000	$350,000
VA	City of Richmond	200,000	85,000	$316,000	$737,438	$1,053,438
LA	City of Shreveport	198,525		$151,014	$403,986	$555,000
WI	City of Madison	194,591		$87,817	$411,000	$498,817
TX	City of Lubbock	190,000	190,000	$202,430	$271,468	$473,898
CA	City of Bakersfield	190,000	88,470	$20,000	$191,118	$211,118
AR	City of Little Rock	179,795	179,795	$115,000	$236,000	$351,000
MA	City of Worcester	170,000	125,000	$175,000	$375,000	$550,000
TN	City of Knoxville	165,000	165,000	$324,650	$401,100	$725,750
UT	City of Salt Lake	161,000	161,000	$9,800	$112,000	$210,000
NC	City of Winston-Salem	160,000	160,000	$270,000	$511,376	$781,376
AL	City of Huntsville	159,789	159,789	$125,500	$80,000	$205,000
MI	City of Flint	147,000	147,000	$258,000	$451,000	$709,000
MO	City of Springfield	145,000	175,000	$194,000	$495,000	$689,000
AZ	City of Tempe	142,000	142,000	$167,000	$200,000	$367,000
NC	City of Durham	137,000	137,000	$433,200	$394,950	$828,150
CO	City of Lakewood	128,500	128,500	$368,400	$398,000	$766,400

Table 4 - page 2

APPLICATION COSTS — All Cities*

		Population** jurisdiction	Population** served by MS4	Part 1	Part 2	Total
KS	City of Topeka	125,000		$100,000	$430,000	$492,000
TX	City of Beaumont	120,000	120,000	$342,000	$384,000	$726,000
VA	City of Alexandria	115,000	90,000	$150,000	$510,000	$660,000
GA	City of Macon	107,365	107,365	$10,000	$20,000	$30,000
VA	City of Portsmouth	104,000	104,000	$250,000	$600,000	$850,000
Total Population - 50 respondents:		16,179,896				
Total MS4 Population - 45 respondents:			13,353,508			
Total Part 1 Costs - 48 respondents:				$12,718,394		
Total Part 2 Costs - 48 respondents:					$18,323,836	
Total Application Costs - 50 respondents:		***				$33,880,230

* Respondents shown in table completed MS4 permit applications pursuant to U.S. EPA's November 1990 regulations.

** Respondents generally assigned population data for jurisdiction and system service population.

*** Total application costs for respondents who provided both Part 1 & 2 cost data or total application cost data.

NAFSMA SURVEY RESULTS:
(shown alphabetically by state)

PERMIT COST ESTIMATES -- All Respondents*

		Population**		Application	5-year Permit Cost Estimates	
		jurisdiction	served by MS4	Costs	Total Costs	Net New Costs
AL	City of Huntsville	159,789	159,789	$205,000	$77,000	$77,000
AL	Jefferson County	390,126	390,126	$1,585,000	$7,500,000	$7,500,000
AR	City of Little Rock	179,795	179,795	$351,000	$850,000	$850,000
AZ	City of Tempe	142,000	142,000	$367,000	$1,500,000	$1,000,000
AZ	City of Phoenix	900,000	900,000	$1,000,000	$2,500,000	$2,500,000
AZ	City of Mesa	304,000	304,000	$500,000	$12,570,000	$1,000,000
AZ	City of Tucson	410,000	410,000	$700,000	$6,220,000	$6,220,000
CA	City of Bakersfield	190,000	88,470	$211,118	$332,500	$332,500
CA	City of Stockton	226,255	226,255	$1,569,750	$6,275,000	$5,500,000
CO	City of Lakewood	128,500	128,500	$766,400	$3,320,000	$774,108
CO	City of Colorado Springs	290,000	290,000	$1,450,000	$23,792,000	$1,852,000
CO	City of Aurora	227,280	227,280	$524,370	$1,352,753	$85,388
CO	City of Denver	473,959	473,959	$771,400	$13,127,533	$1,747,593
FL	Polk County	405,382	290,071	$389,275	$3,400,000	$2,500,000
FL	Palm Beach County	860,000	860,000	$155,000	$130,000	$130,000
FL	City of Tampa	283,000	300,000	$135,270	$1,057,000	$1,057,000
FL	Hillsborough County	280,015	280,015	$400,000	$1,560,240	$872,400
GA	City of Macon	107,365	107,365	$30,000	$2,373,000	$1,123,000
HI	City of Honolulu	836,000	735,000	$530,000	$18,263,800	$1,850,500
KS	City of Topeka	125,000		$492,000	$20,500,000	$7,800,000

Table 5 - page 1

PERMIT COMPLIANCE COST ESTIMATES — All Respondents*

		Population**		Application Costs	5-year Permit Cost Estimates	
		jurisdiction	served by MS4		Total Costs	Net New Costs
KS	City of Wichita	300,000	300,000	$850,000	$4,500,000	$4,500,000
KY	City of Lexington	225,000	219,168	$278,000	$11,657,500	$2,922,000
KY	City of Louisville & Jefferson Co. [1]	665,000		$585,000	$6,700,000	$3,200,000
LA	Jefferson Parrish	450,000	390,000	$995,000	$50,000,000	$780,000
LA	City of Shreveport	198,525		$555,000	$2,287,500	$2,077,500
MA	City of Worcester	170,000	125,000	$550,000	$8,500,000	$1,500,000
MA	City of Boston	553,712	107,700	$462,000	$16,200,000	$41,000
MD	Prince George's County	711,000	670,000	$900,000	$4,500,000	$4,500,000
MI	City of Flint	147,000	147,000	$709,000	$5,426,600	$826,600
MN	City of Minneapolis	368,000	392,000	$600,000	$4,403,000	$2,903,000
MO	City of Springfield	145,000	175,000	$689,000	$1,000,000	$1,000,000
NC	City of Winston-Salem	160,000	160,000	$781,376	$17,776.00	$7,280,000
NC	City of Durham	137,000	137,000	$828,150	$33,000,000	$32,000,000
NC	City of Charlotte	420,000	420,000	$744,136	$9,726,800	$7,980,000
NC	City of Raleigh	230,000	230,000	$210,000	$9,151,000	$1,231,000
NE	City of Lincoln	200,000	200,000	$350,000	$12,000,000	$10,000,000
NM	City of Albuquerque	380,000	380,000	$350,000	$1,400,000	$1,400,000
OH	City of Toledo	332,940	199,900	$145,000	$823,500	$510,300
OK	City of Tulsa	370,000	370,000	$1,252,000	$796,000	$796,000
TN	City of Memphis	618,682	618,682	$863,183	$2,500,000	$2,250,000
TN	City of Knoxville	165,000	165,000	$725,750	$3,806,500	$3,806,500

Table 5 - page 2

PERMIT COMPLIANCE COST ESTIMATES — All Respondents*

		Population**		Application Costs	5-year Permit Cost Estimates	
		jurisdiction	served by MS4		Total Costs	Net New Costs
TX	City of Arlington	261,721	261,721	$979,290	$24,500,000	$2,500,000
TX	City of Beaumont	120,000	120,000	$726,000	$60,000,000	$5,000,000
TX	City of San Antonio	940,000	1,076,800	$620,000	$212,744,054	$39,263,835
TX	City of El Paso	540,205	540,205	$1,640,000	$129,932,000	$382,256
TX	City of Ft. Worth	450,000		$900,000	$73,400,000	$3,700,000
UT	City of Salt Lake	161,000	161,000	$210,000	$3,122,000	$516,700
UT	Salt Lake County	800,000	270,000	$930,000	$220,000	$200,000
VA	City of Portsmouth	104,000	104,000	$850,000	$13,647,000	$8,200,000
VA	Henrico County	217,000	217,000	$290,000	$778,000	
VA	Arlington County	170,936	170,936	$145,700	$1,313,000	$809,000
VA	Fairfax County	800,000		$534,000	$650,000	$650,000
VA	City of Norfolk	260,000	260,000	$1,020,000	$46,941,000	$15,000,000
WA	City of Seattle	516,259	350,000	$400,000	$38,000,000	$6,000,000
WI	City of Madison	194,591		$498,817	$2,989,383	$900,000
WI	City of Milwaukee	628,088	335,919	$1,475,000	$600,000	$600,000

PERMIT COMPLIANCE COST ESTIMATES — All Respondents*

	Population**		Application Costs	5-year Permit Cost Estimates	
	jurisdiction	served by MS4		Total Costs	Net New Costs
Total Population - 56 respondents:	20,029,125				
Total MS4 Population - 50 respondents:		15,766,656			
Total Application Costs - 56 respondents:			$36,773,985		
Total 5-year Permit Compliance Estimate - 56 respondents:		***		$923,933,439	
Total 5-year Net New Spending for Permit Compliance - 55 respondents:					$219,997,180

* Respondents shown in table completed MS4 permit applications pursuant to U.S. EPA's November 1990 regulations.

** Respondents generally assigned population data for jurisdiction and system service population.

*** Total 5-year Permit Compliance based on estimates provided by respondents who provided data.

1 Joint application submitted by Louisville & Jefferson County Metropolitan Sewer District, the administering agency for the City of Louisville and Jefferson County

NAFSMA SURVEY RESULTS:
(shown by population)

PERMIT COST ESTIMATES -- All Counties*

		Population**		Application Costs	5-year Permit Cost Estimates	
		jurisdiction	served by MS4		Total Costs	Net New Costs
FL	Palm Beach County	860,000	860,000	$155,000	$130,000	$130,000
UT	Salt Lake County	800,000	270,000	$930,000	$220,000	$200,000
VA	Fairfax County	800,000		$534,000	$650,000	$650,000
MD	Prince George's County	711,000	670,000	$900,000	$4,500,000	$4,500,000
LA	Jefferson Parrish	450,000	390,000	$995,000	$50,000,000	$780,000
FL	Polk County	405,382	290,071	$389,275	$3,400,000	$2,500,000
AL	Jefferson County	390,126	390,126	$1,585,000	$7,500,000	$7,500,000
FL	Hillsborough County	280,015	280,015	$400,000	$1,560,240	$872,400
VA	Henrico County	217,000	217,000	$290,000	$778,000	
VA	Arlington County	170,936	170,936	$145,700	$1,313,000	$809,000
Total Population - 10 respondents:		5,084,459				
Total MS4 Population - 9 respondents:			3,538,148			
Total Application Costs - 10 respondents:				$6,323,975		
Total 5-year Permit Compliance Estimate - 10 respondents:***					$70,051,240	
Total 5-year Net New Spending for Permit Compliance - 9 respondents:						$17,941,400

* Respondents shown in table completed MS4 permit applications pursuant to U.S. EPA's November 1990 regulations.

** Respondents generally assigned population data for jurisdiction and system service population.

*** Total 5-year Permit Compliance based on estimates provided by respondents who provided data.

NAFSMA SURVEY RESULTS:
(shown by population)

PERMIT COST ESTIMATES -- All Cities*

		Population**		Application Costs	5-year Permit Cost Estimates	
		jurisdiction	served by MS4		Total Costs	Net New Costs
TX	City of San Antonio	940,000	1,076,800	$620,000	$212,744,054	$39,263,835
AZ	City of Phoenix	900,000	900,000	$1,000,000	$2,500,000	$2,500,000
HI	City of Honolulu	836,000	735,000	$530,000	$18,263,800	$1,850,500
WI	City of Milwaukee	628,088	335,919	$1,475,000	$600,000	$600,000
TN	City of Memphis	618,682	618,682	$863,183	$2,500,000	$2,250,000
MA	City of Boston	553,712	107,700	$462,000	$16,200,000	$41,000
TX	City of El Paso	540,205	540,205	$1,640,000	$129,932,000	$382,256
WA	City of Seattle	516,259	350,000	$400,000	$38,000,000	$6,000,000
CO	City of Denver	473,959	473,959	$771,400	$13,127,533	$1,747,593
TX	City of Ft. Worth	450,000		$900,000	$73,400,000	$3,700,000
NC	City of Charlotte	420,000	420,000	$744,136	$9,726,800	$7,980,000
AZ	City of Tucson	410,000	410,000	$700,000	$6,220,000	$6,220,000
NM	City of Albuquerque	380,000	380,000	$350,000	$1,400,000	$1,400,000
OK	City of Tulsa	370,000	370,000	$1,252,000	$796,000	$796,000
MN	City of Minneapolis	368,000	392,000	$600,000	$4,403,000	$2,903,000
OH	City of Toledo	332,940	199,900	$145,000	$823,500	$510,300
AZ	City of Mesa	304,000	304,000	$500,000	$12,570,000	$1,000,000
KS	City of Wichita	300,000	300,000	$850,000	$4,500,000	$4,500,000
CO	City of Colorado Springs	290,000	290,000	$1,450,000	$23,792,000	$1,852,000
FL	City of Tampa	283,000	300,000	$135,270	$1,057,000	$1,057,000

Table 7 - page 1

PERMIT COMPLIANCE COST ESTIMATES — All Cities*

		Population**		Application Costs	5-year Permit Cost Estimates	
		jurisdiction	served by MS4		Total Costs	Net New Costs
TX	City of Arlington	261,721	261,721	$979,290	$24,500,000	$2,500,000
VA	City of Norfolk	260,000	260,000	$1,020,000	$46,941,000	$15,000,000
NC	City of Raleigh	230,000	230,000	$210,000	$9,151,000	$1,231,000
CO	City of Aurora	227,280	227,280	$524,370	$1,352,753	$85,388
CA	City of Stockton	226,255	226,255	$1,569,750	$6,275,000	$5,500,000
KY	City of Lexington	225,000	219,168	$278,000	$11,657,500	$2,922,000
NE	City of Lincoln	200,000	200,000	$350,000	$12,000,000	$10,000,000
LA	City of Shreveport	198,525		$555,000	$2,287,500	$2,077,500
WI	City of Madison	194,591		$498,817	$2,989,383	$900,000
CA	City of Bakersfield	190,000	88,470	$211,118	$332,500	$332,500
AR	City of Little Rock	179,795	179,795	$351,000	$850,000	$850,000
MA	City of Worcester	170,000	125,000	$550,000	$8,500,000	$1,500,000
TN	City of Knoxville	165,000	165,000	$725,750	$3,806,500	$3,806,500
UT	City of Salt Lake	161,000	161,000	$210,000	$3,122,000	$516,700
NC	City of Winston-Salem	160,000	160,000	$781,376	$17,776.00	$7,280,000
AL	City of Huntaville	159,789	159,789	$205,000	$77,000	$77,000
MI	City of Flint	147,000	147,000	$709,000	$5,426,600	$826,600
MO	City of Springfield	145,000	175,000	$689,000	$1,000,000	$1,000,000
AZ	City of Tempe	142,000	142,000	$367,000	$1,500,000	$1,000,000
NC	City of Durham	137,000	137,000	$828,150	$33,000,000	$32,000,000
CO	City of Lakewood	128,500	128,500	$766,400	$3,320,000	$774,108

Table 7 - page 2

PERMIT COMPLIANCE COST ESTIMATES — All Cities*

		Population**		Application Costs	5-year Permit Cost Estimates	
		jurisdiction	served by MS4		Total Costs	Net New Costs
KS	City of Topeka	125,000		$492,000	$20,500,000	$7,800,000
TX	City of Beaumont	120,000	120,000	$726,000	$60,000,000	$5,000,000
GA	City of Macon	107,365	107,365	$30,000	$2,373,000	$1,123,000
VA	City of Portsmouth	104,000	104,000	$850,000	$13,647,000	$8,200,000
Total Population - 45 respondents:		14,279,666				
Total MS4 Population - 41 respondents:			12,228,508			
Total Application Costs - 45 respondents:				$29,865,010		
Total 5-year Permit Compliance Estimate - 45 respondents: ***					$847,182,199	
Total 5-year Net New Spending for Permit Compliance - 45 respondents:						$198,855,780

* Respondents shown in table completed MS4 permit applications pursuant to U.S. EPA's November 1990 regulations.

** Respondents generally assigned population data for jurisdiction and system service population.

*** Total 5-year Permit Compliance based on estimates provided by respondents who provided data.

RECEIVED
94 JUN -2 AM 11:39
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NORMAN Y. MINETA, M.C.

MWD
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Office of the General Manager

May 26, 1994

The Honorable Douglas Applegate
Chairman
Subcommittee on Water Resources and Environment
Committee on Public Works and Transportation
U.S. House of Representatives
B-370A Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

Submittal of Clean Water Act Testimony

The Metropolitan Water District of Southern California (Metropolitan) appreciates this opportunity to submit written testimony concerning the revised draft Clean Water Act (CWA) bill (Amendment in the Nature of a Substitute to H.R. 3948, April 21, 1994). We request that this communication be incorporated into the CWA reauthorization hearing record.

Mr. Chairman, as you know, Metropolitan is a special district created by the California State Legislature to provide supplemental water for cities and communities in Southern California. Metropolitan's service area includes more than 160 cities and has a combined population of over 16 million. To provide this service, Metropolitan operates an extensive system of drinking water conveyances, reservoirs, and water treatment facilities.

Our primary sources of supply are the Colorado River delivered through the Colorado River Aqueduct, and the State Water Project which transports water from the Sacramento-San Joaquin Delta to Southern California. Metropolitan also has worked with its member agencies for years to develop other sources of supply through reclamation of wastewater, clean-up of contaminated groundwater, conservation of agricultural water, and desalination of brackish water and seawater. Metropolitan is dedicated to providing our customers with a safe, reliable, and affordable drinking water supply.

Grand Avenue Los Angeles California 90071 • Mailing address Box 54153 Los Angeles California 90054-0153 • Telephone (213) 217-6000

As prelude, your Subcommittee should be aware that the Nation's drinking water suppliers are witnessing a dramatic increase in drinking water regulations that are being developed pursuant to the Safe Drinking Water Act (SDWA) Amendments of 1986. This increase in regulatory activity is resulting in the costly installation of more advanced and refined treatment technologies at drinking water treatment plants throughout the Nation, in order to ensure compliance with new regulations and protect public health. However, the effectiveness of installing more advanced treatment technologies is approaching the point of diminishing returns.

Concurrent with this increased regulatory activity, the public is demanding water that is both safe and aesthetically acceptable to drink. Greater awareness on the part of the public over the quality and cost of their drinking water is forcing water utilities to take a broader perspective in examining ways of ensuring that the water is wholesome.

In order for drinking water purveyors to meet the demands of new drinking water regulations and the reasonable expectations of their drinking water consumers, prevention of contamination at the source must become an essential element in water resources management and in providing the public with safe drinking water supplies. We believe the reauthorization of the CWA provides an important opportunity to amend the Act to provide source water protection for public drinking water supplies. Incorporation of source water protection in the CWA is essential to provide linkage between drinking water requirements under the SDWA and water quality control programs under the CWA. Linkage of the SDWA and CWA will facilitate protection of surface waters designated as public water supplies, as well as protection of ground water resources which provide approximately half of the Nation's drinking water (ground water is protected under the SDWA), so that a consistent approach for protection of water resources is developed.

Failure to implement source water protection for public drinking water supplies will result in significantly increased costs to water suppliers and ultimately to the residential water consumers. For example, failure to control the loading of microbial pathogens (e.g., Cryptosporidium) into the Nation's water supplies, from agricultural runoff and municipal wastewater discharges, will result in increased costs for installation of treatment technologies that are necessary to comply with

stringent water treatment and pathogen removal/inactivation requirements specified in U.S. Environmental Protection Agency (EPA) drinking water regulations. Cryptosporidium was the organism responsible for the disease outbreak in Milwaukee in March 1993, in which over 400,000 people became ill and as many as 100 deaths occurred. It has been estimated that the nationwide capital costs associated with treatment plant improvements necessary to remove/inactivate pathogens and comply with an Enhanced Surface Water Treatment Rule will be from 3.5 to 6.3 billion dollars.

Another example of the high costs associated with poor source water quality occurs in the Sacramento/San Joaquin Delta (Delta), which serves as a drinking water supply for 20 million Californians. There is significant loading of disinfection by-product precursor compounds into the Delta from agricultural discharges. In fact, up to 40% of the disinfection by-product precursor load in the Delta is estimated to originate from agricultural drainage. This source water quality problem will necessitate costly treatment plant improvements in order to comply with future regulations. It is estimated that San Francisco Bay Area and Southern California water utilities, which use the Delta as a source of supply, will need to spend several billion dollars to install advanced treatment technologies in order to comply with the future disinfection by-product regulation. A good source control program minimizing the discharge of disinfection by-product precursors to drinking water source waters may minimize these costs.

I encourage you and your Subcommittee to consider the following comments as you revise H.R. 3948 and move forward with the CWA reauthorization.

Source Protection for Drinking Water Supplies. Metropolitan strongly supports the language in the goals and policies section of H.R. 3948 which addresses source protection for public drinking water supplies. We commend the Public Works and Transportation Committee for introducing this amendment to the CWA which is critical in order to protect public health and ensure safe and affordable drinking water supplies. We believe source protection for drinking water sources is a key element of the CWA reauthorization, and we applaud the proposed resolution of this issue.

Nonpoint Source Management Programs. Metropolitan supports the revisions to the existing CWA nonpoint source management program which have been incorporated into H.R. 3948. We are especially supportive of provisions in section 312 of the revised draft H.R. 3948 which will allow EPA to prioritize distribution of CWA section 319 grants and give consideration to States that develop and implement nonpoint source management programs that will, among other things, protect waters designated as public water supplies. Metropolitan believes that solid, adequately-funded, and State-implemented nonpoint source management programs are critical to addressing significant nonpoint sources of drinking water contaminants discharged to our Nation's surface waters which serve as sources of drinking water.

State Watershed Management Programs. Metropolitan believes source protection for public drinking water supplies should be an integral part of State watershed management programs. We support the steps the Public Works and Transportation Committee have taken so far to address this need. Specifically, we support the watershed management provisions in H.R. 3948 that consider the need to protect drinking water supplies as a factor in designating priority watersheds, and which establish monitoring programs to evaluate the effectiveness of watershed management programs. We encourage you to take one step further and amend section 315 of the revised draft bill to include source protection for drinking water supplies as an important objective of State watershed management programs, and to require State water quality monitoring programs to assess the quality of sources of drinking water.

Beneficial Use of Reclaimed Water. In Southern California and other arid regions of the Nation the use of reclaimed water is an increasingly important element of good water resources management. Reclaimed water is an economical and environmentally acceptable alternative to importing water from sensitive areas, such as the Sacramento/San Joaquin Delta and the Owens Valley in California. The use of natural channels of ephemeral or intermittent streams is often necessary to transport reclaimed water to its area of use. Rigid application of strict EPA water quality criteria for discharges of reclaimed water to ephemeral streams or effluent-dominated water bodies is inappropriate in arid regions and discourages wastewater reuse. Metropolitan is supportive of the provisions in H.R. 3948 which establish a national policy to encourage the beneficial use of reclaimed water, and require EPA to develop guidance for

development and adoption of water quality standards applicable to arid areas. We encourage you to expand these provisions and include language in H.R. 3948 which authorizes the States to adopt site-specific water quality standards that will facilitate the use of reclaimed water in arid regions of the Nation, and the discharge of reclaimed water to ephemeral or intermittent streams. Proposed CWA amendments addressing this issue are provided for your consideration in Attachment 1.

Antidegradation. Metropolitan has concerns about provisions in section 303 of the revised draft H.R. 3948 which would essentially codify the existing EPA regulations requiring antidegradation measures. The current regulatory antidegradation program allows EPA flexibility in program implementation. Our concern is that adding statutory antidegradation requirements to the CWA could remove the administrative flexibility necessary for an effective Federal-State partnership for water resources protection in California, as well as other States, and remove the flexibility necessary for balancing competing water resources interests. Inflexible implementation of antidegradation measures could seriously impact the ability of water suppliers to implement necessary changes in water resources management that are required to achieve environmental restoration, while ensuring reliable water supplies. The discharge of source water and/or treated drinking water under the National Pollutant Discharge Elimination System, for the purpose of maintaining compliance with the Safe Drinking Water Act, may also be compromised by strict antidegradation provisions. In addition, we are concerned about provisions in the antidegradation section which instruct EPA to prepare antidegradation policies for States that do not submit policies meeting minimum requirements within 24 months of enactment. We believe the antidegradation requirements, including designation of outstanding national resource waters, should continue to be encouraged and implemented administratively, and we urge you to delete section 303 from the bill.

Wetlands. Metropolitan is very interested in amendments to the CWA which will facilitate the ability of water suppliers to integrate the protection of wetlands with the development and management of water resources projects. We support the wetlands provisions in subsection 405(i) of the revised draft H.R. 3948 which establish a program for the development, use, maintenance, and oversight of mitigation banks. Metropolitan believes that mitigation banks, where properly designed and administered, have great potential to

provide benefits for both California's existing wetlands resources, and for projects that cannot avoid impacts to wetlands.

As you and your Subcommittee move forward with the reauthorization of the CWA, we urge you to consider further amendments to the wetlands provisions in H.R. 3948 which will provide exemptions for specific activities important to management of water resources facilities. Specifically, Metropolitan recommends the following amendments:

- Groundwater Recharge. Maintenance of spreading areas for groundwater recharge created on uplands should be an activity exempt from wetlands protection regulation. While incidental wetlands values may be associated with spreading areas, protection of such incidental values may unreasonably restrict important groundwater recharge activities in Southern California and other arid regions of the Nation.

- Emergency Maintenance. Emergency maintenance of water conveyances should be specified as an activity exempt from wetlands regulation. Existing CWA legislation already provides this exemption to emergency maintenance of dams, dikes, transportation structures, etc. Public health and safety would benefit from this proposed amendment.

- Maintenance of Drinking Water Reservoirs. Maintenance of drinking water reservoirs should be specified as an activity exempt from wetlands regulation, when such reservoirs are managed for the primary purpose of supplying safe drinking water. Maintenance activities are necessary to maintain reservoir operations, capacity, and water quality. This amendment would clarify the ability of Metropolitan and other water utilities to provide a reliable water supply without degrading the environment which is otherwise protected by federal statute.

- Access Roads. The exemption from wetlands regulation provided for the construction or maintenance of farm and forest roads should be expanded to include maintenance of access roads to and within drinking water treatment plants. Prompt maintenance of treatment plant roads following storm damage is necessary to ensure smooth operation of the plants and provision of safe drinking water.

Comprehensive Plan for the San Francisco Bay-Delta Estuary. During markup of the Senate CWA bill (S. 1114), the Senate Environment and Public Works Committee approved an amendment incorporating revised language from H.R. 2320, a bill introduced by Representative Nancy Pelosi (D-CA) for implementation of a comprehensive plan for the San Francisco Bay-Delta Estuary. The revisions to the original bill ensure diverse representation in implementation of the Comprehensive Conservation and Management Plan for the San Francisco Bay-Delta Estuary. Metropolitan urges you to support this revised Bay-Delta language and incorporate it into H.R. 3948.

Thank you for your consideration of these CWA issues which address the interrelationships of surface water quality protections and the needs of public drinking water suppliers. We look forward to working with you on these important changes to H.R. 3948 as you move forward with your CWA reauthorization efforts. Please contact me at (213) 217-6211, if you would like to discuss these issues or if I can answer any questions regarding our position.

Very truly yours,

John R. Wodraska
General Manager

LAS:wt
s:\staff\housecwa.tes

Attachment

cc: Rep. Norman Mineta
Rep. Bud Shuster
Rep. Sherwood Boehlert
Rep. Bob Filner
Rep. Walter Tucker
Rep. Jay Kim
Rep. Steve Horn
Rep. Howard McKeon

ATTACHMENT 1

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Proposed Amendments for the Clean Water Act Reauthorization

Beneficial Use of Reclaimed Water

Metropolitan supports amendments to the CWA to explicitly authorize the States to adopt site-specific water quality standards to facilitate the use of reclaimed water in arid regions of the Nation.

Suggested Amendments:

Amend section 101 of the Federal Water Pollution Control Act by adding at the end the following new subsection "(h)":

"(h) It is the policy of Congress to promote the beneficial use of reclaimed water to the fullest extent reasonably possible in those arid States of the Nation which have limited ability to develop and maintain traditional water resources. It is further a policy of Congress to recognize that reclaimed water is a valuable resource and that the discharge of reclaimed water to otherwise arid environments, such as ephemeral water bodies, also can support limited aquatic environments which would not otherwise exist. Water quality standards established for such water bodies shall consider the unique ecosystems associated with reclaimed water, and shall require no presumptive interim or final objectives for its use."

Amend section 303(c) of the Federal Water Pollution Control Act by renumbering paragraph "(2)" as "(3)" and inserting a new paragraph "(2)" as follows:

"(2) Whenever a State adopts or reviews water quality standards for an ephemeral water body in an arid State or an arid region of a State, such standards shall consider the need for allowing the discharge of reclaimed water to the water body to promote the beneficial use of reclaimed water pursuant to section 101(h). The standards shall be such as to protect the public health and welfare, reasonably maintain the quality of the reclaimed water resource, and serve the purposes of this chapter. The standards shall be established taking into consideration:

"(A) The use and value of reclaimed water as a public water supply, with a view toward both potable and non-potable uses;

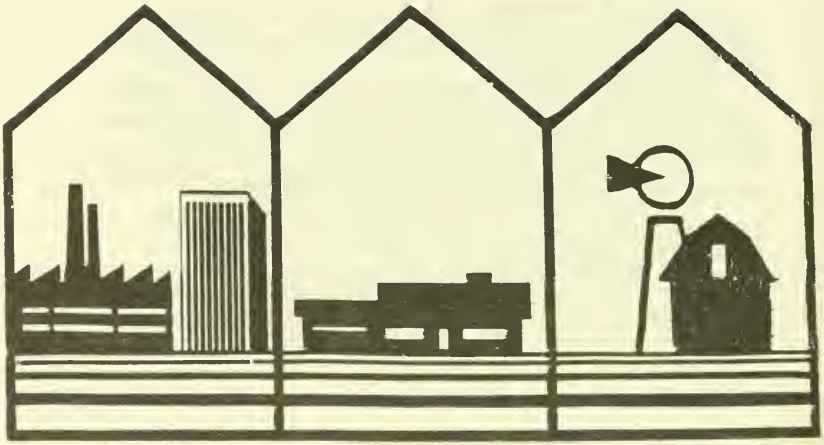
"(B) The propagation of fish, shellfish, and wildlife, but only where the water body, in its natural state, has historically supported an indigenous fish and wildlife population;

"(C) The natural conditions which influence water quality in the area, including extremes of temperature, water flow, turbidity, mineralization, and salinity, flooding, and poor quality substrate;

"(D) The best available water treatment technology economically achievable on a case-by-case basis;

"(E) The extent to which beneficial use of the reclaimed water resource will augment the State's traditional water resources; and

"(F) Whether discharge of reclaimed water will result in a net economic and/or environmental benefit to the State, considering any loss of existing uses resulting from discharge of reclaimed water."



Statement of the
NATIONAL ASSOCIATION OF REALTORS®

The Voice for Real Estate™
THE WORLD'S LARGEST TRADE ASSOCIATION

STATEMENT OF
THE NATIONAL ASSOCIATION OF REALTORS®
BEFORE THE HOUSE COMMITTEE ON PUBLIC WORKS AND
TRANSPORTATION SUBCOMMITTEE ON WATER RESOURCES
ON THE CLEAN WATER ACT

MAY 1994

STATEMENT OF

THE NATIONAL ASSOCIATION OF REALTORS®

BEFORE THE HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

SUBCOMMITTEE ON WATER RESOURCES

ON THE CLEAN WATER ACT

MAY 1994

INTRODUCTION

Thank you for the opportunity to submit the NATIONAL ASSOCIATION OF REALTORS® comments for the record on the federal Clean Water Act. The NATIONAL ASSOCIATION OF REALTORS®, comprised of approximately 750,000 members involved in all aspects of the real estate industry, has a keen interest in the Clean Water Act. I would like to take this opportunity to commend you, Mr. Chairman, and the members of this Subcommittee for your leadership on this issue.

The association believes that development should be encouraged as it is a stimulus to the economy, it increases the tax base, provides places to live and work, and offers opportunities that would not otherwise exist. However, we also realize the responsibility we have to educate and work with local, state, and federal government officials to develop responsible growth planning that is equitable and considers the divergent needs of transportation, housing, agriculture, commercial, industrial, and environmental concerns. With that in mind, it is very important to note that our nation will not grow without the proper highway and water infrastructure.

While we need an appropriate infrastructure, we can not continue to grow or retain the status quo without rectifying the current wetlands dilemma. The association strongly supports H.R. 1330, introduced by Reps. James Hayes (D-LA) and Tom Ridge (R-PA), which would provide for classification of wetlands prioritized by function and value, set up a "one-stop shopping" permit system, allow for mitigation banking and provide for public comment and notification of wetlands designations to affected property owners. And most importantly, it provides for just compensation to property owners when their land is taken as the result of a wetlands permit denial.

The NATIONAL ASSOCIATION OF REALTORS® supports passage of legislation which includes: a standardized wetlands definition applicable to all federal agencies and which requires reasonable and sufficient evidence of each wetland indicator (hydrophytic vegetation, hydric soils and hydrology); a clearly defined, expeditious and streamlined permitting process which allows those seeking permits to make application to and receive a response from a single federal agency; the creation of a priority wetlands ranking system, which provides for protection of ecologically significant wetlands but allows permits to be issued in the case of wetlands of lesser environmental importance; a requirement that all local authorities and affected property owners be notified of wetlands inventories to be conducted in their states, and of proposed wetland jurisdictional determinations; and the use of wetlands mitigation banking as an alternative to the prohibition of use of wetlands.

Similarly, water resource management which seeks to protect and enhance recreation and aquatic life must also consider residential, commercial, industrial, agricultural and municipal usage. Federal water pollution control programs must balance the ecological integrity of water bodies with

the economic interests of landowners and industry and with existing state law and interstate water compacts which have traditionally regulated water usage.

While the Association supports programs to enhance the environment, we believe that these programs should be conducted in a balanced manner. Planning for the classification and use of land must adequately consider the needs of housing, agricultural, commercial and industrial growth, as well as the quality of life and a healthy local economy.

NAR COMMENTS AS THEY RELATE TO IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS

The NATIONAL ASSOCIATION OF REALTORS® understands that both the U.S. Corps of Engineers and the U.S. Environmental Protection Agency are currently using the 1987 Manual to identify and delineate wetlands. With that in mind, we thought our comments on delineation would be helpful so that once the National Academy of Sciences study is complete a program can be implemented that will address our nation's environmental and economic needs with regard to the wetlands issue.

As the industry which assists in making the American dream of owning a home become a reality, we are aware of the critical role of environment in preserving America's quality of life, and we want to make certain that those lands that are truly wetlands continue to remain as such. Wetlands not only plays a major role in our environment, but they are also a selling tool utilized by our membership to increase property values and enhance not only ownership of environmentally sensitive lands, but also stewardship of these important lands for our nation.

RECOMMEND THAT HYDROPHYTIC VEGETATION, HYDRIC SOILS AND HYDROLOGY BE UTILIZED WHEN DELINEATING A WETLAND

The association supports a policy that recommends that **all three parameters** (which include hydrophytic vegetation, hydric soils and hydrology) be utilized in delineation of a wetland. The REALTORS® support a standardized definition for identification to be developed which includes all three parameters. While these parameters have been listed in the past, wetlands have often been identified by identifying the presence of one of the three parameters and inferring the presence of the other two.

NAR BELIEVES THAT LAND MUST NOT BE PRESUMED TO BE A WETLAND, IT MUST BE PROVEN TO BE A WETLAND

Previously, wetlands delineations were made using the presumption that land is a wetland, unless it can be proven that the land in question is not. With that in mind, we believe that the 1987 Manual is correct in that it requires that the land is presumed to be a non-wetland until it is proven that the land in question is proven to be a wetland.

NAR IS SUPPORTIVE OF WATER BEING PRESENT IN ORDER TO DELINEATE A WETLAND

It is imperative that if land is to be delineated as a wetlands, strong evidence of water must be present.

NAR CONSIDERS PUBLIC INPUT AND AN APPEALS PROCESS IMPERATIVE IN DETERMINING THE PROPER WAY TO DELINEATE A WETLAND

It is crucial that public input be gathered on any and all issues that determine the overall land use policy for the nation. In addition to comments, we would recommend that the government seek public input through public meetings, open forums, and utilizing groups that may have had firsthand knowledge in the development of projects having to do with the issue at hand. The Manual which will determine the way land is delineated is a major concern of the REALTORS®.

GENERAL COMMENTS AND RECOMMENDATIONS NEEDED FOR A SOLUTION TO THE WETLANDS DILEMMA

- NAR is supportive of a clearly defined permitting process. To achieve this we would recommend a concept likened to "One-Stop Shopping". While the proposed changes have made great strides to correct the problems associated with the 1989 Manual, we are still supportive of allowing one agency to administer the program. Regardless of whether or not our recommendation is adopted, we would urge that the government consider developing a checklist or booklet from the approving governmental authority outlining what permits are necessary, what the purposes are, who does the processing, what the processing time is and the estimated fee schedule.

- NAR supports a policy which will provide for a classification system for wetlands. We agree that the most environmentally sensitive and useful wetlands should be protected because

they serve vital ecological functions, such as flood control, habitat spawning areas ... and the like. However, the current federal policy lacks the flexibility to differentiate between vital ecological wetlands and lands which serve a marginal environmental purpose.

- NAR is supportive of a legislative/regulatory solution which would include some form of prioritization or ranking so that we can protect the most valuable of our wetlands, while allowing private landowners of less ecologically sensitive properties the right to develop lands as they see fit, within local planning and zoning parameters.

- NAR believes that man-made wet areas, such as swimming pools, ditches, culverts, ponds, waste lagoons, and the like, that were intentionally or accidentally created where non-wetlands once existed should be exempt from wetlands regulation.

- NAR recommends that all governmental entities involved and private property owners be notified of any wetlands delineations. In addition, we believe that a regulatory process needs to be implemented allowing citizens rights to appeal wetlands delineations.

- NAR recognizes the vital necessity of professional competency to meet the challenges of real estate practice in an increasingly sophisticated and complex society. Professionalism in real estate through education and training is one of the primary objectives of the Association. We encourage the government to work with our Association to promote public awareness of the value of wetlands. In turn, with our many local boards and state associations, the REALTORS® can provide the government with information as to how the regulation will impact real property owners. With that in mind, we would also like to recommend that the

government, as well as the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers, perform field testing in areas of the country where our membership can be of service to the government.

NATIONAL ASSOCIATION OF REALTORS® WETLANDS POLICY

Recognizing the extreme environmental significance of wetlands, the NATIONAL ASSOCIATION OF REALTORS® believes that any wetland legislation or regulation should include language to provide for:

1) a standardized definition for identification which includes hydrophytic vegetation, hydric soils and hydrology;

2) a clearly defined permitting process which includes all governmental authorities thereof;

3) the creation of a priority ranking system to identify areas most essential for acquisition;

4) a requirement of all authorities with regulatory powers to notify state and county governments, local media, and affected property owners of wetlands inventories to be conducted in their states; and

5) the use of wetlands mitigation banking.

In March 1991, the REALTORS® Management Team endorsed H.R. 1330, the "Comprehensive Wetlands Conservation and Management Act of 1991." At the 1991 Mid-Year Meetings, the NATIONAL ASSOCIATION OF REALTORS® Board of Directors endorsed the Management Team's action and passed the following motion:

> "That the NATIONAL ASSOCIATION OF REALTORS® strongly support, H.R. 1330, the 'Comprehensive Wetlands Conservation and Management Act of 1991' and that the ASSOCIATION seek bi-partisan and broad geographic support and cosponsorship in both the House and Senate."

PRIVATE PROPERTY RIGHTS

NAR's concerns extend beyond the immediate interests of the real estate industry. Because over seventy percent of our nation's wetlands are owned by private citizens, we also wish to direct attention to the larger issue of protecting private property rights.

The NATIONAL ASSOCIATION OF REALTORS® has worked for years to encourage a balanced approach to environmental protection that accommodates the important needs for both conservation as well as economic opportunity and vitality. To balance the efforts of government to serve the public well-being by controlling pollution and protecting natural resources with the economic and property rights secured by the Constitution, we believe that the cost of the benefits to the general public achieved by such regulation should be borne by the beneficiaries--the general public. We oppose those aspects of environmental and natural resource legislation that amount to uncompensated condemnation of private property through government action. It is essential that

the rights of private property owners be fully recognized in local, state, and federal programs and laws.

In this context, the NATIONAL ASSOCIATION OF REALTORS® believes that Federal wetlands regulation should expressly recognize that the application of wetlands permitting requirements may result in a "taking" of property within the meaning of the Fifth Amendment's Just Compensation clause, which requires compensation to be paid to the affected property owner. This is evident from decisions of the United States Claims Court in Loveladies Harbor Inc. v. the United States, Florida Rock Industries v. United States, Formanek v. United States, and, most recently, Bowles v. United States. In each of these cases, the court held the Army Corps of Engineers' denial of a permit to place fill on wetlands so diminished the owner's property interest as to result in a "taking", and awarded the just compensation mandated by the Fifth Amendment. Indeed, the plaintiff in the Loveladies case has been involved in litigation for twelve years, and his travails continue as that case awaits decision by the Court of Appeals for the Federal Circuit. Moreover, the Supreme Court's decision in Lucas v. South Carolina Coastal Council emphasized the protection of property rights provided by the Fifth Amendment by referencing what the Court termed a "categorical rule" requiring compensation when all economically viable use of a property is eliminated, such as that which occurs when a permit to use a wetland is denied. The Court also made it clear that compensation is a Constitutional requirement except in rare cases where regulation merely implements limitations on use of the property already imposed by the common law of nuisance or property.

To prevent other property owners from similarly becoming embroiled in years of litigation and spending the huge sums of money necessary to do so, Federal wetlands regulation should

require the regulating agency to expressly consider the implications of permit denials on private property rights. In particular, the law should require that any wholesale denial of use be carefully analyzed to determine the extent of compensation to be provided to the affected property owner. In a few cases, such analysis may determine that the action falls within the very narrowly conscribed circumstances suggested by Lucas, where the government need not provide compensation because the proposed use would constitute a common law nuisance. Perhaps just as importantly, Federal wetlands regulatory legislation should require that complete denials of use be clearly justified and imposed only where the affected area is of such extreme ecological significance and vulnerability as to justify such draconian action. Regulation should require the regulator to permit beneficial uses of wetlands which do not present a real and significant threat to substantial public interests. Preservation of important wetlands can also be accomplished by providing financial incentives for property owners to leave wetlands on their land undisturbed. This would also relieve builders, for example, from unfairly bearing the cost of environmental improvement or protection, which cost is in any event generally passed on to homebuyers.

The NATIONAL ASSOCIATION OF REALTORS® strongly believes that Federal wetlands regulation of this nature is necessary to preserve the fundamental right of all private property owners, working through local government, to determine and enjoy the highest and best use of their land. To be sure, NAR recognizes that the application of some restrictions on property use serves the interests of all, but NAR believes that all citizens have the right to acquire and use real property with the confidence and certainty that the value of their property will not be unduly diminished or jeopardized by governmental action at any level without the owner's express consent.

It is important to note that our ASSOCIATION supports H.R. 385, which was introduced by Rep. Gerald Solomon. This legislation requires federal agencies to establish procedures to assess whether a pending rule or regulation may result in the taking of private property. It would also require agencies to avoid takings wherever possible.

WATER RIGHTS

The central question to a debate of this issue is simply stated: What is the proper federal role in water resource management? The NATIONAL ASSOCIATION OF REALTORS® opposes water allocation legislation at the federal level which supersedes state law and interstate water compacts and which may result in takings of water property rights without compensation.

Water supply needs vary from state to state. Congress has traditionally deferred to the responsibility and expertise of the states for the allocation, administration, and use of water for residential, commercial, industrial, agricultural, municipal, recreational and aquatic life purposes. As a result, states have chosen their own water law systems in order to secure a stable and clean water supply to provide for sufficient food, drinking water, economic productivity, recreation and aquatic life. An extensive intrastate and interstate water supply infrastructure has been established based upon these state water law principles.

We are concerned that federal initiatives to expand existing water pollution control programs in order to protect the ecological integrity of water bodies may go far beyond what is necessary to meet water quality needs. Overly restrictive requirements might impose economic

burdens on landowners and industry — perhaps without significantly improving water quality — and in the process erode traditional state authority to determine land and water usage.

We are also concerned about excessive federal regulatory enforcement of the Clean Water Act which goes beyond the spirit and intent of the law. Overzealousness by the EPA, with regard to more stringent standards and enforcement have made it increasingly difficult for utility providers (i.e., towns and private utility companies) to reach the required standards, leading to excessively high water, sewer and impact fees and a general "no growth" climate. Farmers are prohibited from using and tending their land with proper farming, draining, and — in some cases — dredging procedures. Property owners are prevented from reclaiming land that is washed away by storms. Regulatory standards and enforcement must be reasonable in order to accommodate economic growth and allow property owners to reasonably use their land.

NATIONAL ASSOCIATION OF REALTORS® WATER POLICY

We support the wise use and management of our nation's water resources so that residential, commercial and industrial development, can proceed unencumbered in the future. States' water rights and regional customs, as they have developed over the years, should be considered by all levels of government. We also recognize the importance of a well-developed infrastructure in ensuring adequate water quality and quantity.

WATER/SEWER ISSUES

President Clinton has stressed the need to increase spending on infrastructure as a means to stimulate the economy and help improve the productivity of the American worker. In recent years, the Environmental Protection Agency (EPA) has been tightening water quality standards at a time when it has been cutting back on financing for state and local governments to comply with the tightened regulations. Local communities have increasingly been raising the water bills of existing customers and imposing impact fees on developers, making them foot the bill for new water/sewer hookups. The developers, in turn, tack the fees on to the cost of new housing, making it less affordable.

The EPA has estimated that we would have to spend over $150 billion over the next twenty years just to meet current requirements. Yet, as you know, federal funding of sewer construction is scheduled to expire completely in FY 1994. At that time, all funding of new sewer construction will have to come from states and local governments, many of which are in worse financial shape than the federal government. Unavailability of financing for construction of new systems or rehabilitation of older sewer systems to expand their capacity will have a serious impact on new home construction and on the affordability of existing housing.

The NATIONAL ASSOCIATION OF REALTORS® supports the resuscitation of the federal construction grants program for sewer construction and continued federal capitalization of existing State Revolving Loan Funds (SRFs) for sewer construction beyond the proposed expiration of funding in Fiscal Year 1994. We also support the easing of tax and regulatory barriers to facilitate the use of public/private partnerships to fund water supply and sewer construction projects.

CONCLUSION

NAR believes properly conducted programs of land preservation and historic preservation which attempt to protect aquifers, agricultural lands, wetlands, scenic vistas, natural areas, historic properties and open space may have a positive effect on the quality of life in towns, counties and municipalities. However, in establishing land use laws and regulations for the purpose of protecting these resources, the cost of the benefits of these programs to enhance our nation's resources should be paid for by the general public. Therefore, we believe that financial incentives should be developed for the protection of wetlands.

Current government real property acquisition practices have resulted in excessive amounts of private property being placed in the government estate. Federal property acquisition agencies have been authorized by Congress to acquire private property for parks, national forests, refuges and for other purposes, but have not been provided with the resources to promptly compensate landowners or adequately manage acquired lands.

The Fifth Amendment of the United States Constitution states that private property [shall not] be taken for public use without just compensation. This premise was one of the fundamental building tenets of our nation and, it should remain so today. However, as a result of federal agencies' interpretations of the Federal Manual for Identifying and Delineating Jurisdictional Wetlands, many lands that are of marginal ecologic value are being incorporated into the wetlands system. This, in turn, is having a negative impact upon housing affordability and the economy.

The NATIONAL ASSOCIATION OF REALTORS® and the nation support a wetlands policy that is environmentally sensitive, yet allows our nation to be economically competitive. The "Comprehensive Wetlands Conservation and Management Act," H.R. 1330, will provide this nation with a law that protects those lands that need to be protected, while allowing our citizens to retain their Fifth Amendment rights of just compensation, under the Constitution. We urge your support of this legislation and the concepts it embodies.

Thank you for the opportunity to express our views.

SUPPLEMENTAL TESTIMONY OF

MR. RICHARD ROBINSON

SENIOR MANAGER, ENVIRONMENTAL AFFAIRS

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION

BEFORE THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

U.S. HOUSE OF REPRESENTATIVES

JUNE 3, 1994

ON

THE WATER QUALITY ACT OF 1994

H.R. 3948

SUPPLEMENTAL TESTIMONY OF
MR. RICHARD ROBINSON
SENIOR MANAGER, ENVIRONMENTAL AFFAIRS
NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION
BEFORE THE
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
U.S. HOUSE OF REPRESENTATIVES
JUNE 3, 1994
ON
THE WATER QUALITY ACT OF 1994
H.R. 3948

Mr. Chairman and members of the Committee, I am Richard Robinson, Senior Manager, Environmental Affairs, for the National Electrical Manufacturers Association (NEMA). NEMA is the principal national trade association for manufacturers in the electrical industry. NEMA represents over 550 domestic manufacturers of products used in the generation, transmission, distribution and end-use of electrical energy. NEMA members serve a $100 billion domestic market, export about $11 billion, and employ 500,000 Americans.

NEMA welcomes the opportunity to offer our comments on The Water Quality Act of 1994, H.R. 3948, a bill to reauthorize the Federal Water Pollution Control Act, 33 U.S.C. 1251-1387 (the Clean Water Act). While we did not have chance to testify at the hearings on this bill on May 24 and 26, 1994, we believe it is important for us to present our views to you.

NEMA is a member of the Clean Water Industry Coalition (CWIC), a group of approximately 150 companies and associations supporting the responsible management of the nation's water resources. We believe that H.R. 3948 is flawed, and agree with the CWIC statements as to the major areas where the bill is impaired, namely, ground water, antidegredation, mixing zones, enforcement, and the lack of a provision on risk assessment. For your information, I am attaching copies of the CWIC statements on these issues.

You have heard others testify at some length on all of these areas except enforcement. Therefore, in this statement I will concentrate on enforcement and permitting issues.

General Comments

The primary purpose of enforcement, as EPA states in its Green Book on Clean Water Act Reauthorization, is to deter violations in the first place, not to punish everyone who makes a mistake. Most firms in this country have accepted that their facilities should not only be in compliance with environmental laws, but are actively pursuing pollution prevention measures. It is impossible to be in compliance at all times, however, despite the best of intentions because of the great number of requirements and the fact of human error. Under this bill, small businesses which are trying to stay in compliance could be severely and

excessively punished as a result of a single unintentional violation. One might ask if citizens would like to be monitored in their automobiles at all times, and be automatically fined every time they exceed the speed limit.

The effect of all the enforcement amendments enumerated below is to severely punish all violators for any infraction. For small businesses, it is economically impossible to correct violations and shoulder additional, exorbitant costs and penalties.

Citizen suits

Section 503(b) of the bill would allow citizen suits for violations occurring within 180 days of the filing of a notice under the statute. This provision would partially reverse the Supreme Court's decision in the Gwaltney case not to allow citizen suits for past violations. NEMA fails to understand the need for citizen suits for wholly past violations since, by definition, neither the EPA nor the state would be pursuing the violator, and the violation would already have been corrected. Clearly, such a provision can only be punitive.

Section 310(k)(5) of the bill would eliminate comparable state actions as a bar to citizen suits, but retain the bar for federal actions. Therefore, a citizen would be able to file a lawsuit against an alleged violator despite a state prosecution. It makes no sense to subject a violator to dual lawsuits for the same violation regardless of whether the state or EPA is prosecuting the action.

Economic Benefit of Noncompliance

Section 310(l) of the bill provides that the minimum penalty a court or administrative law judge can assess is the economic benefit of noncompliance. This section further requires that the agency develop regulations to determine such economic benefit. The theory behind this provision assumes that: (1) the economic benefit of noncompliance can be determined with some precision by regulation, and (2) such a penalty will provide the correct punishment and deterrence for a violator.

Both of these assumptions are false. First, most violations occur when a firm's employee makes a mistake or something in the production process goes awry, not because of a conscious decision to save the company money by avoiding Clean Water Act requirements. Second, it is impossible to accurately calculate the economic benefit of noncompliance because any such figure must be based on a number of assumptions about which reasonable economists have and continue to disagree. Several articles have already been written by economists criticizing EPA's economic benefit model's assumptions.

In actuality, penalties only need to be high enough to deter prohibited behavior. Since EPA's reported compliance rate by industry is over 90%, there is no reason to increase existing penalty rates.

Finally, establishing a penalty assessment floor of economic benefit will only have the effect of creating more litigation and fewer settlements. As with Superfund, defendants will opt to take their chances with a judge rather than settle at or above a figure calculated by the agency. While the economic benefit model is a useful settlement discussion tool, it is a counterproductive statutory penalty mandate.

Injunctive Actions

Section 310(d) of the bill: (1) specifically includes remedial measures and an environmental audit as measures a court can order as injunctive relief against a violator, (2) allows EPA to pursue "other appropriate relief" in addition to restraining violations and requiring compliance, and (3) permits a court to order injunctive relief solely upon a finding that a violation occurred.

The types of relief this amendment would provide are beyond what a court would normally allow in such actions. It is important to recognize that injunctions are for emergency situations, and the ordered relief almost always involves directing a defendant to stop proven, irreparably damaging behavior. The kinds of relief provided for in this section have nothing to do with immediate harm required in injunctive actions, but could turn the Act into a remediation law like Superfund.

As EPA correctly states in its Green Book on Clean Water Reauthorization, the traditional test in injunctive cases can be difficult to meet. It is supposed to be difficult to meet because of the extraordinary relief injunctive actions can afford. There is no need to amend this well established area of law so that the government can greatly expand its powers under the Act.

Penalty Fund

Section 310(m) of the bill would establish a special EPA fund for collected fines/penalties. EPA would only have to report to congress annually on its uses of this money. This concept would create an incentive for the government to find violations and collect the largest possible penalties to finance its activities. It is our position that only congress should be allowed to appropriate monies collected by agencies.

Pretreatment

Sections 310(a-c) of H.R. 3948 greatly increase the regulatory and enforcement burden on facilities discharging to publicly owned treatment works by: (1) expanding the violations for which such dischargers may be prosecuted; and (2) establishing extensive new record keeping, reporting, and monitoring requirements. These additions are unnecessary in most cases. Rather than attempting to force the existing permitting system on these dischargers, it would make more sense to target the problem areas and handle them appropriately.

Judicial Review of Permit Actions

Section 401(a) of the bill would give persons who did not participate in the public review process standing to file a lawsuit objecting to the issuance of a permit. Such a provision unfairly puts permittees at the risk and cost of a court action after they have completed the long and expensive, administrative permit process.

Ground Water Permitting

Section 404 of the bill would permit discharges of pollutants that may eventually enter ground water in the same manner as direct discharges to navigable surface waters. The permitting system as proposed is vague and unenforceable, and invites extensive litigation. Ground water should not be dealt with in the same manner as traditional discharges under the NPDES system, but should instead be considered under specific programs for the protection of ground water or through other regulatory programs like RCRA.

Conclusion

For your information, I am also attaching a short document I prepared after discussions with and review by a member of EPA's Water Office compliance staff entitled, "Clean Water Act - What Is Compliance?" This paper succinctly summarizes how EPA and others measure compliance under the Clean Water Act, and demonstrates that the agency needs no new enforcement tools to continue its excellent enforcement program under this law.

Finally, NEMA wishes to express its support for the principles espoused in the bipartisan substitute to H.R. 3948. We believe, along with other industry groups and state and local governments, that the substitute provides the proper foundation for reauthorization of the Clean Water Act. It is based on the premise that the Act is working for point sources, and needs only minor adjustments.

Mr. Chairman and members of the Committee, NEMA appreciates the opportunity to offer these comments on H.R. 3948 and the reauthorization of the Clean Water Act. I would be pleased to provide any further information if requested.

CWIC
CLEAN WATER INDUSTRY COALITION

ENFORCEMENT

BACKGROUND

The Clean Water Act already includes strong penalties against violations, inlcuding accidents. Violators are subject to civil penalties of up to $25,000 per day of violation, and criminal penalties up to $250,000 plus prison terms. There are administrative penalties of up to $25,000 for less serious violations and up to $125,000 for more serious violations. The Act has entirely separate enforcement schemes for spills of oil and hazardous substances, and authorizes citizens to bring enforcement actions against alleged violaters. Compliance is now at 92%.

H.R.3948

H.R.3948 would overturn a key Supreme Court decision (Gwaltney) and allow citizens to sue for past violations, even though corrected. The bill would significantly expand enforcement to indirect dischargers, increase civil and criminal penalties, establish the minimum penalty (by a court or EPA) to be "economic benefit of noncompliance", allow courts to require remedial measures (*e.g.* removal of sediments) or environmental audits, and more.

EFFECT ON BUSINESS

Any individual or activist group (which might include a disgruntled former employee), is allowed to sue a business for past violations that have been corrected. New record-keeping, paperwork, monitoring, and reporting will be required. Civil and criminal sanctions would be increased.

ISSUES AND IMPACTS

■ Businesses and others comply with the current Act 92% of the time, according to EPA. Are stiffer penalties really needed? There is no valid reason for overturning the Gwaltney decision. Citizen suits are to "supplement rather than supplant" government enforcement action. The objective of citizen suits should be to bring facilities into compliance. The bill will encourage "bounty hunting" and nuisance lawsuits for dubious environmental benefit.

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ANTIDEGRADATION

BACKGROUND

Current Clean Water regulations authorize EPA to develop "antidegradation" policies to protect current uses of waterbodies and prevent water quality from being lowered, or degraded. States adopt standards and uses for their waters and set specific criteria to protect those uses. EPA's responsibility is to oversee state water quality program and provide guidance.

H.R.3948

H.R.3948 would require states to adopt restrictive federal antidegradation policies subject to approval by EPA. States would be required to conduct an "antidegradation review" prior to issuing a permit for any new, expanded or increased discharge into a waterbody. The bill would authorize EPA to develop an antidegradation policy for states that do not have an approved policy, without notice and opportunity for public comment.

EFFECT ON BUSINESS

This proposal would prevent facilities from altering their discharge levels. This will prohibit plant expansion, changes in production output, expansion of capacity, and new sewer hook-ups. This is a "no growth" policy that will retard local economic development.

ISSUES AND IMPACTS

- This legislation is federal land use planning. It would shift traditional state authority to develop antidegradation policies to the federal government. Federal imposition of such policy, without opportunity for public comment, is inappropriate.

- Antidegradation reviews will slow down and may prevent new permits. This will restrict business development and economic expansion. At a minimum, facilities may be required to install additional costly, new pollution controls for no environmental benefit.

- Antidegradation policies should not be prescribed automatically nationwide. A "one-size fits all" approach will not work due to different hydrological and climatic differences in different states.

- "Antidegradation," as proposed in the House bill is federal land use planning and direct interference in local economic development.

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MIXING ZONES

BACKGROUND

Mixing zones are small areas in lakes, rivers and streams where point source discharges enter and mix with receiving waters. Current law does not require that mixing zones meet the water quality standards that are set for the receiving waters as a whole if the discharges will not pose a health or environmental risk. EPA recognizes the appropriateness of mixing zones and has established recommendations to states for the use of mixing zones in issuing permits. Currently, states have discretion to allow mixing zones in discharge permits on a site-by-site basis.

H.R.3948

H.R.3948 would provide new authority for EPA to prohibit or restrict the use of mixing zones for discharges containing substances that are persistent, acutely toxic or bioaccumlative.

EFFECT ON BUSINESS

Facilities will have to meet more strict water quality standards. This means plants will be required to install additional pollution control technology for no increased environmental benefit.

ISSUES AND IMPACTS

- States should continue to have primary responsibility for developing mixing zone policies and applying mixing zones on a site-specific basis. It has not been shown that changing policy will result in cleaner water.

- Restricting or prohibiting mixing zones for persistent or bioaccumlative substances to protect human health and wildlife has no technical or scientific justification. Mixing zones, when properly applied, already provide for protection of aquatic life from acute and chronic toxic effects.

- States should continue to make site-specific decisions based on science and technology.

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GROUND WATER

BACKGROUND

The Clean Water Act addresses surface waters. Other legislation gives states the primary responsibility for protecting and managing ground water. Almost all states have ground water protection programs and have set appropriate ground water quality standards, bolstered by a number of federal statutes: the Resource Conservation and Recovery Act (RCRA), the Safe Drinking Water Act (SDWA), Superfund, and the Oil Pollution Act.

H.R.3948

H.R.3948 would drastically expand the scope of the Clean Water Act to include ground water. It would establish a national policy to protect ground water and require EPA to issue guidance for limitations on discharges into the ground or ground water. National Pollutant Discharge Elimination System (NPDES) permits would be required for discharges into the *ground* or *ground water* if (1) there is a direct, demonstrable hydrologic connection with surface water, (2) greater than *de minimis* quantity of a pollutant is able to reach surface water, and (3) the activity is not addressed by other federal law.

EFFECT ON BUSINESS

H.R.3948 imposes significant new regulations and permitting requirements on business.

ISSUES AND IMPACTS

- There is no demonstrated need for another federal ground water law, nor a massive new regulatory program that would duplicate existing state and federal programs.

- Ground water can not be dealt with the same way as direct discharges to surface waters. Permits are meaningless because discharges are never direct; the connection between surface and ground water is not always clear.

- The proposed permitting requirements are vague. This means courts will be asked to decide what types of activities may not be covered by the permit requirements.

- The bill overlooks the question of what risk there may be to surface water quality from ground water. This will result in "technology for technology's sake" with no benefit to the environment.

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CLEAN WATER ACT - WHAT IS COMPLIANCE?

Background

- While there are many facilities in the country which discharge effluent to the waters of the U.S., EPA has identified approximately 7,000 which it considers "major" sources. Some of these sources are municipal treatment works and some are industrial facilities.

- Sources usually have a number of "outfalls" or pipes where effluents are discharged, the average being around 5. Sources also have several different types of pollutant parameters which they are monitoring at each outfall, the average being about 10. Therefore, all major U.S. sources have about 350,000 monitoring requirements (7,000 x 5 x 10). While sources monitor these outfalls at different intervals, EPA uses monthly averages as its primary enforcement tool.

- Some of these pollutants are considered "toxics" while are others are defined as "conventional pollutants." EPA defines a source as a "significant noncomplier" (SNC) when it twice exceeds its monthly average discharge limit either by 20% for toxics or by 40% for conventional pollutants. A source can also become an SNC by exceeding the monthly average for the monitored pollutant parameter by any amount 4 times in 6 months.

Compliance Measurements

- EPA keeps its compliance information on a quarterly basis, and has found that approximately 10% of the sources are SNCs in any one quarter.

- The U.S. PIRG, however, calculated the same information over one year and found that over 20% of the sources were SNCs. Since most sources which are SNCs change every quarter (EPA reports approximately 75% are new every quarter), U.S. PIRG can show higher noncompliance rates. The longer the period one measures, the higher will be the noncompliance rate.

- EPA is not tracking the national compliance rate for the approximately 350,000 requirements for discharges by major sources in the U.S. Industry information shows that this compliance rate is well over 95%.

- How can one make sense of all these seemingly inconsistent numbers? Using a baseball analogy, EPA's figures show that during one quarter of the baseball season, 10% of major league fielders have made at least two errors. U.S. PIRG's figures reveal that over the entire season, over 20% of major leaguers have made at least two errors. Industry information demonstrates that, for the total number of chances handled by major league fielders, over 95% were handled without error.

- Finally, any source which appears as an SNC for two consecutive quarters appears on EPA's "exceptions" list. There are approximately 100 of these every quarter, and they receive the greatest enforcement attention. EPA headquarters has sent out guidance stating that regions should never have more than 2% of their sources on the exceptions list. That the regions are generally able to meet this requirement is further evidence that EPA's enforcement tools are adequate to bring sources into compliance.

4/27/94 10:00

BIPARTISAN ALTERNATIVE

DISCUSSION DRAFT
SUBSTITUTE TO H.R. 3948

SEC. 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title. "The Water Quality Act of 1994"
(b) Table of Contents. (Reserved)

SEC. 2. DEFINITION. (from H.R. 3948) The "Administrator" means the Administrator of the Environmental Protection Agency.

SEC. 3. AMENDMENT OF FEDERAL WATER POLLUTION CONTROL ACT. (from H.R. 3948) The amendments in the bill are amendments to the Federal Water Pollution Control Act.

TITLE I – RESEARCH AND RELATED PROGRAMS

§ 101. NATIONAL GOALS AND POLICIES. (Modify: Include two of the policies in H.R. 3948 and add three proposed by states.)

(a) Net Benefits. It is the national policy to ensure that the development and implementation of water quality protection programs pursuant to this Act shall produce benefits to the public health, safety and the environment that justify the cost of implementation and compliance.

(b) State-wide Strategies. It is the national policy to support state efforts to develop and identify, prioritize and implement water pollution prevention and control strategies in consultation with local governments to meet the goals and objectives of the Act.

(c) State consultation. It is the national policy to recognize, support and enhance the role of the state, tribal and local governments in carrying out the purposes of the Act.

(d) Reclamation and Reuse. (from H.R. 3948) It is the national policy to encourage reclamation and beneficial reuse of wastewater.

(e) Water Use Efficiency. (from H.R. 3948) It is the national policy to encourage water use efficiency.

§ 102. STATE MANAGEMENT ASSISTANCE. Authorizes $250 M per year (FY 1995 through 2000) under § 106 to assist states in administering state programs under the Act.

TITLE II – CONSTRUCTION GRANTS

§ 201. USES OF FUNDS. Removal of Limitation. (from H.R. 3948) Removes the limitation in existing law on funding no more than 20% of the state's SRF funding on combined sewer overflow and collector sewer projects.

§ 202. SEWAGE COLLECTION SYSTEMS. (from H.R. 3948) Expands funding eligibility for sewage

collection systems in existence after 1972 but prior to the date of enactment of the Water Quality Act of 1994.

§ 203. CLOSE OUT OF CONSTRUCTION GRANT PROGRAM. (From Mineta substitute to H.R. 3948) Allows EPA to negotiate a budget with States for closeout of the construction grant program.

§ 204. TREATMENT WORKS DEFINED. (from H.R. 3948)

(a) Inclusion of Other Lands. Clarifies the existing definition of "treatment works" to include all land acquisition necessary for construction of the treatment works, making such costs eligible for funding under the SRF program.

(b) Policy on Cost Effectiveness. Technical correction to remove unnecessary language in existing section 218 relating to cost effectiveness.

§ 205. VALUE ENGINEERING REVIEW. (from H.R. 3948) Raises the threshold for requiring value engineering review from $10 million to $25 million.

§ 206. GRANTS FOR CONSTRUCTION OF TREATMENT WORKS. (modification to the provisions in H.R. 3948) Authorizes grants to the following communities in the following amounts.

Boston, MA	$153 million
New, York, NY	70 million
Los Angeles, CA	50 million
Los Angeles County, CA	50 million
Seattle, WA	35 million
Wayne County, MI	82 million
Small Communities Program	500 million

One half of the amounts authorized are to be from funds appropriated in FY 94 with the remaining half to be from any amounts appropriated in FY 95 which are above $2.5 billion appropriated for the SRF program. The grants for small communities would be distributed to the states based on the Act's allotment formula to assist small communities with sewer construction needs. Small communities would be defined by the State (not to exceed 75,000).

Boston, Massachusetts. (An additional $100 million is authorized to be appropriated in FY 95 for Boston but only if the full $3.0 billion authorized for the SRF program is appropriated.)

TITLE III – STANDARDS AND ENFORCEMENT

§ 301. EFFLUENT LIMITATIONS. (from H.R. 3948) Extends the 2-year innovative technology waiver to 3 years and limits its availability to demonstrate environmentally beneficial treatment systems.

§ 302. ANTIDEGRADATION. (Based on consultations with the states) The section requires each state to develop an antidegradation policy (to be submitted to EPA for review and comment) and to implement the policy (following state-developed implementation procedures). Each state must also consider, and allow citizens to petition for designation of certain areas as ONRWs. Provisions on temporary or short term exceedances for ONRW's and on limiting antidegradation reviews for ongoing discharges are also included.

§ 303. INFORMATION AND GUIDELINES.

(a) Guidance on Water Quality Standards for Low Flow Areas. (from H.R. 3948 but expand to include guidance on ephemeral streams). EPA is to promulgate guidance to the States on development and adoption of water quality standards for arid areas and ephemeral streams.

(b) Procedural Guidelines. (from H.R. 3948) Allows government officials who derive a portion of their income from permitted facilities to serve on permit review boards.

§ 304. RISK ASSESSMENT. (Still being developed) Requires risk assessment to be done for each standard, effluent limitation, or other regulatory requirement (except for issuance of permits and purely procedural requirements), and related guidance, under the Clean Water Act.

§ 305. TOXIC POLLUTANTS.

(a) Toxic Effluent Limits and Standards. (Partially from H.R. 3948) Requires specific factors to be considered by EPA in promulgating effluent standards (or prohibitions) for toxic chemicals. Factors to be considered include: the pollutant's persistence, toxicity, degradability, and bioaccumulation potential; the magnitude of risk; the relative contribution of point source discharges to the risk; the availability of substitute chemicals; the beneficial and adverse social and economic effect; the availability of other regulatory authorities; and such other factors as the Administrator deems appropriate.

(b) Review of State Water Quality Standards. Requires that States review and revise their water quality standards once every five years, rather than once every three years as required under existing law.

(c) Fish Consumption Advisories. (from H.R. 3948) Authorizes EPA, in consultation with Federal and State agencies, to issue guidance on fish consumption advisories, monitoring for contaminants and testing protocols.

(d) Beach Water Quality Monitoring. (from H.R. 3948) Authorizes EPA, in consultation with Federal and state agencies, to issue guidance on beach water quality monitoring and the issuance of health advisories. EPA is to report on information available on State beach water quality monitoring.

§ 306. FEDERAL ENFORCEMENT.

(a) Penalty Limits. Provides for a consumer price index adjustment to automatically increase all penalty limits in the Act.

(b) Civil Actions Commenced by the Administrator. (from H.R. 3948) Clarifies that the Administrator may bring a civil action to require compliance or obtain other appropriate relief.

(c) Joining States as Parties in Actions Involving Municipalities. (from H.R. 3948) Joining States as parties to litigation involving municipalities made permissive rather than mandatory.

§ 307. FEDERAL FACILITIES. (from H.R. 3948) Amends existing Section 313 of the Act to clarify that Federal agencies are subject to all Federal, State, and local regulatory and enforcement authorities. Waives sovereign immunity. Provides for EPA administrative enforcement authority.

§ 308. CLEAN LAKES. Authorizes appropriations to carry out the Clean Lakes program at $30 M/yr. (FY 1995-2000).

§ 309. NONPOINT SOURCE MANAGEMENT PROGRAMS. (Based on consultations with the states) Requires each § 319 program to include "measures" to reduce pollutant loadings and may include "enforceable policies and mechanisms" and other methods to manage nonpoint sources so as to provide for a reasonable likelihood of attaining water quality standards within 15 years. Reasonable progress toward water quality standards attainment may be demonstrated by a variety of measures and mechanisms. Adequacy of Federal funding is a factor in determining reasonable progress. Authorizes EPA to review state programs and, in certain instances, to prepare and implement a program for a given state. Authorizes new or increased funding for technical and financial assistance by EPA including grants for preparing and/or implementing reports and programs. Increases the Federal cost share from 60% to 75% and requires EPA is directed to establish an allotment formula for distribution to the states. Expands eligible uses of funds. EPA authorized to withhold grants to states that are not in compliance. Increases funding levels from $300 M for FY94 to $759 M for FY 2000 with a $25 M/year cap on ground water/nonpoint source grants. Directs EPA to publish guidance on best management practices and measures for consideration by the States.

§ 310. NATIONAL ESTUARY PROGRAM. (part of provision from H.R. 3948) Correction of a spelling error in the listing of priority estuaries in existing law.

§ 311. POLLUTION PREVENTION. (Still being developed)

(a) Pollution Prevention Plans. Requires industrial dischargers of more than 200,000 lbs. of pollutants (including indirect dischargers) to prepare pollution prevention plans. The plans would identify pollutants covered by the plan, describe pollution prevention alternatives evaluated, establish goals and strategies and include information on measures implement. The plans would be retained on site and be protected from disclosure of confidential business information. Summaries would be available to the public.

(b) Toxic Reduction Action Plans. Requires that municipalities of over 250,000 with approved pretreatment programs and federally owned treatment works develop toxic reduction action plans. The plans would be designed to reduce the introduction of toxic and hazardous pollutants into the treatment works. Requires EPA to promulgate guidance within 18 months. Approval of the plans would be a precondition to approval of required pretreatment programs.

§ 312. STATE WATERSHED MANAGEMENT PROGRAMS. (Based on consultations with the states) Authorizes and encourages states to participate in voluntary watershed management programs. Necessary procedural and substantive components are described. Approved state programs and specific watershed plans could receive funding under various existing Clean Water Act authorities. Incentives for watershed management include: increased flexibility for issuance of point source permits (where point and nonpoint sources are striving towards attainment of water quality standards under a watershed plan); synchronized permit terms; 10-year permit terms; assumed compliance with CZARA coastal requirements; opportunities for pollutant transfers (trading); multipurpose grants; and additional planning set-asides.

§ 313. UNFUNDED MANDATES. (Still being developed) Include a provision on unfunded mandates.

TITLE IV – PERMITS AND LICENSES

§ 401. STORMWATER DISCHARGE PERMITS. (Still being developed) Amends current law to permanently exempt from permitting municipal separate storm sewers serving a population of

under 100,000 and non-industrial commercial activities. Also exempts construction sites of 5 acres or less and covered industrial facilities where stormwater does not come into contact with equipment, activities, materials or product. Facilities exempt from permitting would be subject to nonpoint source controls. Clarifies that existing permitted municipal discharges would not be required to comply with numeric effluent limitations or water quality standards. Municipal permits would require controls to reduce the discharge of pollutants to the maximum extent practicable and cost-effective. Adequacy of Federal funding is a factor in determining reasonable progress towards meeting the goals of the Act. Authorizes funding for cost-effective, innovative municipal stormwater control measures.

§ 402. COMBINED SEWER OVERFLOWS. (based on consultations with the states) Requires that permits for the discharge of combined sewer overflows be subject to the CSO policy announced by EPA on April 11, 1994. Authorizes permits calling for implementation of long-term control strategy of up to 15 years, including revisions to existing permit limits or compliance schedules established under existing law or judicial order.

§ 403. BENEFICIAL USE OF BIOSOLIDS. (from H.R. 3948) Requires the Administrator to issue guidance by 1/1/96 on the beneficial use of sludge (also referred to as "biosolids").

TITLE V – GENERAL PROVISIONS.

§ 501. EMERGENCY POWERS. Expands EPA's existing emergency authority to allow EPA to bring a court action to prevent imminent and substantial threat to the environment.

§ 502. NEEDS ESTIMATE. (from H.R. 3948) Authorizes the existing needs estimate to be prepared quadrennially rather than biennially.

§ 503. GENERAL PROGRAM AUTHORIZATIONS. (from H.R. 3948) Authorizes $775 million for FY 1995-2000 to carry out the Act.

TITLE VI – STATE WATER POLLUTION CONTROL REVOLVING FUNDS.

§ 601. WATER USE EFFICIENCY MEASURES. (from H.R. 3948) Authorize use of SRF funds to finance water use efficiency measures whose principal purpose is improving or protecting water quality.

§ 602. GUIDANCE FOR SMALL COMMUNITIES. (from H.R. 3948) Requires EPA to issue guidance within 1 year on simplified procedures to aid small communities in obtaining assistance under the SRF program.

§ 603. TYPES OF ASSISTANCE. (based on consultations with the states) Hardship communities would be eligible for extended repayment schedules of up to 30 years or negative interest rates of up to 2%. "Hardship" would be defined by the State based on guidance to be issued by EPA. No more than 20% of the total funding provided in any year may be for "hardship" assistance. No community may receive more than $20 million in loan forgiveness. States may use up to 2% of SRF grants for technical assistance to small communities.

§ 604. ALLOTMENT OF FUNDS. (from H.R. 3948) Provides for a new allotment formula based on

current needs.

§ 605. CAPITALIZATION MATCHING GRANTS. (Still being developed) Allows higher level of funding for states that overmatch or show a demonstrated higher state level of effort.

§ 606. AUTHORIZATION OF APPROPRIATIONS. (from H.R. 3948) Funds authorized to carry out the SRF program as follows:

FY 1992	$2.4 B
FY 1993	2.55 B
FY 1994	2.5 B
FY 1995	3.0 B
FY 1996	3.5 B
FY 1997	4.0 B
FY 1998	4.5 B
FY 1999	5.0 B
FY 2000	5.5 B

TITLE VII – MISCELLANEOUS PROVISIONS

§ 701. FINANCIAL ASSISTANCE FOR INTERNATIONAL WASTEWATER TREATMENT FACILITIES. Authorizes $50 M for 50% grants for construction of international wastewater treatment works for protection of U.S. residents from pollution originating in Mexico.

§ 702. WASTEWATER SERVICE FOR COLONIAS. (Still being developed) (from H.R. 3948) Authorizes the Administrator to provide 50% grants to colonias in the U.S.-Mexico border area. Up to $30 M in FY 94 and $30 million in FY 95 is authorized.

§ 703. INTAKE CREDITS. Requires the Administrator to provide intake credits for pollutants in a discharger's intake water.

§ 704. TECHNICAL AMENDMENTS. (from H.R. 3948)

TITLE VIII – WETLANDS (Include provisions of H.R. 1330)

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June 9, 1994

BY MESSENGER

The Honorable Norm Mineta
Chairman
Committee on Public Works & Transportation
United States House of Representatives
2165 Rayburn House Office Building
Washington, DC 20515

The Honorable Bud Shuster
Ranking Member
Committee on Public Works & Transportation
United States House of Representatives
2165 Rayburn House Office Building
Washington, DC 20515

938
Rogers
6/20/94

Dear Mr. Chairman and Mr. Shuster:

The National Realty Committee would like to submit the enclosed statement (with attachments) to be included in the hearing record for H.R. 3948, the "Water Quality Act of 1994," and the bipartisan alternative. Serving as Real Estate's Roundtable in Washington for national policy issues, NRC -- as well as its individual members -- has directed considerable resources and attention to environmental policy issues. NRC's members are America's leading real estate owners, advisors, builders, investors, lenders, and managers.

Recently, NRC has carefully considered policy issues concerning urban stormwater runoff and watershed planning. We are particularly concerned that the urban stormwater provisions in H.R. 3948 will inevitably result in enormous expenditures to collect and treat urban runoff with little, if any, improvement in water quality. This concern results, in part, from the requirement that urban runoff attain a more stringent standard than other nonpoint sources which are more

significant contributors to water quality problems. Other concerns of NRC include the potential application of national management measures, the potential for excessive litigation and citizen intervention, and the lack of sufficient federal funding.

Our statement details our specific concerns and offers the following recommendations:

1. Stormwater control should be subject to technology-based, rather than water quality based standards and should be no more onerous than the standard established for other nonpoint sources.

2. Stormwater management measures should be cost-effective and proportionate to the risk associated with such discharges. The availability of federal funding should be directly linked to the requirement to implement management measures and practices.

3. Adopt appropriate measures to address the priorities identified on a watershed basis.

4. Local land use authority should be explicitly protected.

5. Watershed planning must be a viable alternative to the management measures and practices otherwise required by the Act.

As part of our statement we have included specific legislative language to amend H.R. 3948 and the bipartisan alternative. We appreciate your considering these concerns and look forward to working with the Committee as you deliberate on amendments to the Clean Water Act. If you have questions or comments, please contact Roger Platt, NRC's Deputy Counsel for environmental affairs, at (202) 639-8400.

Sincerely,

Steven A. Wechsler
President

Enclosures

SAW/bkk

STATEMENT OF THE NATIONAL REALTY COMMITTEE
on H.R. 3948 and the Bipartisan Alternative

Submitted to the
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
U.S. HOUSE OF REPRESENTATIVES

June 9, 1994

INTRODUCTION

The National Realty Committee is pleased to submit this statement regarding "the Water Quality Act of 1994", H.R. 3948, and the bipartisan alternative to H.R. 3948. The National Realty Committee (NRC) serves as Real Estate's Roundtable in Washington for national policy issues. NRC's members are America's leading real estate owners, advisors, builders, investors, lenders, and managers.

The Clean Water Act has made great strides over the past 20 years in improving our nation's surface water quality. The success of the Clean Water Act can be attributed to clear objectives and the commitment of all levels of government to achieve those objectives. This must remain the guiding principle of the Clean Water Act if the next 20 years are to see the same degree of progress, particularly with respect to stormwater.

Unfortunately, the proposed legislation does not continue the partnership between local, state and federal governments that has facilitated water quality improvements over the past 20 years. Rather, the legislation before the committee, at least with respect to urban stormwater runoff, establishes a framework for the application of costly management measures that will yield little environmental benefit. As recently as last year the National Research Council concluded that any attempt to develop national strategies to improve water quality would either fail or would be excessive for many areas. The Council's report recommended that regional strategies should consider all pollutant sources, and management options should reflect social goals and priorities relative to risks, costs, and benefits.

To produce the greatest environmental benefit, the legislation must accurately address the stormwater problem. Stormwater is a nonpoint source of pollution, and urban stormwater runoff contributes far less to water quality impairment than other nonpoint sources. However, the legislation before the Committee imposes more onerous point source control requirements on stormwater and does not distinguish between the various types of runoff. All stormwater runoff is erroneously considered a priority source of pollution. As a result, the most costly mandates would be applicable to urban runoff without regard for its relatively minor contribution to water quality impairment.

NRC/NLC STUDY: "DEFINING THE URBAN STORMWATER RUNOFF PROBLEM"

The National Realty Committee, together with the National League of Cities, recently commissioned a study of urban stormwater runoff. Entitled "Defining the Urban Stormwater Runoff Problem," the report was prepared by the nationally recognized environmental engineering firm Montgomery Watson. The report reviewed the existing studies about the impacts of

stormwater runoff and surveyed several metropolitan areas throughout the country to determine if the stormwater programs initiated in 1987 have changed water quality. The authors of the report reached the following conclusions:

The urban stormwater runoff problem has been overstated. Conclusions about stormwater quality have been drawn based upon information reported by the states. However, many of the problems reported to EPA are not caused by municipal stormwater. These problem sources, which are regulated under different provisions of the Act, include leaking septic systems, CSO's and industrial site runoff. This has resulted in the prospect of burdensome yet unnecessary regulations being imposed on flows from commercial and residential areas which in most areas are not significant sources of stormwater pollution.

The urban stormwater runoff problem frequently has been described using outdated or over-generalized data. No stormwater permit has completed the 5-year term under the NPDES program. Therefore, the beneficial effects of measures employed over the past four years have not yet been calculated. In addition, other pollution control mandates, such as pretreatment and banning lead in gasoline, have had a positive impact on stormwater quality and yet their benefits have also not been taken into account.

Results of recent water quality surveys indicate that urban stormwater runoff is a small source of pollution compared to other sources. The most significant sources of stormwater quality problems are: agricultural activities, wastewater sewer overflows, municipal and industrial point sources, illicit discharges, and erosion. EPA reports estimate that only 4 to 10 percent of water quality impacts result from urban runoff.

Vast differences in hydrology, soils, vegetation, precipitation patterns, and land uses argue against national urban stormwater standards. The most recent EPA water quality survey illustrates the significant differences in the degree of water quality impairment that can be attributed to urban stormwater runoff. Any attempt to define guidance at the national level for treatment requirements or "best management practices" will either be very general and therefore not useful, or so specific as to result in impossible solutions that are not cost-effective.

Applying national end-of-pipe standards for urban stormwater discharges would be extremely costly and yield little environmental benefit. The American Public Works Association has estimated that the cost of meeting effluent limit standards would be at least $406 billion for construction of stormwater control and $543 billion annually for operation and maintenance costs. In fact, these estimates may be low because they do not include engineering, design, and property costs. The annual cost for achieving these standards could be up to 500 times more expensive than wastewater treatment because of the volume of water and the intermittent nature of storms.

ANALYSIS OF H.R. 3948 AND THE BIPARTISAN ALTERNATIVE

Considering the potential cost of stormwater regulations and the relatively minor contribution of urban stormwater runoff to water quality impairment, Congress should ensure that stormwater mandates are cost-effective and feasible. Our specific concerns regarding the legislation currently before the Committee include:

Costs: H.R. 3948 requires that municipal stormwater discharges make reasonable progress toward the attainment of end-of-pipe water quality standards by December 31, 2009. Thus, stormwater, which is essentially a non-point source, is required to meet the type of standard applied to industrial and wastewater discharges. The mandate to attain effluent discharge water quality standards is an inherently unworkable goal. It will inevitably lead to enormous expenditures in capital improvements and operation and maintenance, far eclipsing the cost of wastewater treatment which has been funded substantially by federal grants.

With no federal grants for stormwater controls and the prospect of only minimal federal loan assistance, the stormwater provisions of H.R. 3948 constitute a significant federal mandate with virtually no funding. Authorizing higher expenditures from the State Revolving Fund (SRF) does not solve the funding problem. Continuing federal deficits will limit the annual federal appropriations to capitalize the fund. In addition, the SRF is merely a loan program whose proceeds must be repaid, leaving local governments to foot the bill for stormwater management costs. Every dollar spent by a locality on stormwater control is a dollar that will not be spent on other essential local government services. Municipal utilities will be forced to impose new taxes or increase what some jurisdictions now call a "rain tax."

End-of-Pipe Water Quality Standards: Both H.R. 3948 and the bipartisan alternative defer the attainment of water quality standards "except to the extent necessary for implementation of management measures." This leaves open a back door for regulators and, perhaps more importantly, the courts to require numeric effluent limits, despite the general deferment until 2009. Our experience has been that with EPA's resources and enforcement capabilities stretched to the limit, litigation defines the reach of a regulatory program. For example, litigation is currently pending against at least three cities in Los Angeles County for failure to comply with stormwater permitting requirements despite the fact that their populations are far below the 100,000 threshold established by Congress.

National Management Measures: H.R. 3948 authorizes EPA to develop management measures and practices, with objective minimum performance standards for each management measure, to be incorporated into a stormwater management program. Such national management measures inevitably fail to recognize regional differences and local conditions and will result in rigid measures with numeric objectives that must be uniformly applied across the country. By contrast, the management measures proposed in the bipartisan alternative include criteria for cost-effectiveness, economic achievability, regional variations, and recognize the effectiveness of alternative approaches. We welcome the flexibility of the bipartisan alternative.

Citizen Actions: H.R. 3948 authorizes increased citizen activism in developing and enforcing Clean Water Act initiatives. This will result in increased litigation and regulation without necessarily providing for improved water quality. Allowing citizens to seek judicial review of every NPDES permit decision, intervene as a matter of right in any federal action or decision, petition EPA for regulation, and organize water quality monitoring teams will diminish the success this legislation has achieved over the past 20 years and place it in the company of other environmental statutes that are mired in litigation and regulatory inaction.

Construction Activities: H.R. 3948 exempts construction sites of less than five acres from NPDES permit requirements. While we welcome this exemption, we believe it is redundant to require separate permits for construction site runoff that discharges into a permitted municipal stormwater system. NRC recommends that the Committee require construction activities to be permitted indirectly as part of the municipal permit program.

Groundwater Recharge: Groundwater from all sources, including spreading basins and detention ponds (commonly used as a stormwater control technique) would be regulated as a point source of pollution under H.R. 3948. At best, this requirement will result in redundant regulation of stormwater discharges. It also could unnecessarily preclude the use of an essential management measure.

"Drinkable" Water Quality Objective: H.R. 3948 adds "drinkable" to the "swimmable" and "fishable" objectives of all waters of the United States. While this might be an appropriate goal, it becomes a requirement when water quality standards are established, raising them to unrealistic levels and mandating new regulatory measures to meet such high standards.

Grants: The bipartisan alternative allows for $20 million annually in stormwater grants. Anytime the total grant appropriation falls below $20 million the attainment deadline will be deferred one year. We welcome the availability of federal grant funds. However, this provision seems to assume that reasonable progress can be made with $20 million annually. The $300 million in federal grants over 15 years does not begin to address even the capital improvement costs of $408 billion that may be necessary to attain water quality standards. Compared to the $80 billion federal commitment for wastewater treatment over the past 20 years, the $300 million authorization is far too meager.

Land Use Control: H.R. 3948 calls for the application of the best available storm water control practices, technologies, processes, operating methods, and siting criteria. NRC is concerned that siting criteria can be used to override local land use decisions. This has been our experience with other environmental statutes.

We commend the bipartisan alternative for excluding "siting criteria" from its definition of management measures.

Risk and Cost-Benefit Analysis: The bipartisan alternative requires the analysis of risk when developing any regulations or standards under the Act and requires that social, environmental, and economic benefits must be reasonably related to the anticipated costs. We applaud this provision to ensure that stormwater management measures, as well as all other requirements under the Act, are reasonable considering their cost and benefit to the public and the environment.

RECOMMENDATIONS

1. Standards: Stormwater control should be subject to technology-based, rather than water quality-based standards. Site-specific standards should be established within each watershed, taking into consideration the degree of water quality impairment attributed to urban stormwater runoff. If a national standard must be achieved, the most appropriate standards are those established under Section 303 of the Act for receiving waters rather than effluent limitations. H.R. 3948 proposes that all non-point sources other than municipal stormwater discharges attain such standards. It is only appropriate that Section 303 standards be applied to stormwater considering the fact that stormwater is a nonpoint source whose contribution to water quality impairment is significantly less than other types of nonpoint source pollution. Why should municipalities be held to a higher, more costly, standard than other more egregious sources of pollution?

2. Cost-Effectiveness: Because of the enormous potential cost, the legislation should require the consideration of cost-effectiveness in the context of other water quality mandates within a watershed. The availability of federal funding should be directly linked to the requirement to implement management measures and practices.

3. Management Measures and Practices should be broad guidance to be applied according to the priorities of a given watershed. Qualitative rather than quantitative performance standards should be developed in order to allow states and localities the flexibility to adopt management measures that are cost-effective and appropriate for their region.

4. Federal Land Use Control: Clean Water Act amendments should, contain an explicit reaffirmation of local government's authority to determine land use. The proposed legislation contains references to "siting criteria" under management measures. While the impact of land uses on water quality must clearly be a factor in making land use decision, federal regulations should not usurp or abridge a local government's authority to ultimately determine land uses.

5. Watershed Planning: To be effective, watershed planning must be a viable alternative to the command and control approach of federal regulation. Once a watershed has developed an enforceable strategy to control priority sources of pollution, such a watershed plan should replace the otherwise mandated requirements of the Act. H.R. 3948 has taken significant steps in this direction by allowing for trading between point and nonpoint sources within a watershed to achieve water quality objectives. However, the legislation needs to be strengthened to ensure that the comprehensive watershed plan replaces management measures and practices otherwise mandated by the Act.

CONCLUSION

The members of NRC and their local and regional communities will benefit from efforts to protect and improve water quality and are prepared to incur a fair share of the costs necessary to accomplish that goal. It is imperative, however, that the progress achieved by the Clean Water Act continue by prioritizing our Nation's efforts in this area. The most significant sources of water impairment must be addressed first if efforts to address lower priority sources are to have any impact at all. We want to work with the Committee toward that end.

Included with this testimony is a copy of the NRC/NLC stormwater study, "Defining the Urban Stormwater Runoff Problem" and specific legislative language to amend H.R. 3948 and the bipartisan alternative. We hope the Committee will draw from this material to develop a feasible and cost-effective approach to stormwater management.

H.R. 3948
PROPOSED AMENDMENTS

The following amendments are proposed to make watershed management a viable alternative for managing nonpoint source discharges, and to provide that expenditures for management measures and practices are appropriate for the degree of water quality impairment attributed to urban stormwater. Amendments are also proposed to protect the land use authority of local governments and reduce the potential for unwarranted administrative and judicial review of permits and other governmental actions. Following each proposed amendment is a brief explanation in *italics* of the amendment.

The amendments are grouped into the following categories:

- STORMWATER DISCHARGE PERMITS
- WATERSHED MANAGEMENT
- NPS MANAGEMENT MEASURES AND PRACTICES
- WATER QUALITY CRITERIA FOR NONPOINT SOURCES
- LAND USE AUTHORITY
- RIGHT OF INTERVENTION
- JUDICIAL REVIEW OF NPDES PERMIT DECISIONS

STORMWATER DISCHARGE PERMITS

Page 78, line 18: After "REQUIRED.--" add "Except for activities located in state or local government jurisdictions enrolled in a state watershed management program under Section 322,"

Page 79, line 12: After the word "not" add "significantly"

Page 79, lines 13 and 14: After the word "with" delete "or do not come into contact with"

The industrial discharges which the Administrator may exempt from discharge requirements are those discharges which are not significantly contaminated by contact with stormwater runoff.

Page 80, line 4: Add after "a" and before "violation" the word "significant"

In addition to the industrial and municipal discharges subject to these stormwater discharge requirements, the Administrator may add other discharges that significantly contribute to a water quality violation.

Page 80, after line 11: Add the following:

"In the event that--

(1) a state fails to submit a plan for a specific watershed are in accordance with the schedule adopted pursuant to Section 322(b)(4);

(2) a state fails to submit to and have approved by the Administrator any plan disapproved by the Administrator under Section 322(c) within one year of the initial disapproval by the Administrator; or

(3) a revocation of approval occurs under Section 322(f)

all activities under this section within the applicable watershed are shall be subject to the permit requirements established under this section."

In the event that a state fails to submit or receive approval for a watershed plan, all activities within the watershed shall be subject to the stormwater management requirements of Section 402(p).

Page 81, line 3: After "practicable" add "and economically feasible."

Page 81, line 11: After the word "under" add "Section 303 of."

The applicable water quality standards for

municipal stormwater will be those standards established for receiving waters under Section 303 of the Act.

Page 81, lines 15 through 23: Delete everything after the word "shall" and add "be revised to be consistent with the provisions of this Act."

As existing permits are renewed, they will be revised to be consistent with the requirements of this Act. The proposed language in H.R. 3948 appears to require management measures to attain water quality standards within the next 5-year period of a revised NPDES permit, rather than by 2009.

Page 82, after line 10: Add the following new paragraph and reletter subsequent paragraphs accordingly:

"(D) DELEGATION OF AUTHORITY UPON THE APPROVAL OF A STATE WATERSHED MANAGEMENT PROGRAM.--Upon the approval of a state watershed management program pursuant to Section 322, all permit requirements and authority established pursuant to this section shall be delegated to the state for implementation in accordance with state oversight and evaluation under Section 322(b)(9)."

Page 82, lines 19 through 22: Delete everything after "2009."

Numeric effluent limits and attainment of water quality standards shall not be required prior to December 31, 2009. The proposed language in H.R. 3948 explicitly defers such requirement and then provides an ambiguous exception for purposes of imposing future regulations. The exception is too broad and could easily result in numeric standard being imposed despite the deferment.

Page 85, line 9: After the word "measures" add ", including consideration of stormwater project costs per household and the cumulative impact of water quality control requirements within a watershed."

Consistent with the proposed policy statement, stormwater management measures must be affordable and considered in the context of the cumulative cost of water control requirements for an area. Such a specific cost containment provision is appropriate because of the significant potential cost of controlling stormwater.

Page 85, line 12: Add after "which" "incorporate reasonable efforts to"

Page 85, line 14: After the word "available" add "feasible."

Page 85, line 15: Delete words "siting criteria".

Page 85, line 16: Delete the word "The" and add the following:

"Management measures are intended to define broad management systems and are not intended to prescribe specific management measures uniformly applicable nationally or regionally. In order to provide guidance that will allow for adaptation of management measures to diverse local conditions, the"

Page 85, line 17: Delete words "objective minimum" and add "qualitative."

EPA shall develop qualitative rather than object minimum performance standards in order to allow states and localities the flexibility to adapt management measures that are cost-effective and appropriate for their region.

Page 85, line 18: Delete word "standards" and add "criteria."

Page 85, line 19: Add after the word "measure" "such that reasonable further progress toward attainment can be effectively assessed."

WATERSHED MANAGEMENT

Page 5, Add after line 3 the following:

"(f) STATEMENT OF CONGRESSIONAL POLICY.--Section 101(33 U.S.C. 1251) is amended by adding at the end the following new subsection:

(h) It is the policy of Congress to encourage the development and implementation of comprehensive watershed management to maintain and enhance water quality, to restore and protect the living resources supported by waters, and to ensure that waters are of a quality sufficient to meet human needs, including water supply and recreation.

(i) It is the policy of the Congress that programs for achieving the objectives of the Act be developed in each watershed, that the highest priority for such programs be given to controlling the sources of water pollution that have the most significant adverse impact on the objectives of the Act and that the cost-effectiveness and economic impact of proposed control measures be fully incorporated into definitions of management measures and practices for controlling nonpoint sources of pollution, including stormwater discharges."

Policy statements are added to clarify that the objectives of the Act include the development of watershed management plans and that priorities be established within each watershed to focus cost-effective and economically feasible management measures on those priorities, particularly for controlling nonpoint source discharges.

Page 50, line 15: Add after the word "shall," "for all jurisdictions not enrolled in the Section 322 state watershed management program,"

The EPA Administrator would propose best management measures only for those nonpoint sources not included in a watershed management program.

Page 51, line 2: Add at the end thereof "or, in the case of an area enrolled in a state watershed management program under Section 322, such measures and practices as identified in the state watershed management plan;"

A watershed management program may be submitted for approval to EPA as an alternative to the stormwater management program outlined in Section 402(p).

Page 54, line 12: Add at the end thereof "This subsection shall not apply to an area enrolled in a State Watershed Management Program pursuant to Section 322."

The EPA Administrator would propose best management measures only for those nonpoint sources not included in a watershed management program.

Page 56, line 9: Add after "(b)" "or a State Watershed Management Program under Section 322"

Nonpoint sources within an area enrolled in a state watershed management program under Section 322 would be subject to those management measures and practices identified in the watershed program.

Page 69, line 14: Add after "Application.--" "As an alternative program to the stormwater discharge permit requirements of Section 402(p) and in furtherance of the goals of Section 319,"

Additional management measures prescribed by EPA would not apply to nonpoint sources covered by a watershed management program.

Page 71, line 15: Add after "2009" ",or an attainment date approved by the Administrator in response to a demonstration by a state that special economic, social or environmental factors preclude attainment by the date specified in this subsection."

The water quality standards attainment date may be extended beyond 2009 if a state demonstrates that special economic, social, or environmental factors preclude attainment by 2009.

Page 72, after line 11: Add the following and renumber paragraphs:

"(7) PROGRAM REQUIREMENTS.--Each management program submitted to the Administrator under this subsection shall include the following:

(A) An identification of each category, subcategory, or particular nonpoint source designated under subsection (c)(2)(A) that contributed to the impairment of waters listed pursuant to subsection (a)(1).

(B) A description of the program (including appropriate non-regulatory or regulatory programs for enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects) to be carried out to control pollution added to water from nonpoint sources.

(C) A certification of the attorney general (or equivalent official) of the State stating that the laws of the State provide sufficient authority to ensure the implementation of the management program of the State, including, at a minimum, the authority to seek injunctive relief for the failure to implement and carry out a measure pursuant to subparagraph (B)."

This language, similar to S.1114, describes the elements of a watershed management program.

Page 72, line 14: After "program" add ",including periodic determinations to ensure that reasonable further progress within the economic capability of sources within the watershed is being made in relation to program objectives."

The monitoring requirement is revised to allow for periodic determinations of the effectiveness of the watershed management program within the economic capability of sources within the watershed.

Page 73, line 2: After "minimum" add "planning"

Page 73, after line 4: Add the following new paragraph and reletter subsequent paragraphs accordingly:

"(d) SITE-SPECIFIC WATER QUALITY PLANS.--

(1) IN GENERAL.--

(A) SOURCES.--Each State management program that is approved by the Administrator pursuant to subsection (d) shall provide that sources of nonpoint pollution, including agricultural sources and municipal stormwater runoff, may implement a site-specific water quality plan in lieu of implementing the management measures described in subsection (c).

(B) AGRICULTURAL SOURCES.--With respect to agricultural sources that implement a plan referred to in subparagraph (a), the Secretary of Agriculture shall assist States in the development and implementation of the plans to the fullest extent practicable.

(2) REQUIREMENTS FOR PLAN.--Each plan developed pursuant to paragraph (1) shall--

(A) provide for the implementation of management measures that--

(i) are appropriate to the site;

(ii) are economically achievable by the owner or operator of the source; and

(iii) will result in a significant reduction in nonpoint pollution from the source;

(B) recognize and incorporate appropriate management measures in place at the site at the time the plan is developed;

(C) establish schedules for the implementation of management measures as expeditiously as practicable, but not later than 3 years after the date of initiation of the plan;

(D) provide for a periodic assessment of the implementation of

the plan and the effect of management measures; and

(E) be reviewed every 5 years after the date of initiation of the plan.

(3) AGRICULTURAL PLANS.--To assist in the development of site-specific water quality plans for agricultural sources pursuant to this subsection, each State with a management program that has been approved by the Administrator pursuant to subsection (d) shall develop a local handbook that is consistent with local field technical guides of the Soil Conservation Service of the Department of Agriculture.

(4) PLAN APPROVAL.--Each plan developed pursuant to paragraph (1) shall be reviewed by an appropriate official of the Federal or State agency specified in the management program developed pursuant to subsection (b). If the plan meets the requirements of paragraph (2), the official shall approve the plan.

(5) EFFECT OF EXISTING PLANS THAT PROTECT WATER QUALITY.--

(A) IN GENERAL.--An owner or operator of a nonpoint source who, as of the date of enactment of this paragraph, complies with the requirements of--

(i) a plan developed pursuant to the conservation reserve program established under subchapter B of chapter 1 of subtitle D of title XII of the Food Security Act of 1985 (16 U.S.C. 3831 et seq.) and is implementing the plan; or

(ii) a plan developed pursuant to the agricultural water quality protection program established under chapter 2 of subtitle D of title XII of the Food Security Act of 1985 (16 U.S.C. 3838 et seq.) and is implementing the plan.

shall be deemed to satisfy the requirements of paragraph (1).

(B) ADDITIONS TO EXISTING PLANS.--If the State determines that a portion of the land area of an owner or operator described in subparagraph (A)--

(i) is not covered by an applicable plan referred to in such subparagraph; and

(ii) is contributing to the impairment of a water listed pursuant to subsection (a)(1), the State shall require the owner or operator to develop a plan for the land area pursuant to the requirements of paragraph (2), unless the owner or operator is complying with management measures consistent with the guidance published pursuant to subsection (c).

(C) REVISED PLANS.--If a plan referred to in subparagraph (A) is revised, the plan shall be deemed to satisfy the requirements of paragraph (1) if the plan is consistent with the requirements of paragraph (2)."

Site-specific water quality plans for nonpoint sources could be developed in lieu of other prescribed management measures. This is similar to provisions in S.1114.

Page 73, After line 9: Add the following new paragraph and reletter subsequent paragraphs accordingly:

"(e)(1) APPROVAL OF CERTAIN PLANS.--Any watershed management plan that has been approved by the Administrator pursuant to

section 320(f), and any plan developed pursuant to section 525 of the Water Quality Act of 1987 (33 U.S.C. 1375 note), shall be considered to have been approved by the Administrator for the purposes of this paragraph.

(2) APPLICABILITY OF OTHER PROGRAMS.--A State or area of a State that has in effect a program approved pursuant to section 6217(b) of the Coastal Zone Act Reauthorization Amendments of 1990 (16 U.S.C. 1455b(b)) shall be considered to meet the requirements of this subsection."

To eliminate redundancy in management programs, watershed and coastal zone management programs which address nonpoint source discharges are considered to meet the requirements of this section.

Page 74, after line 16: Add the following new paragraph and renumber subsequent paragraphs accordingly:

"(1) DELEGATION OF AUTHORITY OVER MUNICIPAL AND INDUSTRIAL STORMWATER DISCHARGES.--Upon approval of a state watershed management program by the Administrator, the authority to exercise municipal and industrial stormwater discharge requirements and associated permits under Section 402(p) (33 U.S.C. 1342) shall be exercised by the state in a manner provided for in the approved state program."

Once a watershed management program has been approved by the Administrator of EPA, the administration of municipal and industrial permits shall be transferred to the state to be implemented in the manner outlined in the watershed plan.

NPS MANAGEMENT MEASURES AND PRACTICES

Page 61, line 4: After "which" add "incorporate reasonable efforts to"

Page 61, line 6: After the word "available" add "feasible."

The word "feasible" is added to ensure that best available control practices are also feasible.

Page 61, line 7: Delete the words "siting criteria."

The words "siting criteria" are deleted to ensure that federal guidance is not interpreted as land use control. Siting criteria differ significantly with climate, topography, hydrology, and other site-specific factors. Federal management measures could not possibly be responsive to such specific needs, and would most likely result in misinterpretation.

Page 61, after line 8: Add the following:

"(4) SCOPE OF MANAGEMENT MEASURES AND PRACTICES.--The management measures defined pursuant to this subsection shall identify broad management systems capable of being adapted to specific local climatic and hydrologic conditions rather than specific measures applied uniformly throughout the nation. The management practices defined pursuant to this subsection shall be provided by the Administrator solely for informational purpose with the selection and application of such practices at the discretion of state and local government as applicable."

The scope of management measures and their intent is clearly defined to ensure that federal guidance is provided for informational purposes to assist states and localities in adopting those measures and practices that will be most cost-effective and responsive to local conditions.

WATER QUALITY CRITERIA FOR NONPOINT SOURCES

Page 26, line 18 through 25 and Page 27, lines 1 through 3: Delete.

Hydrological conditions vary so greatly across the country that establishing water quality criteria for nonpoint sources would be an impossible task for the Agency and most likely would result in inappropriate standards for the diverse regions of the country.

LAND USE AUTHORITY

Add the following new section:

"Sec. . LAND USE AUTHORITY.--Nothing in this act constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in the act provides or transfers authority over such land use."

This provision is similar to a provision enacted with the Clean Air Act Amendments of 1990. As federal and state agencies implement the mandates of the Clean Water Act, the land use authority of local governments must be expressly protected to ensure that land use decisions remain the final purview of local government.

RIGHT OF INTERVENTION

Page 47, lines 2 through 4: Delete everything after the word "Act."

The right of any individual to intervene in any federal action opens the potential for countless law suits. The Clean Water Act can be enforced and citizen suits permitted without inviting legal action for every federal action taken. Our experience with Superfund clearly demonstrates that expending precious financial resources on legal challenges does not necessarily improve environmental quality.

JUDICIAL REVIEW OF NPDES PERMIT DECISIONS

Page 77: Delete lines 19 through 22.

This provision invites excessive legal action. Water quality violations should be the primary focus of judicial review, not permitting decisions.

BIPARTISAN ALTERNATIVE
PROPOSED AMENDMENTS

STORMWATER DISCHARGE PERMITS, SEC. 402(p)

Page 76, line 20: Add the following new sentences:

"For purposes of this section, a "discharge composed entirely of stormwater" shall include any discharge from a municipal separate storm sewer system, except for illicit connections. A "municipal separate storm sewer system" means any municipal storm sewer system that is not a combined sewer system."

Page 79, line 6: Add after the word "system" the following:

"unless such discharges are expressly authorized by the permitting authority."

Page 83, line 13: Add ", except as otherwise provided under this section" after the word "permittee"

> *These modifications are necessary to ensure that permitted non-stormwater conveyances in a storm sewer system may continue. For example, reclaimed water or water transported to spreading basins for groundwater recharge purposes is conveyed through municipal storm sewer systems. Such legitimate non-stormwater discharges should be allowed to continue despite the prohibition on non-stormwater discharges.*

Page 79, line 17: Add "Section 303" after the word "under"

Page 84, line 22: Add "Section 303" after the word "under"

> *The applicable water quality standards for municipal stormwater will be those standard established for receiving waters under Section 303 of the Act, the same standard as that proposed for all other nonpoint sources.*

Page 81, lines 19 though 22: Delete everything after "2009."

> *Numeric effluent limits and attainment of water quality standards shall not be required prior to December 31, 2009. The proposed language explicitly defers such requirement and then provides an ambiguous exception for purposes of imposing future regulations. The exception is too broad and could easily result in numeric standards being imposed despite the deferment.*

Add the following new section:

"Sec. LAND USE AUTHORITY. -- Nothing in this act constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in the act provides or transfers authority over such land use."

This provision is similar to a provision enacted with the Clean Air Act Amendments of 1990. As federal and state agencies implement the mandates of the Clean Water Act, the land use authority of local governments must be expressly protected to ensure that land use decisions remain the final purview of local government.

MONTGOMERY WATSON

Defining The Urban Stormwater Runoff Problem

February 1994

Prepared for:

National League of Cities
National Realty Committee

MONTGOMERY WATSON

February 3, 1994

National League of Cities
and National Realty Committee

Montgomery Watson is pleased to provide this paper on defining the urban stormwater problem. As Congress considers amendments to the 1987 Clean Water Act, the impacts of non-point source discharges must be clearly understood. This understanding is imperative to structure control strategies that will yield the greatest benefit at the least cost. This assessment includes a review of current knowledge of the impacts of urban stormwater runoff and summarizes the findings of studies completed for Congress, the U.S. Environmental Protection Agency, and other entities.

This report includes an Executive Summary with concise conclusions and recommendations of this report, a summary of studies concerning urban stormwater runoff completed in the past 15 years, a discussion of cost implications of stormwater quality controls, and brief summaries of watershed management programs that several communities have implemented.

In summary, this report found that the impacts of urban stormwater runoff need to be separated from the impacts of other non-point sources such impacts of: agricultural and industrial site runoff, erosion, and wastewater overflows and leaking septic systems. In addition, it appears that the most effective strategy for stormwater management is to use a watershed management approach that will allow local problems to be identified and prioritized. It would be extremely difficult to approach this problem with national standards due to the wide variety of watershed characteristics and storm events. National standards would result in many oversized and unnecessary facilities. Rather it would be more appropriate to develop watershed-specific programs.

If you have any questions concerning this paper, please contact us.

Very Truly Yours,

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Serving the World's Environmental Needs

EXECUTIVE SUMMARY

PURPOSE OF THE REPORT

As Congress considers amendments to the 1987 Clean Water Act, the impacts of non-point source discharges must be clearly understood. This understanding is imperative to structure control strategies that will yield the greatest benefit at the least cost. At this time, the impacts of urban stormwater runoff are not clearly understood because the specific effects have been masked by the greater impacts of industrial, agricultural, erosion, point source discharges, and wastewater overflow discharges.

An Understanding of the Extent of Urban Stormwater Problems and Other Types of Stormwater Pollution is Imperative Prior to Initiating National Urban Stormwater Quality Programs

This assessment includes a review of current knowledge of the impacts of urban stormwater runoff. Reports completed by the U.S. Environmental Protection Agency (EPA) and other agencies relating to urban stormwater runoff have been summarized in an attempt to define "water quality impairment due to urban stormwater runoff". In addition, several metropolitan areas throughout the nation were contacted to determine if new stormwater quality programs initiated in response to the 1987 Clean Water Act Amendments had changed water quality.

OVERVIEW

The nature of stormwater discharges is significantly different from that of wastewater point source discharges. Congress recognized these differences by establishing a separate National Pollutant Discharge Elimination System permit process for non-point source discharges and by defining a separate standard for stormwater based on the "maximum extent practicable" management measures. The stormwater program established by Congress in 1987 incorporated a phased program intended in part to provide the information base for a more comprehensive program to be developed when Congress re-authorized the Clean Water Act.

The National Urban Runoff Program (NURP) study completed in 1983 is often cited as the basis for stormwater management programs. However, the NURP study indicated that agriculture, erosion, and wastewater were the primary causes of water quality impairment due to storm events. In addition, NURP suggested that illicit connections to storm drains be eliminated and local water quality strategies should be developed.

The Urban Stormwater Runoff Problem has been Overstated. Agriculture, Erosion, Wastewater Overflows, and Leaking Septic Systems are the Major Causes of Water Quality Impairment, not Urban Stormwater Runoff

The findings that agriculture, erosion, wastewater overflows, and leaking septic systems are the major causes of water quality impairment have been reiterated in several EPA reports. The EPA and other agencies also found that many pollutant sources attributed to "urban runoff" are not caused by discharges from residential and commercial areas. The "urban runoff" problem is frequently caused by discharges from marine vessels, shipyards, marinas, leaking septic systems, industrial sites, and erosion of stream channels and shorelines.

The need for local water quality strategies, preferably on an integrated watershed basis, has been supported by the National Research Council in a report for EPA and Congress. The findings of the National Research Council indicated that regional strategies should consider all pollutant sources and integrate policies for air, water, and land. The study also stated that local management options should reflect social goals and priorities relative to risks, costs, and benefits. The plans must be flexible to allow changes based on information collected after new management programs are implemented. This could allow agencies to eliminate non-viable programs or improve ongoing programs.

COST IMPLICATIONS

This assessment clearly indicates that expenditures for new regulatory stormwater control strategies should be limited until studies can be completed to define the effectiveness of ongoing water quality management programs and the extent of the remaining problem. Additional studies should be conducted on a watershed basis to accurately identify pollutant sources and prioritize solutions.

To the extent that existing and future watershed studies identify urban runoff as a specific problem, additional measures should be employed that are appropriate for each watershed.

Costs for Treatment of Stormwater From Residential and Commercial Areas in Major Metropolitan Communities Throughout the United States Could be Over $406 Billion for Construction and Over $543 Billion Each Year for Operation and Maintenance

Cost implications of national effluent and/or treatment standards were evaluated in a recent study by the American Public Works Association of Southern California. The study identified a potential range of national costs of $147 million to $406 billion for construction of stormwater controls and $1.1 billion/year to $543 billion/year for operation and maintenance.

The costs shown in Figure 1 (located at the end of this section) are conservative estimates and may be as much as 50 percent low because the costs do not include the cost of stormwater pipelines, land and permits for the treatment facilities, and design costs.

Annual Costs for Improving Stormwater Quality could be up to 500 times more Expensive than Wastewater Treatment Because of the Volume of Water and Intermittent Nature of Storms

These costs can be compared to the costs of providing municipal wastewater treatment. Since 1972, municipalities throughout the nation have spent about $76 billion for construction (with about $50 billion funded through federal grants). These municipalities continue to spend $1.1 to 1.8 billion/year for operations and maintenance. It should be noted that these costs primarily remove solids and organic materials. This would be comparable to Level 4 Best Management Practices, as shown in Figure 1. The Level 5 treatment represents a treatment level significantly higher than most wastewater treatment plants provide, as shown in Figure 1. The Level 5 controls would be mandated if national stormwater discharge standards were required to meet national water quality standards.

Several agencies across the country have implemented watershed programs. These watershed programs have led to less costs than costs for complete stormwater treatment. For example, these agencies implemented what was approximately equivalent to non-structural controls, or Level 2 in the APWA study. If these agencies had implemented complete stormwater treatment to remove solids, metals and microorganisms, as described under Level 5 in the APWA study, the construction costs would be significantly higher, based on data presented in the APWA report, as shown in Figure 2.

Results of Recent Water Quality Surveys Indicate that Urban Stormwater Runoff is a Small Source of Stormwater Pollutants. Applying National End-of-Pipe Standards for Urban Stormwater Discharges Would be Extremely Costly

CONCLUSIONS

Based upon this review of studies completed over the past 15 years and discussions with stormwater quality management agencies throughout the nation, the following specific conclusions are provided.

- The urban stormwater runoff problem has been overstated.
- The urban stormwater runoff problem frequently has been described using old or over-generalized data.
- Results of recent water quality surveys indicate that urban stormwater runoff is a small source of stormwater pollutants compared to other non-point sources (less than 4 percent in some categories of receiving waters).
- Future monitoring results are needed to identify the extent of remaining urban stormwater quality problems and the cost-effectiveness of control strategies and measures.
- Applying national end-of-pipe standards for urban stormwater discharges would be extremely costly.
- Vast differences in hydrology, soils, vegetation, precipitation patterns, and land uses argues against national urban stormwater discharge standards.
- Proposed urban stormwater quality controls and national water quality standards would require urban areas to fund costly facilities to collect and treat stormwater flows while not addressing for more significant sources.

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Existing Programs for Source Controls Should be Continued and Watershed Management Programs Should be Implemented to Evaluate Identify and Address Water Quality Problems

RECOMMENDATIONS

A watershed evaluation approach would identify the most significant stormwater pollutant sources, including pollutant discharges from industrial sites, agricultural areas, and leaking septic systems. Therefore, based upon the findings presented in this paper, the following recommendations are presented.

- Continue and expand the use of initial "good-housekeeping" and public education measures that are currently being implemented by most metropolitan areas.
- Continue the Stormwater National Pollutant Discharge Elimination System permit programs for industrial and hazardous waste sites.
- Limit the scope of measures for urban runoff in a watershed to primarily non-structured measures until non-point source problems are understood.
- Develop and initiate a watershed approach applicable to <u>all</u> pollution sources to identify and address water quality problems.
- Develop watershed water quality plans that address water quality constraints, opportunities, and priorities within the framework of the unique physical and economic situation each watershed.

By identifying the specific sources of stormwater quality impairment, pollution control efforts can be targeted and made more effective. This approach would save billions of potentially unnecessary construction dollars and annual operation and maintenance dollars that are needed for other programs and services.

LEVELS OF BEST MANAGEMENT PRACTICES

LEVEL 1

NON-STRUCTURAL SOURCE CONROLS

- Prevent Illicit Discharges
- Increased Street & Sidewalk Sweeping
- Clean Storm Drains

LEVEL 2

MINOR STRUCTURAL SOURCE CONTROLS

- Diversion Channel
- Grass Swales
- Improve Natural Channels to Reduce Erosion
- Plant Vegetation on Exposed Soils

LEVEL 3

FLOATABLES AND OIL REMOVAL

- Parking Lot Oil/Grease Separators
- Parking Lot and Rooftop Runoff Storage and Separators

LEVEL 4

SOLIDS REMOVAL

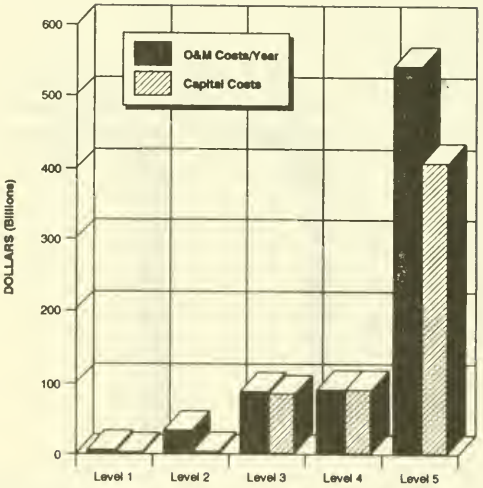
- Detention Basin
- Primary Clarifiers
- Swirl Concentrators
- Screens
- Wetlands

LEVEL 5

METALS REMOVAL

- Detention Basins and Wetlands
- Primary Clarifiers and Lime Precipitation

ESTIMATED NATIONAL COSTS TO IMPLEMENT BEST MANAGEMENT PRACTICES ALTERNATIVES (IN BILLION DOLLARS)



Source APWA 1992
ENR 4900

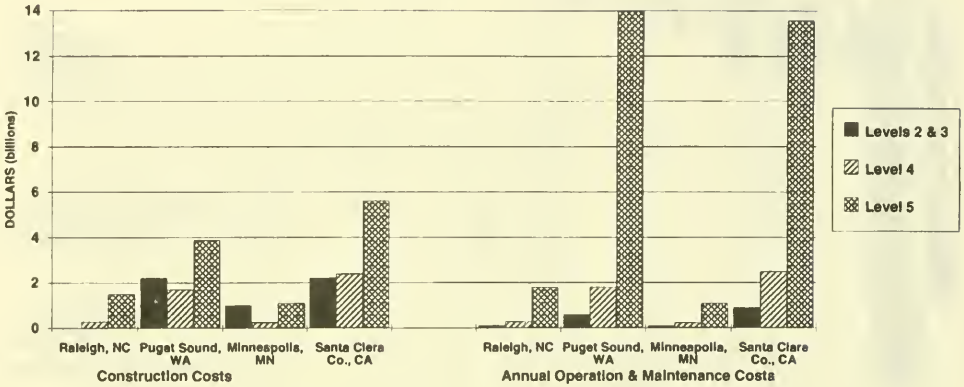
Note Costs do not include pipelines land, permits, or design costs
Therefore costs could increase by 20 to 50 percent

FIGURE 1

FIGURE 2

ESTIMATED COSTS TO IMPLEMENT BEST MANAGEMENT PRACTICES ALTERNATIVES IN SELECTED COMMUNITIES

(Source: APWA 1992)



MONTGOMERY WATSON

Defining The Urban Stormwater Runoff Problem

February 1994

Prepared for:

National League of Cities
National Realty Committee

Montgomery Watson is an employee-owned environmental engineering firm with over 2300 employees in 65 offices worldwide. In the 45 offices in the United States, Montgomery Watson specializes in water and wastewater planning and design projects conducted for federal, state, and local agencies. Many of these projects have included assessments of receiving waters to identify sources of pollution and development of plans to reduce or eliminate pollutant discharges.

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DEFINING THE URBAN STORMWATER RUNOFF PROBLEM

PURPOSE OF THE REPORT

Various reports completed since the early 1960s by the U.S. Environmental Protection Agency (EPA) and other agencies have indicated that urban stormwater runoff may impair receiving water quality. However, these reports have not been able to identify the degree of impairment, the extent of the problem, or the costs and benefits of the solution.

As Congress considers amendments to the 1987 Clean Water Act, the impacts of non-point source discharges need to be clearly understood. This understanding is imperative to structure control strategies that will direct limited resources to valid needs. At this time, the impacts of urban stormwater runoff are not clearly understood because the specific effects have been masked by the greater impacts of industrial, agricultural, erosion, point source discharges, and combined sewer systems (CSOs) discharges. Most studies indicate that urban runoff causes less than 10 percent of the total non-point source pollution problem.

An Understanding of the Extent of Urban Stormwater Problems and Other Types of Stormwater Pollution is Imperative Prior to Initiating National Urban Stormwater Quality Programs

The purpose of this paper is to assess the current level of knowledge of and the current regulatory and legislative approach to addressing the impacts of urban stormwater runoff. To meet that objective, this paper provides a summary of reports by the EPA and other agencies relating to urban stormwater runoff that were prepared in an effort to define "water quality impairment due to urban stormwater runoff". In preparing this report, several metropolitan areas throughout the nation were contacted to determine if new stormwater quality programs initiated in response to the 1987 Clean Water Act Amendments had changed water quality.

OVERVIEW

Overall, EPA and other agency reports have found that the most significant contributor to stormwater pollution is agriculture, and that many pollutant sources attributed to "urban runoff" are not caused by discharges from residential and commercial areas. The "urban runoff" is usually caused by discharges from marine vessels, shipyards, marinas, leaking septic systems, industrial sites, and erosion of stream channels and shorelines.

Proposed programs for "urban stormwater runoff" will not reduce the major causes of stormwater pollution and may not be necessary after concurrent water quality programs are completed.

CONCLUSIONS

Based upon this review of existing studies and discussions with stormwater quality management agencies throughout the nation, specific conclusions are as follows.

Results of Recent Water Quality Surveys Indicate that Urban Stormwater Runoff is a Small Source of Stormwater Pollutants. Applying National End-of-Pipe Standards for Urban Stormwater Discharges Would be Extremely Costly

- **The urban stormwater runoff problem has been overstated.** Reported urban stormwater runoff problems frequently include problems due to erosion, leaking septic systems, CSOs, and industrial site runoff. These problems have been recognized and are regulated under different portions of the Clean Water Act. The proposed urban stormwater programs would only treat pollutant sources and flows from residential and commercial areas rather than more significant sources of non-point source pollutants.

- **The urban stormwater runoff problem frequently has been described using old or over-generalized data.** Therefore, impacts due to stormwater runoff and the beneficial effects of measures employed over the past several years cannot be specifically defined.

Specific Water Quality Control Plans Can be Developed for Agricultural Runoff and Sediment Source Controls, Industrial Site Runoff and Discharge Source Controls, Sanitary Sewer and Leaking Septic System Overflows, and the Remaining Urban Stormwater Runoff Flows

- **Results of recent water quality surveys indicate that urban stormwater runoff is a small source of stormwater pollutants compared to other non-point sources (less than 4 percent in some categories of receiving waters).** Rather, the most significant sources of stormwater water quality problems are:

  - Agricultural Activities
  - Non-point Natural Sources
  - Wastewater Sewer Overflows
  - Municipal and Industrial Point Sources
  - Illicit Discharges
  - Erosion from Disturbed Soils

- Future monitoring results are needed to identify the extent of remaining urban stormwater quality problems and the cost-effectiveness of control strategies and measures. The programs to reduce the other types of stormwater runoff pollution (noted above) were only recently implemented and will probably reduce the overall water quality problem. There is a need to evaluate the effectiveness of current urban runoff programs before considering additional regulatory measures.

- Applying national end-of-pipe standards for urban stormwater discharges would be extremely costly. The costs and potential disruption associated with trying to capture and treat stormwater from existing urban areas are so great as to necessitate careful and thorough analysis of the nature and degree of the problem areas and potential alternative solutions.

A Watershed Management Approach Will Address the Most Significant Pollutant Sources, Thereby Reducing the Amount of Stormwater Flows that Require Treatment, Prioritize Solutions, and Lead to Solutions that are Funded Equitably by the Pollutant Sources

- Vast differences in hydrology, soils, vegetation, precipitation patterns, and land uses argue against national urban stormwater standards. Any attempt to define guidance at the national level for stormwater treatment requirements or "best management practices" will either be very general and therefore, not useful; or too specific as to result in impossible solutions that are not cost-effective.

- Proposed urban stormwater quality controls and national water quality standards would require urban areas to fund costly facility to collect and treat most of the stormwater flows while not addressing for more significant sources. However, these types of controls will be extremely costly and will not eliminate the majority of stormwater pollutants.

RECOMMENDATIONS

Based upon the inconclusive nature of stormwater runoff studies, it is important that stormwater control strategies are based upon additional studies that define the specific impacts on ongoing water quality management programs and the extent of the remaining problem. Additional studies should be conducted on a watershed basis to accurately identify primary pollutant sources and to prioritize solutions.

Programs for Source Controls Should be Continued and Watershed Management Programs Should be Implemented to Identify and Address Water Quality Problems

A watershed evaluation would identify the most significant stormwater pollutant sources, including pollutant discharges from industrial sites, agricultural areas, and leaking septic systems. Therefore, based upon the findings presented in this paper, the following recommendations are presented.

- Continue and expand initial "good-housekeeping" and public education measures that are currently being implemented by most metropolitan areas.
- Continue to implement the Stormwater National Pollutant Discharge Elimination System permit programs for industrial and hazardous waste sites.
- Limit the scope of measures for urban runoff in a watershed until non-point source problems are understood.
- Develop and initiate a watershed approach applicable to <u>all</u> pollution sources and address water quality problems.
- Develop watershed water quality plans that address water quality constraints, opportunities, and priorities within the framework of the unique physical and economic situation in each watershed.

By identifying the specific sources of stormwater quality impairment in specific watersheds, pollution control efforts can be prioritized and targeted. This approach would save billions of unnecessary construction dollars and annual operation and maintenance dollars that are needed for other programs and services.

LEGISLATIVE BACKGROUND

The 1972 Clean Water Act prohibited pollutant discharges to navigable waters from point sources unless the discharges were authorized by a National Pollutant Discharge Elimination System (NPDES) permit. This program focused on reducing municipal and industrial point-source pollutant discharges.

Recent Studies Indicate that NURP Mass Loading Projections may be Overstated. If Stormwater Quality Regulations are Based on Overstated Projections, Municipalities Could Construct Unnecessary or Oversized Treatment Facilities

As the control measures for point sources were implemented, the need to address non-point pollution sources was considered. Non-point source water quality management studies and the National Urban Runoff Program (NURP) studies were initiated in the 1970s in an effort to quantify the overall problem. Limited amounts of sampling were used to develop unit mass loading rates (such as 1,000 lbs/acre of a pollutant). Results of the NURP studies were used to develop stormwater plans to reduce pollutant discharges. The results of the NURP studies also have been considered in the development of wet weather effluent requirements.

Recent water quality studies indicate that pollutant mass loadings projected by NURP studies were overstated. These studies also identified a great variability in loadings and impacts throughout the country. Therefore, the management plans and/or the effluent regulations may be inappropriate and result in excessive spending for construction and operation of future urban stormwater treatment facilities.

In 1987, amendments to the Clean Water Act were adopted. Some of the amendments defined stormwater discharges that are required to have a NPDES permit, prohibited non-stormwater discharges to storm sewers (including dry weather discharges from industrial sites) unless a NPDES permit is issued, and required controls to reduce the discharge of pollutants to the "maximum extent practicable" management measures. This term was included because Congress recognized that stormwater controls must be based upon local conditions. This finding was consistent with 1992 findings of the Ninth Circuit Federal Appellate Court (Court). The Court determined that Congress did not mandate a minimum standards approach or specify that EPA develop minimal performance requirements. The Court also determined that Congress could have written a statute requiring stricter standards, but Congress adopted a statute that allowed local interpretations.

To correctly interpret "maximum extent practicable", EPA must have a thorough knowledge of local water quality problems, and determine the real cost/benefit of required controls for each community or watershed.

DEFINING THE URBAN STORMWATER RUNOFF WATER QUALITY PROBLEM

The Urban Stormwater Runoff Problem has been Overstated. Agriculture, Erosion, Wastewater Overflows, and Leaking Septic Systems are the Major Causes of Water Quality Impairment, not Commercial and Residential Runoff

It is difficult to segregate the impacts of urban stormwater runoff from the impacts of other discharges. First, urban stormwater runoff is discharged into receiving water bodies that also contain discharges from industrial sites, combined sewer (stormwater and sanitary sewer) overflows (CSOs), point-source municipal wastewater treatment plants, and irrigation runoff. Second, the receiving waters frequently include pollution from upstream sources, such as mines, erosion of disturbed soils, and agricultural lands. The impacts of the other pollution sources are usually greater than the impacts of urban stormwater runoff from residential and commercial areas, and therefore, mask the impacts of specific sources.

Initial Stormwater Runoff Studies

Concerns about potential pollution from urban stormwater runoff were raised almost 30 years ago by the U.S. Public Health Service. These concerns have been evaluated many times by the Urban Water Resources Research Committee of the American Society of Civil Engineers, the Council on Environmental Quality, the U.S. Environmental Protection Agency, and other organizations and agencies.

Studies did not Identify a Specific Correlation between Stormwater Runoff from Separate Storm Sewers and Significant Receiving Water Quality Problems

The first non-point sources investigations identified a correlation between discharges from CSOs and water quality problems in the receiving waters. These problems were primarily due to the sanitary sewer flows in the CSO discharges which are regulated under separate portions of the Clean Water Act.

Importantly, the investigations did not identify a specific correlation between urban stormwater runoff from separate storm sewers and significant water quality problems in the receiving waters (EPA 1983). These conclusions also were corroborated by the Office of Research and Development (ORD) which investigated urban stormwater runoff from 250 communities. The results of the ORD study indicated that receiving water quality was highly variable throughout the nation and that there was no correlation between urban stormwater runoff flows and water quality problems as defined by dissolved oxygen concentrations.

Recent Stormwater Runoff Studies

Recent Studies also Indicate that Urban Stormwater Runoff did not Appear to Cause Large Scale or Immediate Water Quality Problems Based on Water Quality Monitoring During and Following Storm Events

The EPA and state water quality agencies have completed additional studies in the past 10 years to define urban stormwater runoff water quality impairment. The studies have indicated that sediment and nutrients are the most significant pollutants, and that agricultural activities were the source of most pollutants during storm periods (EPA 1977, EPA 1992, EPA 1983, EPA 1993, Mancinini 1987, WPCF 1990).

Most of the studies by EPA and other groups also indicated that urban stormwater runoff did not appear to cause large scale or immediate water quality problems based on water quality monitoring during and following storm events (Hearrey et al 1984, Mancinini 1987, EPA 1977, EPA 1983, Hvitred et al 1986). The findings of the many studies indicated that the impacts of stormwater discharges varied widely and were mostly affected by upstream pollution sources and the assimilation capacity of specific receiving waters (EPA 1983).

Observed Wet Weather Fish Kills were Frequently Related to Pesticides, Herbicides, Spilled Oil, and Wastewater Overflows, not Urban Stormwater Runoff

Recent studies have indicated that fish kills that occurred during wet weather periods generally were not directly related to urban stormwater runoff. Rather, the fish kills were frequently related to upstream runoff that contained pesticides, herbicides, spilled oil, and wastewater overflows from leaking septic systems and sanitary sewer overflows (Hearrey et al 1984).

These studies also found that many of the wet weather water quality problems in lakes were caused by eutrophication due to pollutants from leaking septic systems, sediments and fertilizers from agricultural sites, chemical spills, wastewater overflows, and wastewater treatment plant effluent that did not comply with NPDES permits. Many of these sources had been eliminated years before the water quality problems were observed. However, the pollutants had remained in the sediments of the lakes and the problems continued. Therefore, the remaining urban stormwater runoff from residential and commercial areas could be falsely identified as the source of pollutants that were causing water quality problems (Hearrey et al 1984).

The NURP Studies Identified the Most Significant Impairments to the Nation's Waterbodies as Erosion of River Banks, Phosphorous from Fertilizers and Other Chemical Applications Upstream of Lakes, and Bacteria due to Wastewater Overflows and Leaking Septic Systems in Estuaries and Coastal Waters

National Urban Runoff Program Studies

The National Urban Runoff Program (NURP) studies were initiated to provide information and develop methods that could be used for stormwater quality plans throughout the nation. The program developed stormwater quality plans for 28 communities. The communities were selected to include a wide range of conditions in order that the results could be extrapolated to other communities.

The selected communities did not include CSO systems. However, stormwater from several of the selected communities was discharged into receiving waters that contained CSO discharges from adjacent communities. The NURP studies also were designed to determine impacts of urban stormwater runoff on receiving waters. Significantly, only two of the 28 studies included consistent monitoring of the receiving waters.

Many of the Proposed Urban Stormwater Regulations are Focused on Constituents in the Stormwater which have not been Shown to Significantly Impact Surface Waters

The conclusions of the NURP studies were presented in Results of the Nationwide Urban Runoff Program Final Report in 1983 (EPA 1983). The NURP studies found that flows and quality of urban stormwater runoff varied significantly not only between sites, but also within the same storm event at the same site. Therefore, it was difficult to develop consistent findings that could be used throughout the nation. By comparing, findings of all the studies, several overall conclusions regarding major impacts to different types of receiving waters can be developed, as summarized below.

- **Rivers and Streams:** Most significant impacts resulting in habitat changes are caused by high stormwater flows and associated erosion. Significant impacts do not appear to be caused by stormwater quality.

- **Lakes:** Most significant impacts are due to phosphorous, possibly from fertilizer in irrigation runoff.

- **Estuaries, Embayments, and Wetlands:** Most significant impacts can be attributed to bacteria associated with leaking septic systems, sanitary sewer connections to storm drains, and sanitary sewer overflows.

The NURP studies found that the most significant impacts to receiving waters were due to erosion, agricultural or fertilizer sources of phosphorous, and sanitary sewage. These are not constituents that are currently the focus of many proposed urban stormwater regulations. Instead, many of the proposed urban stormwater regulations are focused on constituents in the stormwater which have not been shown to significantly impact receiving waters.

Other conclusions of the NURP studies are summarized in Table 1 (included at the end of this report).

EPA has Recently Implemented Several NURP Study Recommendations, Including Elimination of Illicit Connections Between Sanitary Sewers and Storm Drains and Control of Industrial Site Stormwater Runoff

The NURP studies acknowledged the limitations of the study program due to its scope and schedule. Therefore, the final report included recommendations for stormwater management and for further study to better define the impacts of urban stormwater runoff. These recommendations are listed in Table 2 (included at the end of this report).

Since the completion of the NURP studies, EPA has initiated programs to implement several of the recommendations. These programs have been recently implemented and include elimination of illicit connections between sanitary sewers and storm drains and control of stormwater runoff from industrial sites.

The results of the recent discharge elimination programs and the resolution of outstanding issues identified by the NURP studies should be considered prior to establishing control strategies for urban and other non-point sources.

Recent Water Quality Surveys have indicated that Sediment, Pesticides, and Nutrients from Non-Urban Activities Impair More Waterbodies Than Urban Stormwater Runoff

1992 EPA Water Quality Surveys

Each year water quality surveys are conducted by EPA or by the states which have received authorization from EPA to manage local water quality. The survey results are used to assess water quality problems and allocate federal funds to mitigate the worst water quality problems.

The most recent report completed by EPA to assess the water quality problems due to non-point pollution was summarized in Managing Nonpoint Source Pollution in 1992 (EPA 1992a). The primary findings are summarized below.

- Wildlife habitat and recreation are the "beneficial uses" most impacted by non-point pollution.
- Agricultural activities are the primary sources of non-point pollution, including sediments, nutrient, and pesticides.

- Siltation due to sediments and eutrophication due to nutrients are the most significant non-point pollutants. These pollutants are generally from non-urban areas.

Due to the Need to Aggregate Data, Highly Disparate Activities Associated with "Urban Runoff" including Discharges from Industrial Sites, Vessels, Marinas, Shipyards, and Leaking Septic Systems, and Diversions of Water Supplies were aggregated together

This study and other reports have indicated that pollution due to point source discharges significantly reduced over the past 20 years (EPA 1992, NRDC 1993, CWMCUA 1993). Pollution from CSOs and other non-point sources also has decreased.

For the 1992 non-point source study, the states submitted data for each receiving waterbody, including waterbody type, degree of impairment to beneficial uses, designated beneficial uses, type of monitoring, sources of pollution (ie, urban runoff), and pollutant type.

Due to the wide variety of water quality problems that occur throughout the nation, many of the responses from the states were aggregated into nine categories, one of which is called "urban runoff". However, each category included many types of pollution sources. The term "urban runoff" included stormwater runoff from industrial sites, wastewater overflows, shipyards, and marinas, as well as runoff from commercial and residential neighborhoods. In addition, due to a lack of standard methods to identify water quality impairment and pollution sources, urban runoff problems in one state included impairment due to leaking septic systems and diversion of water for local water supplies.

For the 1992 National Water Quality Survey of Nonpoint Source Pollution, Only 40 States Reported on Rivers, 18 States Reported on Lakes, 3 States Reported on Wetlands, and 18 States Reported on Coastal and Estuarine Waters

The information presented in the EPA report addressed four types of waterbodies: rivers and streams, lakes, wetlands, and coastal waters and estuaries. Information presented in the report is presented below in accordance with these categories.

- **Rivers and Streams:** Only 40 states reported any findings. All 40 reporting states indicated that waters were impaired. The impaired waters represented only 11.8 percent of all rivers and streams in the nation and 16 percent of all rivers and streams in the reporting states.

The Limited Data Set Does Not Provide a Balanced Definition of the Problem

Agriculture was the primary pollutant source impacting nation's rivers (41 percent of all pollutant sources). *Urban runoff (including all categories such as shipyards and leaking septic systems) represented about 4 percent of all pollutant categories.*

- **Lakes:** About 20 percent of all lakes in the nation (excluding the Great Lakes, the Great Salt Lake, and lakes in Alaska) were considered impaired. All of the impaired lakes were located in 18 states. The primary source of pollutants is agriculture (23 percent of all pollutant sources). *Urban runoff caused only 6 percent of the impairment.*

- **Wetlands:** Only three states reported impaired wetlands: California, Delaware, and Iowa. Because of the absence of other data, EPA could not extrapolate the information to a nationwide conclusion. For California and Iowa (the only states that reported pollution sources), 81 percent of the impairment was caused by agricultural runoff. *Only 4 percent was caused by urban runoff sources.*

- **Coastal Waters and Estuaries:** Only five states reported data for coastal waters and thirteen states reported data for estuaries. The EPA report indicated that most of the impairment was due to fuel and oil spills from leaking tanks, hydrologic modification due to erosion, and construction in estuaries. *Urban runoff (including discharges from vessels, marinas, shipyards, and industrial sites) only impacted about 10 percent of the area.*

Based on the reporting states with wide variations in data sources and interpretations, only 4 to 10 percent of the water quality impacts resulted from urban runoff.

California Survey. Because of the diverse nature of the pollutants and types of impairment, the California survey used in the EPA reports appears to present over-generalized conclusions. The over-generalizations are primarily caused by the need to aggregate data and the lack of standard reporting methods.

Most of the Pollutant Sources Categorized in the California Water Quality Assessment as "Urban Runoff" were Actually Caused by Water Supply Diversions, Leaking Septic Systems, Runoff from Industrial Sites, Discharge from Vessels and Marinas, Sediment from Erosion, Erosion of Stream Channels and Shorelines

To determine the extent of over-generalization and inadvertent misrepresentation of data, the data collected in California was reviewed and compared with the data reported in the EPA water quality assessment report. The data from the State of California is based on data collected in 1991 and reported in the Water Quality Assessment study in 1992 (California 1992). This information is also related to the four main types of waterbodies.

- **Rivers and Streams:** Water quality in California rivers and streams was similar to the other reporting states. Only 6 percent of all California rivers were impaired, and 35 percent of the pollutant sources were due to agricultural runoff. The survey also listed 43 percent of the pollutant sources as "urban runoff". However, only 7 percent was actually due to runoff from urban areas. Other impacts attributed to "urban runoff problems" were caused by water diversions and leaking septic systems (27 and 9 percent of all impaired rivers, respectively) not urban runoff.

- **Lakes:** According to the EPA report, California reported the second largest lake acreages affected by urban sources (only Vermont had more acres of lakes impaired by urban runoff). However, careful review of the data from California indicated that 57 percent of the impairment was caused by leaking septic systems and erosion of exposed soils in recreation areas. Agricultural runoff impaired 40 percent of the lakes in California.

In California, 97 percent of Wetlands Impairment Not Caused by Urban Stormwater Runoff

- **Wetlands:** The California data indicated that 97 percent of the impairment of wetlands was caused by agricultural runoff and 3 percent was caused by urban runoff (primarily from industrial sites).

- **Coastal Waters and Estuaries:** The California report indicated that 28 percent of these waters were impaired. Approximately 83 percent of these waters were located within and in the vicinity of San Francisco Bay, Santa Monica Bay, Newport Bay, San Diego Bay, and the Los Angeles Harbor.

Major Problems Identified in the Survey Findings will not be Addressed by Proposed Urban Stormwater Runoff Programs

Many Metropolitan Areas Have Already Implemented Non-Structural Stormwater Controls and Monitoring Programs

Initial Findings from Monitoring Programs in Metropolitan Areas Indicated that Sediments are the Most Critical and Frequent Pollutant

National Research Council also recommended to EPA and Congress to develop stormwater management programs based on local characteristics

Within these waters, causes of impairment included discharges from vessels, shipyards, marinas, industrial sites, agricultural areas, and wastewater treatment plants; habitat modifications; dredging activities; upstream freshwater diversions; and urban runoff. A recent report prepared by EPA (EPA 1992b) indicated that most pollutants in the San Francisco Bay Estuary were caused by agriculture and silviculture activities and natural sources. Urban runoff was the most significant contributor only for lead and total hydrocarbons.

Summary of EPA Water Quality Survey Findings. Overall, both the EPA and California reports indicated that the most significant contributor to stormwater pollution is agriculture, and that many pollutant sources attributed to "urban runoff" are not caused by discharges from residential and commercial areas. The "urban runoff" is usually caused by discharges from marine vessels, shipyards, marinas, leaking septic systems, industrial sites, and erosion of stream channels and shorelines. Proposed programs for "urban stormwater runoff" will not reduce the major causes stormwater pollution and may not be necessary after concurrent water quality programs are completed. It also should be noted that the concurrent programs to control agricultural runoff and failing septic systems will involve rural and recreation communities that are not subject to proposed stormwater runoff regulations.

National Research Council 1993 Report

The National Research Council was requested by EPA at the direction of Congress to examine wastewater and water quality issues in coastal urban areas (CWMCUA 1993). The findings and recommendations of this report relative to stormwater are summarized below.

- **Coastal wastewater and stormwater management strategies should be developed for local characteristics.** The report stated that due to wide variations throughout the nation, it was not possible to develop a standard technology or approach to address all water quality issues.

The report further stated that any attempt to develop national strategies would either fail or would be excessive for many areas.

Source Controls should be Encouraged

- Emphasis should be placed on controlling sources of nitrogen and other nutrients.
- Source controls should be encouraged by incentives and regulations.

All Pollutant Sources should be Considered in Developing Water Quality Programs

- Stormwater quality measures should be based on an understanding of local conditions, and developed with other regional programs to develop the most cost-effective program.

Water Quality Management Options should Reflect Social Goals, Risk Priorities, Costs, and Benefits

- Management programs should be flexible to allow changes based on new information on environmental quality and performance of existing management systems.
- Urban coastal stormwater and wastewater programs should be based on strategies to integrate local characteristics and local issues, based on the following findings.
    - Water and sediment quality criteria standards should reflect risk, uncertainty, and variability of regional and local sites.
    - Regional strategies should consider all pollutant sources and integrate policies for air, water, and land.
    - Management options should reflect social goals and priorities relative to risks, costs, and benefits.
    - An incremental implementation plan to allow feedback from monitoring of new water quality controls.

Lead Concentrations Have Decreased since 1980

Upstream Sources of Sediment and Metals are Frequently Larger than Urban Runoff Sources

Ongoing Programs to Eliminate Illicit Discharges Appear to Reduce Metals and Other Pollutants in Stormwater

Many Reports Do Not Specifically Separate Stormwater Quality Problems Associated with Runoff from Residential and Commercial Urban Areas from Other Stormwater Runoff in Urban Areas, such as Industrial Site Runoff, Hazardous Waste Site Runoff, and Sanitary Sewer Overflows

Recent Water Quality Surveys in Metropolitan Areas

A study in 1992 (APWA 1992) surveyed over 100 metropolitan areas throughout the United States. The purpose of the survey was to determine the types of urban stormwater runoff controls that were being used or were being considered. At that time, most of the urban areas had only started or were planning to start the Clean Water Act permit application process. These agencies also were contacted in conjunction with the preparation of this report. Most of the agencies had implemented programs in the past year to eliminate illicit discharges and initiate public education programs. In addition, these agencies completed water quality sampling programs as part of the stormwater pollution prevention plans that were required by the EPA. Several agencies also had completed their first annual monitoring efforts. The most frequently observed results of the monitoring programs are summarized below.

- Sediments were the most critical and frequently observed pollutant in stormwater flows.
- Lead concentrations in stormwater have decreased since the 1980s due to the reduction in the use of leaded gasoline.
- Metal concentrations in receiving waters appear to decrease as industrial sites, land disposal sites, and municipal and industrial point discharges implement water quality plans pursuant to stormwater and point source NPDES permit programs.
- Upstream sources of sediment and metals frequently generate more significant amounts and types of stormwater pollutants than urban stormwater runoff sources.
- Natural sources frequently were the cause of high concentrations of iron, mercury, and other metals.
- Water quality impacts vary greatly due to climatic, geographic, soil chemistry, and watershed configuration.

It is Difficult to Develop Urban Stormwater Quality Criteria that Will Determine the Need for Treatment Facilities Because Urban Stormwater Pollutant Sources and Impacts Have Not Been Specifically Identified; Some Data is Old and Reflects Water Quality Prior to Implementation of Other Water Quality Programs, and Aggregated Data is Over-generalized

SEPARATING IMPACTS OF URBAN STORMWATER DISCHARGES

In 1992, EPA published a report titled Environmental Impacts of Stormwater Discharges, A National Profile. The report summarized the findings of the Managing Nonpoint Source Pollution Study and other reports. The EPA reviewed the water quality impacts discussed above and found that pollutant characteristics can vary based on land use, the storm event, and soil characteristics. Although data presented in the Environmental Impacts of Stormwater Discharges report indicated that agriculture activities were responsible for most of the impairment of the nation's waters (which is consistent with other EPA reports), the major portion of the report presented concerns associated with discharges from "urban areas".

The report reviewed case studies to illustrate the impacts of "urban runoff". However, the case studies included municipalities with CSOs, treatment plants that were not completely in compliance with NPDES permits, and upstream agricultural and mining activities which contributed to water quality problems, as shown in Table 3 (included at the end of this report).

Several of the municipalities cited in the report were contacted during the preparation of this paper to determine if the water quality problems had been corrected. All of the communities have implemented programs to reduce water quality problems. Two of the case studies did focus on communities with urban stormwater runoff problems. These communities have both implemented water quality programs that emphasize non-structural controls.

Overstatement of the Problem Could Lead to Oversizing or Construction of Unnecessary Treatment Facilities

EXCESSIVE COSTS FOR STORMWATER TREATMENT FACILITIES

Currently, the EPA is attempting to define the urban stormwater runoff problem. Because of the lack of data and the difficulty in segregating impacts of urban stormwater runoff from other non-point and point pollution sources, EPA has relied upon data from previous reports, including data from the NURP studies completed prior to 1983.

Stormwater Quality Problems Do Exist, However Most of the Problems Are Not Due to Urban Stormwater and Are Being Addressed by Other Programs

The NURP data is difficult to use for this purpose because the data also reflects water quality problems associated with lack of secondary wastewater treatment, wastewater overflows, illicit connections to storm drains and discharges from industrial sites, and uncontrolled discharges from numerous (and frequently unidentified) hazardous waste sites. In the past ten years, correction programs for many of these water quality problems have been initiated.

Programs to Reduce Agricultural Runoff, Industrial Site Runoff, Illicit Connections, Leaking Septic Systems, and Sanitary Sewer Overflows are Being Implemented to Control the Majority of Stormwater Pollution

Another concern with NURP data was that receiving waters were not extensively monitored. Computer models were used to predict water quality problems. However, observed values for organics and suspended solids often are lower than projected loadings (EPA 1983). This discrepancy probably occurred because the models were based on stormwater quality in the upper portion of the watersheds. As the stormwater flows through the watershed, sediments are deposited in storm drains and metals absorb to other sediment particles.

The EPA also is using data from water quality surveys. However, as discussed above, over-generalization of the data and a lack of standard reporting methods has led to a misrepresentation of "urban stormwater runoff problems". Basing regulatory responses on older and/or over-generalized data will overstate the urban stormwater runoff problem, and lead to excessive spending of user fees in municipalities to construct and operate facilities that could be avoided.

Following Implementation of the Other Programs, the Extent of the Remaining Urban Runoff Problems Should be Evaluated to Determine the Need for Stormwater Treatment Facilities for Residential and Commercial Areas

Another concern is related to discussions relative to national water quality standards. The NURP studies recommended evaluation of local water quality standards based on local site-dependent "synergy" of conditions. This concern is also reflected through Congressional action in the adoption of the methods for "maximum extent practicable". It would be inappropriate to attempt to develop national water quality standards that would account for a wide variety of wet weather events, soils, land use patterns, and water quality characteristics of stormwater.

Costs for Treatment of Stormwater From Residential and Commercial Areas in Major Metropolitan Communities Throughout the United States Could be Over $406 Billion for Construction and Over $543 Billion Each Year for Operation and Maintenance

It should be noted that this paper recognizes that stormwater runoff problems do exist. However, these problems are being addressed by other programs, including the industrial stormwater runoff program (as required by the Clean Water Act), separation and/or treatment of sanitary sewer overflows, Rural Clean Water Programs that reduce agricultural chemical application rates and increase use of vegetative swales around fields, Clean Lakes Programs and Great Lakes Program to control erosion and nutrients, and programs to minimize discharges from marine vessels and leaking septic systems.

These programs will eliminate many of the water quality problems associated with the "urban stormwater runoff" as defined by the EPA. States and municipalities have initiated numerous programs in the past two to five years to reduce identifiable stormwater runoff problems. Most of the recommended facilities are under construction or only recently have become operational. Therefore, it is difficult to assess the impact of the remaining urban stormwater runoff constituents that may not be addressed by current programs. Additional data to be collected over the next three to five years will be extremely helpful in more specifically defining the nature and extent of the problem.

Cost Implications of Overstating The Urban Stormwater Runoff Problem

Cost implications of national effluent and/or treatment standards were evaluated in a recent study by the American Public Works Association of Southern California (APWA 1992). The study identified a potential range of national costs of $147 million to $406 billion for construction of stormwater controls and $1.1 billion/year to $543 billion/year for operation and maintenance costs for residential and commercial areas, as shown in Figure 1. The costs shown in Figure 1 are conservative estimates and may be as much as 50 percent low because the costs do not include the cost of stormwater pipelines, land and permits for the treatment facilities, and design costs.

LEVELS OF BEST MANAGEMENT PRACTICES

LEVEL 1

NON-STRUCTURAL SOURCE CONROLS

- Prevent Illicit Discharges
- Increased Street & Sidewalk Sweeping
- Clean Storm Drains

LEVEL 2

MINOR STRUCTURAL SOURCE CONTROLS

- Diversion Channel
- Grass Swales
- Improve Natural Channels to Reduce Erosion
- Plant Vegetation on Exposed Soils

LEVEL 3

FLOATABLES AND OIL REMOVAL

- Parking Lot Oil/Grease Separators
- Parking Lot and Rooftop Runoff Storage and Separators

LEVEL 4

SOLIDS REMOVAL

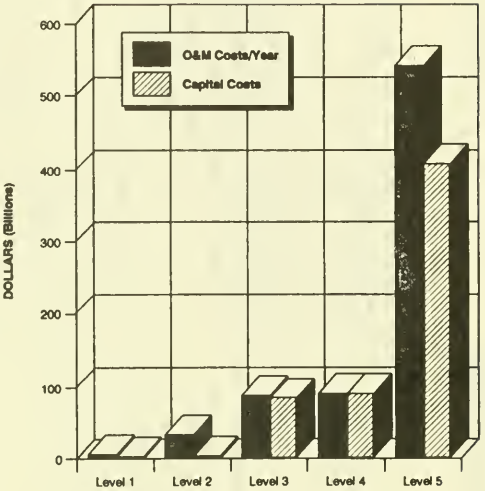
- Detention Basin
- Primary Clarifiers
- Swirl Concentrators
- Screens
- Wetlands

LEVEL 5

METALS REMOVAL

- Detention Basins and Wetlands
- Primary Clarifiers and Lime Precipitation

ESTIMATED NATIONAL COSTS TO IMPLEMENT BEST MANAGEMENT PRACTICES ALTERNATIVES (IN BILLION DOLLARS)



Source: APWA 1992
ENR 4800

Note: Costs do not include pipelines, land, permits, or design costs
Therefore costs could increase by 20 to 50 percent

FIGURE 1

Annual Costs for Improving Stormwater Quality could be up to 500 times more Expensive than Wastewater Treatment Because of the Volume of Water and Intermittent Nature of Storms

These costs can be compared to the costs of providing municipal wastewater treatment. Since 1972, municipalities throughout the United States have spent about $76 billion for construction (with about $50 billion funded through federal grants). These municipalities continue to spend $1.1 to 1.8 billion/year for operations and maintenance. It should be noted that these costs primarily remove solids and organic materials. This would be comparable to Level 4. The Level 5 treatment represents a treatment level significantly higher than most wastewater treatment plants provide. Level 5 controls would be mandated if national stormwater discharge standards are required to meet national water quality standards.

Stormwater Control Measures should Focus on the Most Significant Pollutants and Actual Sources of Pollutants on a Watershed-by-Watershed Basis

This wide range in costs for potential stormwater management plans and the potential implications for local governments validates the need for Congress to exercise great care and control to ensure that these costs are not singularly imposed on municipalities without first considering the results of ongoing programs to control more significant stormwater pollution sources (such as industrial site stormwater runoff, elimination of sanitary sewer overflows, and elimination of combined sewer overflows). The ongoing programs may reduce pollution in "urban stormwater runoff" to such an extent that further treatment may not be necessary.

It is also important that more significant pollutant sources located upstream of the municipalities also be controlled (such as agriculture, leaking septic tanks, and mining activities) to determine if urban stormwater runoff is actually impacting the receiving waters as compared with upstream pollutant sources.

As discussed in the next subsection, several agencies across the country have implemented watershed programs. These watershed programs have led to less costs than costs for complete stormwater treatment. For example, these agencies implemented what was approximately equivalent to non-structural controls, or Level 2 in the APWA study.

If these agencies had implemented complete stormwater treatment to remove solids, metals and microorganisms, as described under Level 5 in the APWA study, the construction costs would be significantly higher, based on data presented in the APWA report, as shown in Figure 2.

COST-SAVINGS THROUGH A WATERSHED APPROACH

A watershed management approach would allow establishment of local water quality standards that would match beneficial uses. The recommendations could be integrated with recommendations of other regional studies to develop integrated water quality programs that would not lead to duplication of efforts.

Communities Are Successfully Implementing Watershed Management Programs that Focus on Source Controls, Erosion Controls, and Upstream Pollutant Sources to Solve the Majority of Stormwater Quality Problems

The use of a watershed approach also allows water quality management to focus on significant problems and prioritize solutions. The watershed management approach addresses all types of non-point source runoff, including sources which are not subject to stormwater requirements of the Clean Water Act Amendments (such as mining and agricultural runoff). This approach also would determine which pollutants and sources of pollutants were regulated by existing water quality programs.

The watershed management approach provides a more complete analysis of pollutant sources throughout the watershed and analysis of beneficial uses of the receiving waters. Several of the communities that were contacted for this paper have initiated watershed programs. Summaries of the early findings of these programs are summarized below.

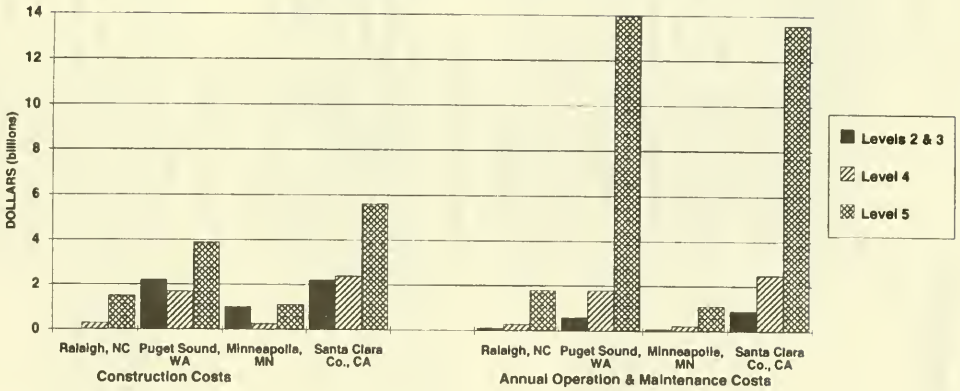
Raleigh, North Carolina

The City of Raleigh implemented a stormwater management plan for several watersheds. Hydraulic modeling was used to determine flood hazards and sediment and nutrient loadings.

FIGURE 2

ESTIMATED COSTS TO IMPLEMENT BEST MANAGEMENT PRACTICES ALTERNATIVES IN SELECTED COMMUNITIES

(Source: APWA 1992)



Water quality monitoring indicated that iron, nitrogen, and phosphorous concentrations were high. *Most of these pollutants appeared to be caused by erosion and runoff from cultivated areas. The city implemented a major erosion control program and minor structural controls.*

Raleigh determined that actual water quality loading rates were lower than NURP projections

The costs averaged about $2,000/acre of land served. This cost is similar to costs presented in other studies (APWA 1992). The measures were estimated to reduce nitrogen loadings by 12 percent, phosphorous loadings by 31 percent, metal loadings by about 25 percent. During the study, the city determined that the previously projected NURP loading rates were higher than actual loading rates. In addition, previous runoff models had underestimated the amount of infiltration into the soils. This also led to an overestimation of mass loadings (Raleigh 1992).

Puget Sound, Washington

The State of Washington Department of Ecology identified *sediment from erosion was the primary stormwater quality problem*. The state developed a program that emphasized erosion controls, industrial discharge controls, increased maintenance of storm drains, and public education. The overall program emphasizes implementation of non-structural BMPs that maximizes infiltration (WCOG 1991).

Minneapolis, Minnesota

Sediment from Exposed Soils, Sand Used for Ice Controls, and Natural Upstream Sources Were Found to be Significant Sources of Stormwater Pollution

A large portion of the metropolitan area is tributary to numerous lakes that were evaluated in the "Chain of Lake Studies". The results of the studies indicated that *sediment was the major water stormwater quality problem. The sediment sources included sand used for ice control and erosion of disturbed soils. Pollution from wastewater overflows also caused water quality problems.* The overall stormwater control program emphasizes separation of the combined sewer system and erosion controls (Minneapolis 1992, Holzin 1993). These improvements also comply with Clean Lakes Program goals.

San Jose, California

Watershed stormwater quality programs identified metals from industrial discharges and natural sources as the most critical pollutant. The initial program emphasizes elimination of pollutants from industrial sites and gasoline stations, and of illicit discharges. The current cost of this program is about $2.9 million/year. Monitoring results indicate that total metal concentrations exceeded local water quality standards, but dissolved metals concentrations were below the standards. Some of the metals, including mercury, occur naturally in the soils (Ho 1993, Drury 1993).

NATIONAL WATER QUALITY REGULATIONS REQUIREMENTS

National Requirements for States to Implement Local Water Quality Criteria is More Appropriate than National Water Quality Criteria Due to the Wide Range of Conditions and Causes of Impairment

The overall need to improve nationwide water quality is an accepted premise for water quality planning. However, the cause of water quality degradation is extremely complicated and varies widely depending upon location, water quality, wet weather storm patterns, and land use patterns. To address the wide variations in water quality concerns and solutions, local solutions should be developed. These solutions may include solving water quality problems upstream of municipal areas.

For example, in Sacramento County, California, metal concentrations were high in the receiving waters due to mine drainage from a hazardous waste site located over 200 miles upstream of Sacramento. Therefore, Sacramento County pursued the possibility of reducing the mine drainage contribution in the river rather than full treatment of stormwater. Other communities have used the watershed approach to implement "good housekeeping" methods and public education programs to eliminate significant pollutant sources. Finally, other areas have significantly reduced water quality problems by eliminating pollutant discharges from industrial or hazardous waste sites.

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All of these examples underscore the need to implement watershed management programs and best management practices, such as public education programs. It appears impossible to develop national water quality standards to address the wide variety of pollutant sources, concentrations, and effective solutions. These conclusions have been presented by many different studies including the NURP studies and others (EPA 1983, NRDC 1993, CWMCUA 1993).

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TABLE 1
SUMMARY OF CONCLUSIONS OF THE NATIONAL URBAN RUNOFF PROGRAM STUDIES

1. Heavy Metals

Copper, lead, and zinc were found in more than 91 percent of all samples. The concentrations frequently exceeded acute and chronic toxicity standards.

Projected receiving water quality problems were not observed during storm events in the two communities that monitored receiving water quality.

Heavy metal concentrations in stormwater runoff appeared to be related to the pH and hardness of the stormwater. The most significant concentrations appeared to be in states located along the Atlantic Ocean and the Gulf of Mexico.

2. Organic Priority Pollutants

Organic priority pollutants were found less frequently and at lower concentrations than heavy metals. These pollutants were primarily pesticides (including compounds which are no longer available for non-licensed use, such as chlordane).

3. Coliform Bacteria

Coliform bacteria sources appeared to be leaking septic systems, connections of sanitary sewers to storm drains, and sanitary sewer overflows.

Significant concentrations were observed in eastern, southern, and midwestern states during warm weather storm periods.

No long-term receiving water quality problems were observed, possibly due to dilution or high die-off rates.

4. Nutrients

Urban stormwater runoff discharges generally contained fewer nutrients and oxygen-demanding substances than treated wastewater discharges which have been permitted by EPA for continuous discharge throughout the year.

Nutrients (primarily phosphorous) appeared to cause eutrophication problems in lakes, but not in rivers or streams.

5. Suspended Solids

Unlike sanitary wastewater, stormwater suspended solids are primarily soils and refuse.

6. Groundwater Quality

Groundwater quality under stormwater recharge areas does not appear to be impacted by stormwater quality.

7. Stormwater Quality Management Facilities

Detention basins, grass swales, recharge basins, and wetlands appear to reduce flow, solids, nutrients, and metals.

TABLE 2
SUMMARY OF RECOMMENDATIONS OF THE NATIONAL URBAN RUNOFF PROGRAM STUDIES

1. Recommendations

Find and disconnect illicit connections of sanitary sewers and industrial discharges to storm drains.

Find and correct sanitary sewer overflows into storm drains.

Develop high-priority programs to control CSO discharges.

EPA should evaluate and develop wet weather standards (that may be different than point source year-round standards) to reflect local aquatic water quality criteria and the intermittent/short-duration nature of wet weather events. The NURP final report discussed the differences between high-intensity, short-duration, and high-frequency storms that occur in warm weather periods in the eastern and mid-western states as compared to the infrequent, but longer duration storms that occur in during winter months in western states.

EPA should determine the local site-dependent "synergy" of pH, temperature, and water quality to develop local water quality standards.

2. Suggestions for Further Studies

Evaluate receiving water quality issues, instead of end-of-pipe water quality, including fate, transport mechanisms, and accumulation issues.

Determine the relationship between pH and heavy metal concentrations in stormwater flows.

Evaluate industrial site stormwater runoff which may have higher pollutant concentrations than runoff from residential and commercial areas.

Evaluate the impacts of higher flows, erosion, and scour which have higher receiving water impacts than urban stormwater runoff.

EPA should develop guidance documents for stormwater quality controls.

Evaluate coliform bacteria sources to determine if high bacterial concentrations are indicative of urban stormwater runoff problems or sanitary sewer problems (including leaking septic systems).

TABLE 3
UPDATE OF EPA CASE STUDIES OF STORMWATER RUNOFF PROBLEMS

Case Study Location	Major Pollution Sources	Recommended Program	Comments (a)
Duwamish River, Washington	Metals from Wastewater Treatment Plants with NPDES permits and Hazardous Waste Sites	Implemented Programs for Treatment Plant Compliance and Hazardous Waste Site Cleanup	Cleanup Programs in Accordance with Industrial Treatment and Hazardous Waste Programs; Not an Urban Stormwater Runoff Problem
South San Francisco Bay, California	Metals from fuel, industrial site discharges, and natural sources (including mercury and iron ores)	Implemented Stringent Industrial Permitting Program and Fuel Station Monitoring Program	Cleanup Programs in Accordance with Industrial Discharge and Treatment Programs; Not an Urban Stormwater Runoff Problem
Westport River, Massachusetts	Bacteria from Dairies and Rural Roads	Runoff Containment Programs for Dairies	Not an Urban Stormwater Runoff Problem
Occoquan Reservoir, Virginia	Nutrients from Agricultural Areas and Forests and from Discharges of 13 Wastewater Treatment Plant Outfalls	Implemented Erosion Controls; and Conveyed Wastewater to 1 Treatment Plant that Provided Tertiary Treatment to Remove Nutrients	Not an Urban Stormwater Runoff Problem
Milwaukee, Wisconsin	Combined Sewer Overflows and Discharges from Wastewater Treatment Plants that Exceeded NPDES Limits	Separated storm drains and sanitary sewers; and Mandated Compliance with NPDES permits	Not an Urban Stormwater Runoff Problem
Kelsey and Bear Creeks, Washington	Sediment and Erosion from Exposed Soils	Local Erosion and Flow Controls	Problem due to Habitat Modification; Could be Associated with Urban Stormwater Runoff Problems
Rouge River, Michigan and Long Island Sound, New York	Combined Sewer Overflows	Ongoing studies	Not an Urban Stormwater Runoff Problem

Note: (a) "Urban Runoff" is defined as Stormwater Runoff from Residential and Commercial areas, only.

GLOSSARY

APWA	American Public Works Association
CSO	Combined Sewer Overflow Systems
CWMCUA	Committee on Wastewater Management for Coastal Urban Areas
EPA	U.S. Environmental Protection Agency
NPDES	National Pollutant Discharge Elimination System
NRDC	Natural Resources Defense Council
NSF	National Science Foundation
NURP	National Urban Runoff Program
ORD	Office of Research and Development
WCOG	Washington Council of Governments
WPCF	Water Pollution Control Federation

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PERSONAL COMMUNICATIONS

All personal communications were conducted by Sandra Siems of Montgomery Watson between July 1, 1993 and October 22, 1993. The municipal agency staff members who were contacted are listed below.

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Tom Ho, Department of Public Works, City of San Jose, California.

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**STATEMENT OF ROBERT W. LOESCHER
OF SEALASKA CORPORATION ON H.R. 3948
BEFORE THE SUBCOMMITTEE ON WATER RESOURCES
AND THE ENVIRONMENT OF THE COMMITTEE
ON PUBLIC WORKS AND TRANSPORTATION
U.S. HOUSE OF REPRESENTATIVES**

Mr. Chairman, Members of the Subcommittee on Water Resources and the Environment: My American name is Robert W. Loescher. My Tlingit name is "Kah Toosh Tu." I am a Huna Tlingit Indian and a member of the Eagle Tribe. My clan is of the Chookaneidi, the people of Glacier Bay. I am of the Ice House. Our clan crests are the bear and the porpoise.

I am also Executive Vice President for Natural Resources of Sealaska Corporation, one of the twelve Native Regional Corporations authorized under the Alaska Native Claims Settlement Act (ANCSA). Sealaska is a member of the Alaska Federation of Natives, Inc. (AFN).

AFN is a statewide Native organization formed by Alaska Native people in 1966. Its membership includes Native non-profit regional associations, tribes, and Native Regional and Village Corporations established under ANCSA. Of AFN's membership, the Regional and Village Corporations collectively own and manager over 44 million acres of Native lands throughout Alaska. I am testifying today in my role as Co-Chairman of the AFN Land Managers.

We are disheartened over the inability of either the Administration's Alaska Wetlands Initiative or existing legislative proposals to reform the Clean Water Act's wetlands program, to come to grips with the conflict that currently exists between the section 404 wetlands program, and the guarantees made by the Federal government to Alaska Natives in ANCSA.

The problem is simply this. In 1971, and in ANCSA, Congress authorized the conveyance of approximately 44 million acres of land to Alaska's Natives in return for our relinquishment of our aboriginal land claims to virtually the entire state. These lands were to be conveyed to us in fee simple to be used and developed by us to meet, in ANCSA's words, the "real economic and social needs" of our Native cultures. ANCSA, §2(b).

Congress gave us only limited discretion in the specific lands which could be chosen to meet those needs. Many of the tracts selected would later be classified as "wetlands" by the Federal government -- something that we could neither have anticipated nor, given our limited flexibility in land selection, avoided. Thus, when Congress, only one year after ANCSA's enactment, imposed a sweeping new regulatory program on all of the nation's "wetlands," it saddled our settlement lands with new restrictions that today strip those lands of their promised potential for meeting our critical "economic and social needs." H.R. 3948 does nothing to correct this gross injustice.

We propose a five-part strategy to allow the section 404 program to meet its intended goals without unduly impairing the capacity of ANCSA lands to meet the real economic and social goals of Alaska Natives. The five elements of that strategy are these:

- The section 404 program must honor the contract inherent in ANCSA. Alaska Natives must be allowed to use their lands to meet their social, cultural and economic objectives and must be afforded other consideration whenever those objectives are frustrated.

- Alaska Native Corporations must be recognized under the section 404 program and must be given the opportunity to participate as equal partners in wetlands delineation and functional analysis, and planning and permitting decisions that affect their property.

- Wetlands delineation, classification, and functional value analysis, and wetlands planning must be regionalized <u>and</u> linked to an accelerated, simplified permitting process.

- The national "no net loss" policy should not be implemented on ANCSA lands. Compensatory mitigation is a breach of the ANCSA contract, and any requirements for avoidance or minimization must be practicable, judged in light of the conditions in each of Alaska's regions.

- The section 404 program must recognize the programs and strategies implemented by the State of Alaska and Alaska Native Corporations to preserve wetlands, and must provide appropriate credits for the protection afforded through those programs.

BACKGROUND

Alaska is like no other state in the Nation. Over 175 million acres, over half of Alaska's acreage, qualify as wetlands under the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) definitions. Of this 175 million acres, 18.4 million are within Federally designated wilderness areas, 40 million are within National Parks and Refuges, and 4.6 million have been legislatively protected by the State. Additional valuable wetlands are protected by State and Alaska Native Corporation programs. Much of the remaining wetlands are comprised of permafrost, isolated tundra, temporarily inundated flats, glacial depressions, and peat lands and isolated wetlands. These "wetlands" are usually ecologically insignificant and serve only minor wetlands functions. They usually do not, for example, significantly contribute to flood control, water quality, fish and wildlife habitat, or water storage or recharge.

Nonetheless, the section 404 program's quest to preserve virtually all of these low value or abundant wetlands has created serious problems for Native Alaskans.

Many of us live in isolated, rural areas. Our everyday life can be extremely harsh. Most rural communities are not accessible by road, and basic supplies must be flown or shipped in at great expense. More than 60% of the rural communities in Alaska lack sewer and water distribution systems to homes. Our electrical power needs are typically met by small self-contained, community-operated diesel generator systems. The current section 404 program only makes this situation worse because: (1) so much of our land qualifies as wetlands; and (2) it is resultantly difficult to develop our lands to meet our needs for basic infrastructure such as sewers, water treatment facilities, schools and hospitals.

ANCSA established Regional and Village Native Corporations, which were given the right to select lands on behalf of their Native shareholders. However, the lands from which the Native Corporations were permitted to choose were very limited. Some Native Corporations, especially Village Corporations, had no option but to take lands which qualify as wetlands. Hence, in many instances, Native Corporations do not have the luxury to avoid wetlands. There is, in the parlance of modern wetlands' talk, often no practical alternative to building a new sewerage treatment plant or school, or providing necessary economic development, except on the wetlands that Congress forced the Natives to select.

When Congress enacted ANCSA in 1971, it wasn't thinking of the consequences of forcing Alaska Natives to build their future on wetlands. And certainly, we were unaware at that time that future Federal programs would result in a literal Federal reassumption of management over lands we were led to believe we were getting in fee.

Similarly, in 1972, when Congress enacted the section 404 program, it didn't realize the disastrous impact which its new wetlands restrictions -- restrictions driven by abuses in the lower 48 -- would have on the Native settlement it had achieved the year previous, and on the promise of self-determination that lies at ANCSA's heart. As a result, intolerable tension exists between these two laws, and the tension grows daily. To alleviate that tension, we are persuaded that the following reforms must be made in the section 404 program.

I. The section 404 program must honor the contract inherent in ANCSA. Alaska Natives must be allowed to use their lands to meet their social, cultural, and economic objectives and must be afforded other consideration whenever those objectives are frustrated.

ANCSA was an agreement, in effect a contract, between the Native people of Alaska and the Federal government. It was intended to resolve finally disputes over the ownership of most of the land in Alaska by deeding to Native Corporations lands in fee (that is, without any wardship oversight by the Federal government) to provide for our economic and social needs. In return, we relinquished our aboriginal birthright to these lands. But the Administration's Wetlands Initiative and the existing legislative proposals that would ratify that initiative would establish a national policy that no wetlands -- including ANCSA wetlands -- should be developed at all, and that landowners should pay for drawing down the national wetlands inventory. That policy, as applied to the wetlands which Congress sold to Alaska's Natives in return for our aboriginal claims, is a breach of contract, and it isn't fair.

Native Alaskans must be guaranteed a substantive role in the regulation of wetlands on their lands.

Native Alaskans must be given the right to participate meaningfully in the regulation of wetlands on their lands. Congress recognized in ANCSA that Native Alaskans must be intimately involved with the decisions affecting their lands. The current wetlands initiative does not do this. To date, Native Corporation landowners and land managers with significant land management responsibilities have been largely ignored in the wetlands regulatory process. Native Corporations have substantial resource data and information that can be used to undertake wetlands planning and management. The Federal government has ignored these opportunities and instead depended only on the limited resource data base in its possession.

To achieve comprehensive wetlands management, it is critical that Native Corporations be given a significant "partnership role" in the development and management of wetlands planning and permitting. The EPA and the Corps should also be required to consult affected Native Corporations to the maximum extent practicable and from the earliest planning stages. This should include participation in the development of regional guidelines for the delineation of wetlands on ANCSA lands. The EPA and the Corps should be required to provide the opportunity for the joint development of wetlands plans and delineations with the affected Native Corporations. Funding should also be made available for affected Native Corporations to participate in the identification of wetlands and watershed management units and plans.

The United States must be required to recognize the guarantees made to Native Alaskans under ANCSA.

In ANCSA, we were promised that we would be able to use our lands to meet our economic and social needs. Congress should simply not ignore that promise. The wetlands program must be modified to require the EPA and the Corps, in any individual permit decisions, to balance the standards and policies of section 404 against the obligation of the United States to allow ANCSA lands to be beneficially used to create and sustain economic and social activity.

For two reasons, development of ANCSA lands routinely requires a section 404 permit. First, the Federal government calls over half of Alaska "wetlands." Second, the geographical constraints on land selection imposed by ANCSA forced many Native Corporations to select wetlands as the only lands available to meet their economic and social needs. Village Corporations, especially, are strongly affected by this limitation. These Corporations were granted as few as 69,000 acres (23,000 acres in Southeast Alaska), and one-third of that grant was required to be taken by selecting the township in which that village was located. Generally, the remaining lands had to be contiguous to that township. This virtually compelled the selection of wetlands, because, given the strong dependence of Native subsistence on fishing, most of these townships are naturally based in or around wetlands.

Forcing Alaska's Natives to build their economies on intensively-regulated wetlands is doubly unfair in light of the remoteness of these areas and the centralization of agency decision-making outside the affected region. These logistical problems alone make it horribly difficult for many Corporations to master the art of Federal permitting. Moreover, the construction season in Alaska is short and a delay of even a month can push a vital project into the next season. Provision must be made in the section 404 program to permit Native Corporations to realize the intended benefits of their lands while still accommodating the goals of the Clean Water Act.

To that end, the core activities contemplated by Congress for ANCSA lands should specifically be authorized by a general permit. A provision should allow general permits for: (a) rural infrastructure development, including water and sewage facilities, hospitals, schools, roads, public housing, and airports; and (b) natural resource development and other economic activities materially contributing to regional or village economies. The advantage of the general permit would be that it allows for reasonable development of ANCSA lands while simultaneously ensuring that specific protection will be in place to protect the environment. Normally, the Federal government's environmental interests can be adequately protected through a comprehensive regime of State of Alaska and other Federal regulatory laws that tightly control land use and both point and nonpoint source pollution, on an industry-by-industry basis. Whenever these laws inadequately protect the Federal

interest, the Corps could impose reasonable conditions on these general permits. The Corps would also have the ability to modify or revoke those permits where high-value, non-abundant wetlands were threatened.

General permits, applicable only when ANCSA lands are being used to meet the "real economic and social needs" of Alaska Natives, would accommodate the legitimate expectations of both statutes. It is a responsible option and a conservative one, and, from our perspective, it is one of only two available choices. Absent these general permits, Natives would expect Congress to provide alternative consideration to ANCSA Corporations whenever use of their lands for economic or social purposes is denied or restricted. To fail to do so would, quite simply, perpetuate this nation's abysmal relationship with the Natives of this continent--a history strewn with the carcasses of promises broken whenever Congress found recision of its treaties with Native Americans to be in the "national interest."

Certainly, we needn't reach that point in Alaska. The general permit concept is one accepted by regulators and environmental interest groups, as well as landowners. It is the perfect and tailored solution to an intolerable conflict.

II. Alaska Native Corporations must be recognized under the section 404 program and must be given the opportunity to participate as equal partners in wetlands delineation and functional analysis, and planning and permitting decisions that affect their property.

The Clean Water Act must recognize Alaska Native Corporations. The current section 404 program recognizes only traditional tribal entities which are listed on the

Department of the Interior, Bureau of Indian Affairs' (DOI-BIA) list of Federally recognized tribes. Proposals for reform refer only to: "Native organizations," "Native interests," "Alaska Natives," "tribes," and "tribal entities." These organizations do not have governance rights over ANCSA lands. Only Native Corporations govern ANCSA lands.

The Administration and Congress seems not to understand the unique structure and respective roles of tribal and Native organizations within Alaska. As a result, its reform process has ignored ANCSA Native Corporations, refusing to recognize that these Corporations manage over 44 million acres of land granted by an act of Congress to 12 Regional Corporations and over 200 Village Corporations. Native Corporations are not recognized by the DOI-BIA on their list of Federally recognized tribal governments, and therefore do not fall within the Native entities referenced in reform proposals. The only way the Administration and Congress can effectively deal with the owners of 44 million acres of land is to recognize fully Native Corporations as governing entities under the Clean Water Act.

We are frustrated by the section 404 program's disregard of the role and responsibility of Native Corporations. Native Corporations are fee title owners of the land and as such represent Native shareholders. They are the stewards of the land and are responsible for all land and resource management decisions affecting that land--including any interaction with the State, Federal, and other governmental entities. The Clean Water Act must be modified to recognize the role of Native Corporations.

III. Wetlands delineation, classification, and functional value analysis, and wetlands planning must be regionalized and linked to an accelerated, simplified permitting process.

Congress must ensure that watershed or ecosystem or eco-region planning is employed to improve the certainty of the wetlands management program on Native lands, and is actually linked to the permitting processes. Numerous reform proposals have asserted the need for advance planning to protect wetlands. If advance planning is to achieve meaningful results, it must be integrated with permitting procedures.

Further, Native Corporations have observed the intolerable process that the City and Borough of Juneau and the Municipality of Anchorage have gone through to secure a minor role and responsibility in the permitting of wetlands. These results are clear indications that there is a concerted effort to centralize all decision-making in the Corps, and that State, local, and Native Corporation participation will be relegated to minor roles. We strongly believe that the effort to centralize these programs is myopic and fails to capture the synergy that would arise from meaningful participation by Native Corporations. Without meaningful participation by Native Corporations in advance planning, any wetlands reform will fail to achieve beneficial results or certainty in permitting.

Watershed and regional planning must include a joint partnership effort between Native Corporations and the Federal government to identify wetlands, agree on their function and hence value, provide funding, and recognize that the planning effort represents the type of sequencing that facilitates the permitting process.

We further believe that wetlands planning must recognize the differing values of the various types of wetlands present in Alaska, and as well the dramatic differences in function, type, and abundance of wetlands in Alaska's various regions. For example, because certain regions in Alaska have an abundance of wetlands, any planning based on value must be expanded to consider abundance and lack of alternatives in these regions.

We urge that the concepts of relative wetlands value and abundance also be incorporated into the wetlands permitting program. Except for references to the section 404(b)(1) guidelines, the Administration's proposed policy does not indicate any strategy for facilitating permitting in areas with low functional value wetlands or areas of abundant wetlands. Congressional guidance is necessary to clarify that special regulatory guidance for these wetlands will be prepared. To that end, we support H.R. 3948's recognition of the varying function and values of wetlands.

IV. The national "no net loss" policy should not be implemented on ANCSA lands. Compensatory mitigation is a breach of the ANCSA contract, and any requirements for avoidance or minimization must be practicable, judged in light of the conditions in each of Alaska's regions.

In Alaska, there are numerous Native Corporation, State, and Federal land management and classification programs that already protect millions of acres of wetlands. This degree of protection is unparalleled in any other state in the Nation in terms of the

sheer magnitude of protected acres. The "no net loss" of wetlands policy fails to recognize these efforts and is insensitive to the needs of the Native Alaskans for access to and use of a small amount of our wetlands.

We are strongly opposed to the implementation of the "no net loss" policy on ANCSA lands. We recognize that any Native wetlands management program will need to provide wetlands protection, particularly for non-abundant, high value wetlands. However, we have already paid for our lands by surrendering our aboriginal land claims in return for this far more limited acreage. We should not be forced to pay twice for those same lands through compensatory mitigation. Congress should reject slavish adherence to the no net loss policy and seek creative solutions that meet the needs of Native Alaskans.

A. Congress must clarify that the "no net loss" policy does not apply to ANCSA land.

The Administration, to date, has attempted to pacify Native Alaskans with assurances that the no net loss policy will not be achieved on a permit-by-permit basis. Only a fraction of Alaska's wetlands have been filled, and only a fraction would ever be filled. We need to be able to develop our lands near our villages and towns; we need to be able to build water systems, schools, roads, and other infrastructure. Without recognition of the our special circumstances, the Administration's salve -- one bereft of any underlying statutory guarantee -- offers neither solace nor certainty. Congress should clarify that this policy does not apply to ANCSA lands.

B. Compensatory mitigation should not be required for ANCSA land.

There are three "sequences" to the "no net loss" policy: (1) avoidance of wetlands impacts; (2) minimization of those impacts; and (3) compensatory mitigation. Even the first two of those "sequences" must be administered in light of the unique problems facing ANCSA Corporations. "Avoidance" may often be an impossible concept, because Congress compelled ANCSA Corporations to select lands comprised primarily of wetlands. "Minimization," in turn, must be defined in light of the starkly limited resources available to many Native Corporations. These two concepts can be applied to ANCSA lands only if done sensibly and sensitively.

"Compensatory mitigation," however, has no place on ANCSA lands. Compensatory mitigation essentially requires us to pay to use our own lands, contrary to the promises of ANCSA. In addition, in areas that are predominately wetlands, compensatory mitigation is impractical and unwarranted. What few uplands Native Corporations were often allowed to select are a resultantly scarce and precious resource that should not be forcibly converted to wetlands. Thus, it is crucial that an exemption to compensatory mitigation for ANCSA lands be part of the wetlands reform.

V. The section 404 program must recognize the programs and strategies implemented by the State of Alaska and Alaska Native Corporations to preserve wetlands, and must provide appropriate credits for the protection afforded through those programs.

Congress must recognize the numerous existing State, Federal, and Native Corporation programs to protect wetlands and integrate and coordinate these programs with

the overall wetlands strategy. Examples of State programs include State surface management plans for oil and gas and other development; the State of Alaska's Mining Reclamation Act; the State of Alaska's Forest Practices Act; and other local community wetlands planning programs. Current legislative proposals would allow the Corps to issue general permits for activities adequately regulated under other programs, and we urge Congress to require specifically the issuance of a general permit for activities subject to these comprehensive environmental laws.

We also urge Congress to include in its wetlands reform recognition that Native Corporations should be given credits for land and resource management practices that protect and enhance wetlands (e.g., riparian buffers, and fish and waterfowl habitat restoration and enhancement projects).

A key strategy for Native Alaskan wetlands should be to recognize the programs that already exist and, through comprehensive coordination of these programs, develop a uniform wetlands management and permitting strategy, as opposed to the piecemeal approach suggested in the Administration's proposed policy. Congress should also consider how additional funding and encouragement might further bring Alaska's Native Corporations into a positive, supportive role in wetlands management and how the Federal government might make better use of the expertise and research that Native Corporations have gathered on the subject.

CONCLUSION

Because of ANCSA, Native Alaskans' relationship with the Federal government is unique. The geographical characteristics of our lands also cannot be compared to or regulated as any other state. The current section 404 program fails to recognize these fundamental differences.

The reconciliation between the objectives of ANCSA and the national desire to protect wetlands does not have to be confrontational. Congress should establish a Native Alaskan wetlands management program which includes partnerships with Native Corporations and provides maximum participation in decisions effecting Native rights and property. To allow ANCSA lands to meet the "real economic and social needs" of Native Alaskans, a general permit should be required for social and economic development that occurs on those lands. Native Corporations should be exempt from any compensatory mitigation, and the concepts of "avoidance" and "minimization" should be administered in light of the constraints of rural Alaska and the promises of ANCSA. It would be a serious breach of ANCSA covenants to require us to pay to use our own lands, when there are no practicable alternatives. Native Corporations should also be given credits for land and resource management practices that protect and enhance wetlands. These contributions to maintaining the Nation's wetlands have thus far been ignored in the wetlands reform process. Congress must now recognize the role and stewardship of the Alaska Native Corporations in conserving and developing their lands.

* * *

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Testimony on behalf of Mayor Ken Pringle of Belmar, New Jersey

It would be difficult to imagine a community that is more dependent upon clean water than Belmar. We have been blessed with more than a mile of beaches that are an enormously popular destination. Each year, hundreds to thousands of tourists look forward to swimming, surfing and fishing in a clean, healthy ocean. Tens of thousands more visitors crowd our municipal marina to fish from piers in Shark River or from aboard our large fleet of party and charter fishing boats. Belmar's many seafood restaurants-some of which have been in business since the beginning of the century-are also very popular among those who enjoy fresh fish, clams and lobsters.

The ocean pollution problems of 1987 and 1988 brought home the importance of clean water to Belmar in a compelling way. Beach attendance dropped precipitously, fishing boats went to sea half empty and restaurant reservations were no longer necessary. Concerns about the economy and the environment had irrevocably merged.

The town of Belmar worked vigorously to prevent a repeat of the pollution problems of those years. Slowly confidence has been rebuilt, tourists are returning and the past few summers have been successful economically and environmentally.

We are aware that what we have regained is in a fragile state. One more pollution laden summer would be decimate the health and economic vitality of the coast and would erode the confidence in the New Jersey shore that we have worked so hard to reestablish.

The Federal Clean Water Act is the foundation for all other clean water legislation. To weaken it would be unwise and would threaten the economic stability of the coast.

Clean Water is vital to a healthy economy. We urge you to pass a strong clean water act and we will not except anything less.

Testimony

of

Richard M. Hayslip

Manager

Environmental Services, Risk Management and Land

Salt River Project

Tempe, Arizona

H.R. 3948

A Bill to Amend and Reauthorize

the Federal Water Pollution Control Act

House Subcommittee on Water Resources and Environment

May 26, 1994

Mr. Chairman:

My name is Richard Hayslip, and I am the manager for environmental services, risk management and land for the Salt River Project (SRP) in Tempe, Arizona. SRP is comprised of both the Salt River Project Agricultural Improvement and Power District and the Salt River Valley Water Users' Association. Now in its ninety-second year, SRP is the oldest multi-purpose reclamation project in the United States. It is the nation's third largest public power utility and Arizona's largest water supplier. I am pleased to have the opportunity to submit this testimony on the Project's behalf.

At the outset, I would like to note SRP's continued support for the Federal Water Pollution Control Act and the Project's long-standing commitment to sound environmental management. We applaud the subcommittee's efforts to protect the nation's valuable water resource -- a resource that is especially precious in the arid West -- and pledge to work with the subcommittee to help craft environmentally and economically sensible solutions to water pollution problems.

Although SRP is interested in multiple aspects of the Clean Water Act, the purpose of this testimony is to highlight one particular shortcoming of the Act which this panel has the opportunity to address in the course of reauthorization deliberations. Specifically, the Act does not currently provide sufficient flexibility under Section 303 to permit states to establish reasonable and effective water quality standards for constructed water conveyance systems in the arid West. The establishment of inappropriate use designations for constructed water conveyances can have serious negative implications for existing operational and maintenance activities, as well as for the development and implementation of future water management strategies. Accordingly, SRP urges the subcommittee to amend the Clean Water Act to permit states to consider the unique characteristics of man-made water conveyance systems in the course of reviewing and adopting water quality standards pursuant to the Act.

Constructed water conveyance systems (e.g., canals) in the arid West have diverse physical, operational and ecological attributes. Some water conveyance systems divert surface water from rivers or reservoirs for delivery to water treatment plants, parks, residential properties, urban lakes and agricultural lands. Other systems have been constructed to receive only groundwater and deliver it to agricultural lands for irrigation purposes. Still others may collect irrigation water drained from agricultural lands or may return water to natural washes, streams and other water bodies. All constructed water conveyance systems require some human intervention to maintain their functionality. For example, most canal systems are periodically drained of all water for maintenance and repairs. Most constructed water conveyance systems are man-made and are not constructed in areas that are or ever were natural waterbodies.

Man-made conveyance systems comprise the very heart of SRP's water distribution network. SRP is constituted as a water conservation project under the Federal Reclamation Act of 1902 and operates one of the larger water conveyance systems in the West. SRP operates and maintains a raw water supply transmission and distribution system which provides an average of 1.1 million acre feet of water each year for agricultural, municipal and industrial uses. The SRP water service area includes approximately 250,000 acres (325 square miles) within Maricopa County, Arizona.

Water is delivered in the SRP area through a man-made water conveyance system consisting of a network of canals, laterals and ditches. Surface water for the SRP area is drawn from six reservoirs on the Salt and Verde Rivers; these reservoirs have a total storage capacity of just over two million acre feet. Almost 250 SRP wells are also used to supplement the surface water supply.

Most states establish water quality standards for constructed water conveyance systems that have significant social, economic, ecological and human welfare impacts or that meet the current statutory criteria of navigable waters. This is often a difficult process, because the water in many such conveyance systems is of high quality, and *could* sustain fish and wildlife, even if fish and wildlife do not exist or occur in the system only incidentally. Establishing an aquatic and wildlife or fish consumption use designation for a canal can seriously affect existing operational and maintenance activities and complicate future water management strategies. Furthermore, some states do not have the resources to adequately differentiate between the many types of conveyance systems or to conduct the use attainability analyses specified in federal regulations under the Clean Water Act (*viz.*, 40 CFR 131.10).

Use attainability analyses are typically complex and costly studies to perform; a single study can cost several hundred thousand dollars. Their application to water conveyance systems -- between and within which there is significant variability -- is especially problematic. Some conveyance systems may provide only irrigation water, while others may serve as a raw water source for drinking water treatment plants. Some systems may convey only surface water, while others may convey only groundwater or a combination of the two. Partly as a consequence of this variability, use attainability analyses, as applied to man-made conveyance systems, will: be necessarily conducted at a high financial cost; impose an unreasonable burden on limited regulatory agency resources; and result in little or no benefit to the environment.

The authorized purposes of water conveyance systems are typically the delivery of water for irrigation or raw water supply for domestic water treatment plants. Fishing and swimming, if they occur at all, are usually incidental and prohibited uses of the system. It is inappropriate to apply water quality standards for certain uses -- such as aquatic and wildlife, full body contact, or fish consumption -- when such uses are unintended, illegal or unauthorized uses of the system. In the isolated cases where water is delivered by the system for such purposes as urban lake supply (where fishing, for example, might be a foreseeable and acceptable use), we recognize that a more stringent set of water quality

standards may be appropriate. This situation illustrates the need to have sufficient flexibility within the legislative framework to apply standards appropriate to the conditions and risks of a given set of circumstances.

Most water conveyance networks are man-made systems, constructed in upland areas, which do not constitute natural aquatic systems. Many of the canals are lined with concrete. Because of these conditions, as well as essential operation and maintenance activities (such as chemical, biological, and physical weed control and the periodic drainage of all water from the canals for repair and cleaning), most conveyance systems are incapable of supporting natural or self-sustaining fish populations. To require water conveyance systems to protect incidental aquatic populations would require the expenditure of significant capital resources and could potentially subvert the original planned and authorized purposes of the system.

In the arid west, considerable attention is being directed toward more efficient use of our limited water resources. One water management option with great potential is the reuse of treated effluent. A particularly challenging aspect of such reuse is the transportation of the resource from where it is available to where it can be most productively used. The current legislative framework, however, poses an obstacle to the transport of effluent by impeding our flexibility to use conveyance systems at their greatest efficiency. For example, current law would restrict our ability to convey treated effluent from treatment facilities to agricultural land (where it could be used for irrigation) if a full range of fishable/swimmable or fish consumption standards were appled to our canal system.

It is not our intent to completely exclude water conveyance systems from regulation; indeed, we have a vested interest in maintaining and protecting the quality of the water resource we manage. We recognize, however, that sufficient flexibility is required to address the unique conditions of the arid west and the central role of water conveyance systems.

SRP proposes that H.R. 3948 be modified to clearly provide states with greater flexibility in establishing water quality standards for constructed conveyance systems by: 1) recognizing the diversity of such systems; 2) protecting existing and reasonably foreseeable uses and recognizing the priority of the authorized purpose of the conveyance system; 3) allowing for appropriate human intervention to maintain the functionality of the system; and 4) simplifying use attainability analyses.

Mr. Chairman, SRP believes that, during its review and adoption of water quality standards, a state should be empowered to consider: the existing and planned uses of water transported in a conveyance system; any water quality impacts resulting from return flows from constructed conveyance systems to navigable waters and the need to protect downstream uses; management practices necessary to maintain the functionality of a conveyance system; state and regional water resource management and water conservation plans; the economic and social impacts of attaining the full range of

statutory uses; and the authorized purposes of the system. Furthermore, a state should not be required to establish recreation, aquatic life, wildlife or fish consumption uses for constructed water conveyance systems if those uses are not existing or reasonably foreseeable or if those uses interfere with the authorized purposes of the system.

In cooperation with the Western Coalition of Arid States, SRP has developed legislative language to authorize consideration by states of the unique characteristics of man-made conveyance systems in the adoption and review of water quality standards. We strongly urge the incorporation of this language into legislation to reform and reauthorize the Federal Water Pollution Control Act. We are prepared to work with the subcommittee to effect this important change and to assist the subcommittee in any other appropriate way.

Thank you for your efforts and for the opportunity to submit this testimony.

85-427 95 – 58

Statement of the Hon. E. Clay Shaw, Jr.
before the
House Subcommittee on Water Resources and Environment
June 7, 1994

Mr. Chairman, I appreciate the opportunity to submit written testimony regarding the Clean Water Act. My testimony addresses the issue of what formula should be used to allocate state revolving funds (SRFs) to individual states and the difficult issue of how best to preserve the ailing Florida Bay.

State Revolving Funds

One of the important issues to be resolved in this year's Clean Water Act reauthorization debate is the matter of what formula should be used to allocate state revolving funds (SRFs) to individual states. The Congressional Sunbelt Caucus has developed a formula that would improve the allotment for 70 percent of the states representing over 300 voting districts. I believe that this formula is more equitable in its distribution of resources, not only to the Sunbelt but to other states that have a proven need based on the 1992 EPA Needs Survey. Therefore, I request that the Subcommittee give careful consideration to the proposed allotment presented in the accompanying table as a viable substitute to the formula proposed in H.R. 3948.

The population of our Sunbelt region is 36.3 percent of the United States. Four of the nation's 10 largest cities and 19 of the nation's 40 largest cities are in the Sunbelt states. Urban areas represent significant needs regarding combined sewer overflows and storm water pollution. On the other hand, small communities find it hard to fund capital improvements, and the 1992 Needs Survey concludes that the small-community needs of the Southern states are greater than those of other regions.

I strongly believe that the allotment formula should reflect current population distribution and small community needs. Current law allocates funds partially on the basis of 1976 population statistics which are almost 20 years out of date. Further, there have been dramatic shifts in population since 1976, primarily toward the Sunbelt states.

Most small communities are hard pressed in meeting EPA requirements for monitoring and water quality. Small communities also are at a great disadvantage regarding economies of scale, therefore per capita costs frequently are much higher than average. It is difficult under the current system for small communities to qualify and pay SRF loans because of weak tax bases, low credit ratings, low household incomes, high per capita needs, and high interest rates. Further, resources are more scarce for small communities, they have little access to private sources, and much of their resources are used just to meet monitoring requirements.

I appreciate the Subcommittee's time and effort in attending to the many request for changes in this very important piece of legislation. In the case of SRF allotment, I believe that the Sunbelt Caucus formula is a clear winner that will have strong support on the floor of the House. Thank you for your consideration of this important proposal.

Florida Bay

Florida Bay is a project that is vitally important to my home state of Florida.

If you have never had the pleasure of visiting this

magnificent body of water, Florida Bay is located off the southern tip of Florida, between the Everglades National Park and the Florida Keys. Florida Bay serves as the principal nursery for Florida's largest commercial fishery, and its warm, clear tropical waters attract visitors from all over the world.

Unfortunately, today Florida Bay is a dying body of water. Its clear waters are turning murky, and the sea life which was once abundant is now disappearing at an alarming rate. The coral reefs off the Florida Keys, the only living coral reefs in the United States, are being threatened by the changes occurring in the Bay.

Although Florida Bay is not in my congressional district, I have a strong interest in this body of water. With the retirement last year of Congressmen Fascell and Lehman, I became the senior Member of Congress from South Florida. I have long been interested in the environmental health of the Everglades, and my interest in Florida Bay is an extension of the growing concern I have had in restoring the natural flow of waters to the Everglades. Scientists agree that the environmental problems of the Everglades and Florida Bay stem from the lack of fresh water drainage. In 1992 alone, 55 square miles of seagrass mysteriously died, and the largest algae bloom ever found in Florida Bay was recorded last summer.

Because this is a national concern, especially with the Everglades National Park involved, I have reintroduced the "Save the Florida Bay Act of 1993" with support from the entire Florida delegation, after having first introduced it in that last Congress. Unfortunately, because the bill was introduced late in the Congress, on September 24, 1992, it was not acted on before Congress adjourned in October 1992.

On March 31, 1993, my reintroduced bill was referred to the House Merchant Marine and Fisheries, and Natural Resources Committees. Since its introduction, I have also received Florida Governor Chiles' support for the bill, through his letter to me of April 6, 1993.

In summary, the Act would create an interagency subcommittee on Florida Bay, within the framework of the South Florida Ecosystem Task Force, to recommend a program for expediting the restoration of Florida Bay. It would also coordinate the implementation of the program among the agencies represented on the Florida Bay subcommittee. An authorization of $3 million would be designated for use by the Secretary of the Interior to aid in implementing the plan. I have attached a copy of the Act, H.R. 1564, for your perusal.

It is important to note that my approach would not detract from existing efforts, but would serve as a starting point for the federal government in addressing the environmental concerns of Florida Bay. I am also open to recommendations from other interested parties should there be some additional ideas that would make the Act more effective.

Florida Senators Mack and Graham are currently preparing the Senate version of my bill as an amendment to the Clean Water Act.

The Clean Water Act is an important piece of environmental legislation that deserves priority during the 103rd Congress. Congresswoman Brown recognizes the need to save Florida Bay and is sponsoring my bill as an amendment to the Act. Because your subcommittee is holding hearings on this significant Act, it is my hope that the subcommittee will also recognize the urgent need to save Florida Bay. I am therefore requesting the subcommittee's favorable consideration of the "Save the Florida Bay Act of 1993"

as an important and necessary provision of the Clean Water Act.

The time to act is now. I look forward to working with the subcommittee to save Florida Bay, one of Florida's most vital natural resources. I thank the subcommittee for its consideration of my request.

In closing, I thank you again for the opportunity to provide testimony on behalf of these projects that are important to the residents of Florida.

SIERRA CLUB

408 C Street, N.E. Washington, D.C. 20002 202·547·1141

June 10, 1994

Hon. Douglas Applegate, Chairman
Water Resources and Environment Subcommittee
Public Works and Transportation Committee
United States House of Representatives

Dear Chairman Applegate,

Robert Warrick, on behalf of the Sierra Club, the Citizens for a Better Environment and American Farmland Trust, presented the following testimony before the U.S. Senate Committee on the Environment and Public Works last summer during its consideration of 1114, the forerunner of S.2093, the Clean Water Act Reauthorization.

We respectfully request that Mr. Warrick's observations concerning polluted runoff be included as part of the permanent record of the Subcommittee's hearing on H.R.3948 held on May 26, 1994. Mr. Warrick is a full-time farmer and serves as the Chair of our National Agriculture Committee. His views express those of many farmers and conservationists. We hope they assist you in your efforts to keep our waters clean.

Sincerely,

Debbie Sease

Debbie Sease
Legislative Director
Sierra Club

Thank you, Mr. Chairman, and members of the Subcommittee, for this opportunity to discuss with you my perspectives on runoff water pollution in the context of proposed the Federal Water Pollution Control Act reauthorization legislation. Specifically, I'd like to focus my remarks on agriculturally created polluted runoff and the role of the farmer in the clean-up process.

My name is Robert H. Warrick and I come before you today wearing a variety of "hats". I am a farmer. I am president of Warrick and Son's Farms and manage the cropping and livestock operations of a diversified family corporation. I am also an environmentalist and a conservationist who is committed to using what are commonly referred to as "sustainable agriculture" practices.

My farming operation makes extensive use of shelterbelts and terracing. We graze our livestock on a rotation schedule to minimize soil erosion and recycle their manures back to the land which dramatically reduces our need for fertilizers. Our pesticide use is limited to spot applications in emergency situations. Our cropping system includes corn, grains, hay and grass, all of which we feed to the livestock in farrow-to-finish hog production and in cow-calf operation.

I would like to start by thanking Senators Baucus, Graham and Chafee for introducing the Water Pollution Prevention & Control Act of 1993 with its commitment to establishing an effective, comprehensive polluted runoff control program. I believe that the watershed restoration approach contemplated by Title III - Watershed Planning and Nonpoint Pollution Control of S. 1114 - provides an effective first step towards meeting water quality goals of the nonpoint program.

However, from my experience of chairing a county Soil and Water Conservation Board, and a Natural Resources District, I feel the success of any watershed polluted runoff program would be determined by how effectively site-level plans are implemented throughout the watershed. From my knowledge of farmers, as a farmer, I see that landowner cooperation in implementing site-level plans can only be obtained where the perception is that mandated management measures were determined through fair and equitable process, applied uniformly to all landowners in the watershed, and based on specific, objective criteria. I would, therefore, urge that any nonpoint pollution program enacted include the following components:

* a watershed-based, comprehensive approach to protect surface water, groundwater, wetlands, lakes and all land uses;
* a process to determine control of which pollution sources

in an impaired watershed are most critical for water quality improvement;

* mandatory site-level plan development and management measure implementation for targeted pollution sources;
* management measures based on specific water quality objectives and criteria to protect human, fish, and wildlife health;
* comprehensive training for all government officials involved in site-level planning or in providing technical assistance in the implementation of management measures; and,
* a unified approach that builds on and incorporates existing conservation and water quality plans from the Food Security Act and other laws.

THE NEED FOR MANDATORY SITE LEVEL PLANNING AND IMPLEMENTATION

Undeniably, agriculture is a major contributor to our nation's polluted runoff problem. According to the EPA, agriculture is the leading source of water pollution in the United States. Farmland runoff has impaired or threatened 100,000 river miles and 2 million acres of lakes in this country. In my home state of Nebraska, agriculture has been cited as contributing to the impairment of 2949 of the 3306 river miles harmed by various sources of pollution. This is about 89%. In Milwaukee, this spring, polluted runoff contributed to six deaths, 200,000 illnesses and paralyzed business for a week, at an estimated cost in the billions.

These facts indicate that far too many of our farming operations use agricultural practices that contaminate our water resources. These practices include:

* excessive use of pesticides and nutrients;
* improper storage, handling and spreading of livestock waste; and,
* use of tillage practices which are incapable of holding soil to the land.

Sustainable agricultural practices which greatly reduce the potential for polluted runoff have been demonstrated on farms and have proven to be both effective and profitable. A few examples of these sustainable practices are:

* band-spraying pesticides over the plants rather than broadcast spraying over the entire row which reduces the amount and cost of applications;
* using conservation tillage which reduces soil erosion and saves in fuel costs;
* planting cover crops which reduces soil erosion and reduces the need for purchased nutrients;
* testing soil nutrients which cuts fertilizer needs and costs;

* testing manures for nutrients and establishing a management program which reduces fertilizer costs;
* diversifying crop rotations which improves soil quality and fertility and serves to break pest cycles;
* using rotational grazing systems; and
* using contour grass strips and strip cropping which reduces erosion.

I employ many of these techniques on my farm, and have a flourishing agricultural business. These practices would reward those farmers already practicing sound stewardship of the land.

An effective runoff program should address all critical pollution sources, including urban sources, mining and forestry sites. If farms are targeted in impaired watersheds, a polluted runoff program should require each farm to develop an integrated "whole farm" plan which incorporates sustainable practices through a systems approach. Farm plans should emphasize cost-effective practices. The plans should also incorporate the goals of the other conservation programs, such as, Conservation Compliance, the Integrated Farm Management Program Option, the Water Quality Incentive Program, the Wetlands Reserve Program or the Coastal Zone Management Program, and should grant the farmer credit for implementing other conservation programs, so that each farmer would be required to do a single comprehensive plan for the entire farming operation. The planning process should provide flexibility so that the farmer can design options which are suitable for his or her own farming operation. Ultimately, however, the implementation of the plan's components should be mandatory. Reasonable time-lines should be provided to develop and implement plans. This approach is consistent with the recommendations for farm-level planning contained in the report Water Quality 2000.

NEED FOR SPECIFIC MANAGEMENT MEASURES
BASED ON OBJECTIVE WATER QUALITY CRITERIA

One common criticism of the existing EPA 319 nonpoint program is of its lack of water quality criteria. The GAO listed the lack of appropriate standards as a key barrier to progress:

> 'Criteria documents' and other technical information are not available to states to enable them to set water quality standards for nonpoint source pollution.

This has resulted in its inability to set objective goals for program performance. More importantly, without objective water quality criteria, management practice implementation decisions are sometimes perceived as arbitrary. This is not well tolerated by farmers. Any regulatory program mandating the implementation of management measures must contain rules which are clear, simple and

effective at
reducing pollution. This can be accomplished only through the establishment of definitive water quality standards, including biological criteria, in areas related to agriculture such as:

* nutrients;
* pesticides; and,
* sediment loadings.

Additionally, management measures to be imposed should be capable of demonstrating an ascertainable, positive impact on water quality criteria.

NEED FOR WELL TRAINED REGULATORS

Last spring, the Midwest Sustainable Agriculture Working Group held a Farmer Roundtable in Rochester, Minnesota to gauge farmer sentiment for a new, regulatory polluted runoff program. Farmers in attendance were concerned about the capabilities of regulators and technical support staff to thoroughly understand specific uses for management measures, and the proper incorporation and adaption of those measures to their individual farming operations. Consistent with those voiced concerns, I would recommend that prior to the development of the first farm plan, a well-trained, committed service delivery team be in place with the resources to do the job well. Field technicians must understand how to work with farmers to develop sensible, practical plans. Certification and training of independent farm planners should also be included.

NEED FOR REFORMATION OF COMMODITY AND CONSERVATION PROGRAMS

I would be remiss if I failed to point out the inconsistencies between existing commodity programs and conservation and environmental programs. Current farm policies provide financial incentives to grow grains in monocultures, or short rotations which necessarily entails heavy chemical use and erosion and rewards destructive farming practices. The Integrated Management Program, a commodity program option that allows farmers to diversify rotations and establish conservation practices without reductions in government benefits, is an example of a USDA program which could be extremely effective in reducing polluted runoff from agriculture if it was fully and properly implemented. Unfortunately, it has been poorly administered. I would recommend that the commodity programs be fundamentally reformed for them to cease rewarding maximum production of a few primary commodities and to start rewarding responsible care of our land and water resources.

The Integrated Crop Management Program and the Water Quality Incentives Program are good examples of how traditional agricultural cost-share assistance can be reformed to better deal with water quality concerns in a more comprehensive and cost-effective manner. These programs, however, have been constrained

by a lack of funding and a shortage of nationwide application. They should be fully funded and more effectively promoted nationally.

In conclusion, farmers know we must do our part to control polluted runoff but we need a mandatory national program to do so. That program must be based on a comprehensive approach, have a fair process to clean up polluted sources and a mandatory site-level plan component with objective criteria.

Thank you for your leadership in this area, and we look forward to working with you in the future to address this critical problem.

SIERRA CLUB • LOMA PRIETA CHAPTER
San Mateo • Santa Clara • San Benito Counties

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June 1, 1994

House Committee on Public Works and Transportation
2165 Rayburn House Office Building
Washington DC 20515-6256

Please include this letter in the May 24-26 Clean Water Act hearing record.

Dear Chairman Mineta and Committee Members:

The Loma Prieta Chapter of the Sierra Club strongly opposes the Clean Water Act bill before you called "An Amendment in the Nature of a Substitute to HR 3984 Offered by Mr. Mineta." The Chapter is also opposed to the bill recently introduced by Congressperson Bud Shuster.

These bills severely weaken the current level of wetlands protection and are contradictory to those protections offered in HR 350 (Edwards) of which you are a co-sponsor. The nation's wetlands have and continue to be lost or degraded at an alarmingly high rate. These fragile ecosystems can not withstand any further legislative assault.

The health of the both the species and economies that these wetlands support are imperiled by this amendment. Wetlands should received increased protection, not the risks posed in this legislation.

Mr. Mineta, we ask that you strengthen protection of our wetlands. Section 404(b)(1) guidelines must not be weakened or altered. Remove the references to prior converted croplands including the definitions and the unfair appeal process which allows only landowners to challenge an Army Corp decisions. Wetlands support so many of our public trust resources that the public deserves to be a part of this process. The "Category of Waters" general permit will become a vehicle for many to degrade and fill significant wetlands. This general Permit must not be allowed.

The Shuster Bill, with essentially the same components of the HR 1330 (Hayes), will further undermine past and proposed wetlands protection.

Sierra Club • Loma Prieta Chapter
3921 East Bayshore Road, Suite 204
Palo Alto, CA 94303
415 390-8411
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Recycled Paper

June 1, 1994
House Committee on Public Works and Transportation

We urge the Committee to reject both of these damaging bills. The concerns of landowners can be addressed, while also protecting the health of our wetlands, through the reasonable language contained in HR 350 (Edwards).

In closing, we respectfully request that you vote no on "An Amendment in the Nature of a Substitute to HR 3984 Offered by Mr. Mineta" and on the bill recently introduced by Congressperson Bud Shuster. Further, we urge you to support a Clean Water Act that includes HR 350 or similar strong language.

Sincerely,

Barry Boulton
Conservation Chair

Julia Bott
Chapter Director

SIERRA CLUB KERN-KAWEAH CHAPTER

2815 La Cresta Drive
Bakersfield, CA 93305-1719
(805) 323-5569

June 2, 1994

House Committee on Public Works and Transportation
2165 Rayburn House Office Building
Washington, DC. 20515-6256

Dear Chairman Minetta and Committee Members:

Our chapter opposes the Clean Water Act bill titled "An Amendment in the Nature of A Substitute to HR 3948 Offered by Mr. Minetta" (referred to here as HR 3948). We support HR 350. Our opposition to HR 3948 centers on our desire that there be no net loss of American wetlands, and the fact that wetland mitigation often does not work.

We believe HR 3948 will result in wetland loss because it allows decision makers to consider the "severity of impact" upon wetlands that a development might have, the "function" and "relative importance" of the wetland, and the availability of a mitigation bank. Also, HR 3948 expands the definition of agricultural lands and "Prior Converted Croplands". Please imagine a county supervisor using these criteria on farmland or on a request to preserve vernal pools. (Our vernal pools are depressions in the soil of the San Joaquin Valley which allow water to pool. As the water evaporates, concentric circles of native flowers appear at the edge of the pool. Except for tourism, no one has earned money from vernal pools.) In your imaginings, remember that many supervisors depend on developers, big oil, and agribusiness for campaign funds; also that Kern County supervisors unanimously approved all three "new towns" they considered in the last three years, potentially depriving the world of tens of thousands of agricultural acres, much of it prime land. We hope you now agree that HR 3948 means wetlands will be lost. Here in California's central valley, we especially cherish the 9% of our original wetlands that still remain natural.

Wetland mitigation often does not work. Theoretically, in order to design a mitigation bank to replace a wetland, one would need to know that the area selected for the bank has exactly the soil type to allow the microbes and plants that flourish in the wetland to grow in the bank when water is added. Recent research suggests that the combinations of plants and microbes in wetlands may detoxify significant amounts of selenium. Actually, biologists have shown that many created wetlands do not function as they were intended.

Please include this letter in the May 24-26 Clean Water Act hearing record. We wish to thank Mr. Minetta for co-sponsoring representative Don Edwards' HR 350.

On behalf of the Kern-Kaweah Chapter, Arthur D. Unger

Arthur D. Unger

STATEMENT
SOUTHEAST WATER COALITION

"THE WATER QUALITY ACT OF 1994" (H.R. 3948 AND
THE BIPARTISAN ALTERNATIVE)

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

JUNE 8, 1994

The Southeast Water Coalition, a joint powers authority of 12 local governments and a water agency in Los Angeles County, is pleased to present comments to the Committee regarding H.R. 3948 and the bipartisan alternative to amend the Clean Water Act. The Coalition was formed to address surface and groundwater quality issues affecting the Central Basin of southern Los Angeles County.

While local governments have numerous interests in amending the Act, we are particularly concerned about the municipal stormwater provisions. The requirement to collect and treat municipal stormwater discharges could become one of the largest unfunded federal mandates ever imposed on local governments. It is imperative for the financial well-being of countless communities across the country and the quality of our nation's surface waters, that Congress authorize a feasible stormwater management program that focuses resources on the major remaining causes of water quality impairment.

Stormwater is perceived to be a major cause of water quality impairment. However, the sources and impacts of stormwater runoff vary greatly. In fact, the impact of urban runoff from residential and commercial sources is not clearly understood because the specific effects are masked by the greater impact of erosion and industrial, agricultural, and wastewater discharges. A recent study commissioned by the National Realty Committee and the National League of Cities entitled "Defining the Urban Stormwater Runoff Problem" concluded the following:

* the stormwater issue has been overstated because of reliance on old or over-generalized data;

* urban runoff is a small source of stormwater pollutants compared to other nonpoint sources;

* national end-of-pipe standards for urban discharges would be extremely costly and would leave many problems unaddressed.

Depending on the level of controls mandated by stormwater legislation, the cost of managing urban stormwater runoff nationwide ranges from $147 million to $406 billion for construction and $1.1 billion to $543 billion/year for operation and maintenance. The annual costs for improving stormwater quality could be up to 500 times more expensive than wastewater treatment because of the volume of water and intermittent nature of storms.

Despite these significant expenditures, water quality improvement would be insignificant. The Environmental Protection Agency estimates that on a national level urban stormwater runoff constitutes only 4% to 10% of remaining water quality impairment. Because other nonpoint sources are more significant causes of impairment, expending even large sums of money on managing urban stormwater runoff will yield little improvement in water quality.

Additional urban runoff management measures may not only produce little water quality improvement, but may be unnecessary considering other mandates currently in place. Existing NPDES stormwater permits have been in force less than four years, providing insufficient time to fully evaluate the impact of their requirements. In addition, ongoing programs such as industrial site controls, pretreatment requirements on wastewater discharges, and banning lead in gasoline improve the water quality of stormwater runoff, eliminating the need to impose many additional stormwater management measures.

Before Congress imposes additional requirements, the sources of water quality impairment must be understood. Urban stormwater runoff should be evaluated to determine its relative contribution to water quality impairment compared to more significant nonpoint sources (such as agriculture, leaking septic tanks, and mining activities) located upstream of the municipalities. Cities cannot afford another costly federal mandate, especially one that produces little environmental or social benefit.

CONCERNS ABOUT H.R. 1948 AND THE BIPARTISAN ALTERNATIVE

In general, the bipartisan alternative to H.R. 3948 is more responsive to the concerns of local governments and attempts to establish priorities for addressing urban stormwater runoff and other nonpoint sources. However, both bills require some modification to continue the 20-year tradition of the Clean Water Act focusing federal, state, and local governments on priority objectives and sharing the financial commitment to attain those objectives. Our specific concerns include the following:

* Costs: Neither bill recognizes that the cumulative

impact of stormwater management measures and other water quality mandates on a locality can far exceed its ability to pay. Both bills ultimately require that stormwater discharges must meet end-of-pipe water quality standards which will inevitably lead to significant expenditures for capital improvements and operation and maintenance.

* Unfunded federal mandate: The stormwater provisions constitute a significant federal mandate with virtually no federal funding. H.R. 3948 proposes increasing the authorization level for the state revolving fund to help fund stormwater management measures. The SRF is a loan program whose proceeds must be repaid. The bipartisan alternative authorizes $20 million annually in grants and defers the standards attainment deadline each year that appropriations fall short of $20 million. These grants are almost insignificant compared to the cost of attaining the standards mandated in the proposed law. The result is that local governments will foot the bill for this major expense, requiring taxes and fees to be raised, incurring debt, or reducing funds for other essential city services.

* Federal land use control: H.R. 3948 adds the requirement that management measures and practices include "siting criteria." This could lead to federal regulations infringing on a local government's right to determine land use.

* Watershed management must be a clear alternative to the traditional command and control approach for each category of discharges. The proposed watershed management provisions do not offer such an alternative and therefore provide little incentive for watershed planning to take place.

* National management measures and practices prescribed by EPA for uniform application across the country are a likely result of both bills, despite the fact that regional and local conditions vary greatly.

* Commercial and construction activities would be regulated as an industrial discharge creating excessive regulation and significantly increasing the cost to businesses.

* Groundwater recharge from all sources, including spreading basins and detention ponds, would be regulated as a point source under H.R. 3948, potentially eliminating or at least over-regulating this important stormwater management measure.

* Citizen actions: H.R. 3948 significantly increases the possibility of increased litigation and regulation as a result of individual right to intervene in any federal action, the ability to sue over any permit decision, citizen monitoring teams, and a petition process--similar to the Endangered Species Act--to compel EPA action.

RECOMMENDATIONS

The Southeast Water Coalition urges the Committee to adopt the following changes that will not only benefit our communities but cities nationwide as they develop stormwater management program:

1. Standards: Stormwater is considered a nonpoint source; however, the proposed legislation requires that stormwater discharges attain point source end-of-pipe water quality standards. This imposes a more onerous and costly burden on stormwater, even though their contribution to water quality impairment is significantly less than other nonpoint sources. The legislation should be amended to require that all nonpoint sources, including stormwater discharges, meet standards established under Section 303 for designated uses of the receiving water. This will significantly reduce the cost implications of the proposed legislation.

2. Funding: If the federal government identifies stormwater as a priority cause of water quality impairment, then the federal government should share in the financial commitment to control it. The requirement to adopt management measures and practices should be directly linked to the availability of federal financial assistance. The bipartisan alternative attempts to establish this link, but we recommend a stronger financial commitment than $20 million per year for stormwater demonstration project grants. We welcome the flexibility of using the SRF to fund stormwater management measures, but the costs of stormwater management measures authorized in the legislation requires a larger commitment of grant funds as well as loan funds.

3. Cost-Effectiveness and Risk Assessment: We fully endorse Section 304 of the bipartisan alternative which requires than any regulatory requirement under the Clean Water Act must consider risk and that social, environmental, and economic benefits must be reasonably related to the anticipated costs. Perhaps more than any other provision, this will help contain the costs of stormwater management.

4. Federal Land Use Control: The Clean Water Act amendments should include the explicit protection of local land use authority, similar to a provision included in the Clean Air Act Amendments of 1990, which ensures that federal regulations do not usurp or infringe upon the authority of city and county governments to

control land use.

5. Management Measures and Practices: Management measures and practices will define the stormwater program and should be broad guidance rather than mandated requirements. Because local conditions and priorities vary significantly, cities must be granted the flexibility to select management measures and develop and stormwater program that addresses the priorities in its watershed. We strongly recommend against minimum objective performance standards being established for each management measure as proposed by H.R. 3948. Such standards will most likely be quantitative (numeric) rather than qualitative and will become a rigid standard that cannot be adapted to local circumstances.

6. Watershed Planning: Watershed planning must be a viable alternative to the otherwise mandated requirements of the act imposed on various categories of discharges. This will provide the greatest incentive to encourage the development of watershed plans. Each locality should be granted the authority to identify priority concerns and development a watershed management program that will the serve as the blueprint to achieve water quality improvements in the watershed. We welcome the innovative authority provided in H.R. 3948 to allow trading between point and nonpoint sources within a watershed.

7. Groundwater Recharge: We recommend deleting Section 404 of H.R. 3948 which calls for point source regulation of groundwater discharges. At best, this provision will result in duplicative and possibly contradictory regulation of spreading and detention basins. At worst, it opuld restrict or eliminate the ability to use this effective stormwater management measure.

8. Citizen Activism: We are disappointed to see the potential for litigation and capricious citizen actions authorized in H.R. 3948. The expansive ability to litigate and intervene in regulatory decisions can greatly increase the cost of complying with environmental laws without necessarily providing environmental benefits. While citizens must be given provided a voice and the right to take legal action against alleged violations of the Act, we are opposed to citizens being given the right to intervene as a party in any federal action. We question the wisdom of establishing citizen monitoring teams at public expense to collect data for planning and enforcement actions. We also question the wisdom of establishing a petitioning process, similar to that of the Endangered Species Act, which can bind agencies to responding to petitions rather than taking a more comprehensive, reasoned approach to implementing the Act.

CONCLUSION

Local governments want to continue the successes we have seen over the past 20 years in improving water quality. That success

has been the result of all levels of government pursuing clear objectives. We strongly urge the Committee to improve both H.R. 3948 and the bipartisan alternative to continue this tradition and work with local governments to focus resources in the most cost-effective way on priority concerns. By incorporating our recommendations into the legislation, the Committee will ensure that water quality improvement will continue with the full support and compliance of local government.

STORMWATER QUALITY TASK FORCE
5469 E. OLIVE AVENUE
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STATEMENT OF
CALIFORNIA STORMWATER QUALITY TASK FORCE

Before the Subcommittee on Water Resources
Committee on Public Works and Transportation
United States House of Representatives

May 24 and 26, 1994

INTRODUCTION

Mr. Chairman, members of the Committee, my name is Doug Harrison, and I am the General Manager of the Fresno Metropolitan Flood Control District in Fresno County, California. The District provides urban storm drainage, flood control and water conservation services to the metropolitan area of central Fresno County.

Today, I am appearing on behalf of the California Storm Water Quality Task Force (CSQTF) which I have served as Chairman from January, 1990 to December 1992 and now serve as Chair of the Legislative Committee.

STRUCTURE AND ACCOMPLISHMENTS OF STORMWATER QUALITY TASK FORCE

The California Stormwater Quality Task Force is a unique organization of some 500 parties representing municipalities, business, industry, regulatory agencies, and independent technical firms. The Task Force has been recognized by the California State Water Resource Control Board as its advisory unit on implementation of Section 402(p) of the Clean Water Act.

The Task Force has led the development of the progressive stormwater quality compliance effort in our State which has accomplished in the following:

1. Issuance in 1990 of municipal stormwater permits to 8 metropolitan counties covering 191 cities and 8 regional districts with a population of 19,500,000.

2. Development and implementation of statewide industrial and construction permits, with guidance manuals, and the related permitting of 12,000 individual business locations.

3. Development and implementation of statewide Best Management Practice Manuals for municipal, industrial and construction permits.

4. Training programs for permittees and regulatory personnel; and

5. A continuing national dialogue, begun in 1991 among environmental, regulatory and stormwater interests.

As of the date of this hearing, the large majority of all experience related to implementation of municipal and industrial stormwater permits under the Clean Water Act is embodied in the Task Force.

COMMENTS ON APRIL 21, 1994 SUBSTITUTE TO H.R. 3948

The Task Force has worked closely with the Administration, environmental interests and the Congressional Committees to expand the awareness of the unique problem of stormwater quality regulation. As a result, many improvements to Section 402(p) have already been incorporated into the Chairman's substitute bill, and our sincere appreciation is extended. However, the need for additional amendments remain, and those we recommend are identified below.

1. The Task Force urges the following additional amendment which is **deemed essential**:

   COMPLIANCE WITH WATER QUALITY STANDARDS —

   (A) Not later than five (5) years after the date of enactment of this paragraph the Administrator shall promulgate regulations revising the procedures for establishing designated uses and for developing water quality standards to consider:

   (i) the episodic nature of stormwater runoff;
   (ii) the varying pollutant loadings of stormwater events; and,
   (iii) the ability of natural ecosystems to accept temporary stormwater discharges.

   (B) Not later than ten (10) years after the date of enactment of this paragraph the Administrator, or the State as the case may be, shall revise the designated uses and water quality standards for permits issued under this Act in accordance with the regulations promulgated pursuant to paragraph (A).

(C) Other provisions of this Act not withstanding, neither the Administrator nor the State, as the case maybe, may require in a permit issued under this section compliance with a numeric effluent limitation or a water quality standard prior to the completion of the requirements of paragraphs (A) and (B) above; and, in no event shall such numeric effluent limitations or water quality standards be imposed as a condition of a permit issued under this section for a period of ten (10) years from the date of enactment of this paragraph.

The development of designated uses and water quality standards which reflect the unique physical character of stormwater is endorsed by the Clinton Administration in the "Green Book". The necessity of considering stormwater in developing such standards has been affirmed by the scientific community and recognized by many in the environmental community.

2. The Task Force also requests consideration of the following additional amendments which are **deemed important.**

(A) Allow the exemption of municipally owned industrial sites if covered under a municipal storm sewer system permit.

(B) Implement a nationwide urban runoff quality research program, funded through an SRF set-a-side, to identify sources of stormwater borne pollutants.

(C) Revise Section 404 of the substitute bill [Section 402(r)] such that the use of stormwater detention or retention is not precluded as a compliance BMP under to Section 402(p).

(D) If Section 402(p)(3)(D) is retained, the exception beginning on line 12 following "December 31, 2009" should be deleted as it creates inconsistency in the permit requirements.

(E) The anti-degradation policy requirements in Section 303 of the substitute bill should be amended to allow downward revisions in previously adopted standards when subsequent scientific data demonstrates such revised standard is appropriately protective.

(F) Section 307 of the substitute bill funding a citizen monitoring program should be amended to direct the funding to the support of an expert nationwide stormwater quality monitoring and analysis program.

3. The Task Force specifically supports the following provisions which have been included in the April 21, 1994 substitute bill.

(A) The definition of management measures as provided in Section 402(p)(5)(B).

(B) The establishment of the "reasonable progress" standard pending development and imposition of **appropriate** water quality standards and numeric effluent limits.

(C) The deferment of compliance with water quality standards and the prohibition against numeric effluents limits until December 31, 2009.

(D) The exemption of small construction sites covered by state or local programs.

(E) The exemption of uncontaminated dischargers.

Discussion

While others are just beginning their permit experience, those represented by the Task Force are completing their first bill permit term. We have experienced first hand the problems interest in the current law (1987 CWA stormwater provisions).

By and large, those problems have arisen from attempting to apply a system of water quality standards and permit regulations, originally designed for classical point source discharges to stormwater - a classically typical non-point discharge.

As currently structured, the stormwater's regulatory program is not implementable and the goals are not achievable. EPA acknowledges that the cost to pursue these misapplied standards is un-estimatible, but total in the "billions of dollars per year."

> "Costs for SW structural controls could run into tens of billions of dollars. In addition, O&M costs for the continued operation of municipal SW programs as well as O&M of control facilities are significant. These facilities are very expensive to maintain, perhaps in the order of billions of dollars per year."
>
> "EPA believes the modeled estimate is reasonable, considering how few of the total SW program implementation costs the model attempted to estimate. Information that would provide a basis for modeling all potential costs for implementing the SW program were not available for the first modeling effort. Further work needs to be done to develop cost estimates for structural and other management practices that may need to be implemented by many cites."

1992 Needs Survey

There is virtual total unanimity among scientific, municipal and regulatory interests that designated uses and water quality standards must be developed in a way that recognizes the unique physical character of stormwater discharges. President Clinton's Clean Water Initiative dated January 31, 1994, provides as follows:

> "The Administration supports encouraging States to review and revise their designated uses and water quality standards implementation procedures, as they develop water quality-based permits, <u>to reflect the episodic nature of stormwater runoff,</u> the varying loadings during stormwater events, and the potential resilience of natural ecosystems to some infrequent, temporary incremental loadings."

However, without providing the instruction and guidance for such consideration through the Clean Water Act, the states will have no consistent basis from which to construct such designated use and standards revisions.

<u>Conclusion</u>

The proposals presented by the Task Force, and mirrored by so many others submitting testimony, are not intended to create an exception from the goals and objectives of the Act. Rather, the proposals are intended to create a methodology through which stormwater systems can achieve consistency with those goals and objectives. But just as typical point source discharges required standards and regulations consistent with their character, so also must stormwater discharges be regulated by relevant standards and requirements.

The uniqueness of the discharge regulatory problem caused by stormwater has already been recognized in the CSO policy. It is only logical that a consistent procedural solution be structural for the separate stormwater discharges.

STATEMENT

OF THE

VIRGINIA PENINSULA CHAMBER OF COMMERCE

COALITION FOR ENVIRONMENTAL AND ECONOMIC BALANCE

TO THE

WATER RESOURCES SUBCOMMITTEE

OF THE

PUBLIC WORKS AND TRANSPORTATION COMMITTEE

FEDERAL WETLANDS POLICY

MAY 26, 1994

85-427 95 – 59

The Virginia Peninsula Chamber of Commerce and its Coalition for Environmental and Economic Balance appreciate this opportunity to submit a brief statement to the Public Works and Transportation Subcommittee on Water Resources hearing on wetlands regulation.

With recent changes to the federal definition of wetlands much of the undeveloped land on the Virginia Peninsula is now considered wetlands and subject to Section 404 of the Clean Water Act. In our view a great deal of the regulatory actions under Section 404 are arbitrary and needlessly time consuming for the permit applicant. Not only is a landowner unsure if a piece of property even contains wetlands because of the expanded definition, but the conditions under which that land may be developed, if at all, are unclear and vary from site to site. We attribute much of the current regulatory mess to the fact that Section 404 of the Clean Water Act was never designed to be the wetlands protection measure it has become through bureaucratic and judicial fiat. To this day Section 404 only refers to the "discharge of dredge and fill material" into the "navigable Waters of the United States". The word "wetlands" appears nowhere in the statute.

This has had grave consequences for the future economic growth and vitality of the Virginia Peninsula. We are a community that is primarily dependent on Department of Defense outlays as we are the home of Newport News Shipbuilding and seven large military installations including Langley Air Force Base and Ft. Monroe. Our efforts to diversify our economy will be hampered if the majority of the <u>privately</u> owned land is locked up in wetlands designations of dubious value.

Do not mistake our intentions, our area is blessed by many valuable and irreplaceable wetlands that provide critical habitat for fish and migratory waterfowl. However, we are concerned that every square inch of land will be regulated under a program that makes no distinction between critical habitat and a drainage ditch. And if the federal program were not confusing enough, a similar program with similar permitting requirements exists on the state level that

often reaches a different conclusion than the federal program.

Clearly what is needed to clear up the confusion and delay is a law specifically designed to protect wetlands, one that balances the legitimate preservation needs of environmentally important wetlands with the rights of landowners and business owners to the use of their property.

To that end, this Chamber strongly supports H.R. 1330 the Comprehensive Wetlands Conservation and Management Act, which now has over 160 co-sponsors in Congress. We believe that this legislation will correct the most serious faults in the current Section 404 program. Among its most important reforms are:

- Realistic definition of wetlands. Areas that are regulated by the federal government as "Waters of the United States" need to exhibit the characteristics of true wetlands, not just damp ground that contains the same plant and animal life as surrounding uplands. Water must be on the surface for at least 21 days out of the year. Water on the surface for this period is the best indicator of wetlands vegetation and true wetlands function.

- Streamline the permitting process. Currently, the Army Corps of Engineers, EPA and the Fish and Wildlife Service jointly administer the 404 program. The EPA has veto power over Corps decisions and writes some of the Corps regulations. The predictable result of this arrangement is a lengthy and chaotic permitting process. Under H.R. 1330 one federal agency, the Army Corps, would become the lead agency in charge of implementing the 404 program. EPA would retain a role as a resource agency.

- Classification of wetlands. While many wetlands provide important ecological functions and values, others are so marginal and plentiful that their ecological importance may not be as great as certain non-wetlands. The Comprehensive Wetlands Conservation and Management Act classifies wetlands into three broad categories of value: high, medium and low with the level of protection based on that ranking. High value wetlands would be essentially placed off limits to most development. Middle value

wetlands would be regulated much as is done today with an emphasis on mitigation and minimization. Low value wetlands would have emphasis placed on minimization.

- Protection for private property rights. Any regulatory scheme for wetlands must take into account that 75% of the nation's wetlands are privately owned. Current protection of property rights is inadequate. H.R. 1330 establishes a reasonable process for providing compensation to private citizens who have lost the use and value of their property under this program.

- Administrative appeals process. An administrative appeals process would be established so that permit applicants can appeal agency decisions on jurisdiction, permit conditions, applicability of a General Permit and final permit decisions.

The issue of wetlands regulation cannot be resolved by fine tuning the current program. We urge the Subcommittee to overhaul the entire regulatory structure of the Section 404 program. We encourage you to ensure that Clean Water Act legislation that is reported from the House Public Works and Transportation Committee incorporates elements of H.R. 1330 in order to help restore fairness to the 404 regulatory program.

W E S T C A S

May 26, 1994

President
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The Honorable Norman Mineta
Chairman, House Public Works and
Transportation Committee
U.S. House of Representatives
RHOB 2165
Washington, D.C. 20515-6256

- and -

The Honorable Doug Applegate
Chairman, Subcommittee on Water Resources
and Environment
U.S. House of Representatives
RHOB/B-376
Washington, D.C. 20515-6261

Re: HR 3948

Dear Chairman Mineta and Chairman Applegate:

We respectfully request that you accept the enclosed statement from the Western Coalition of Arid States and ask that it be included in the Subcommittee's record of deliberations on HR 3948. We believe it important that the Clean Water Act be reauthorized this year with an expanded Arid West section as suggested in our written submission.

We stand ready to assist you both in any way that we can. Please don't hesitate to call upon us if we can provide any additional information or assistance.

Sincerely,

George A. Brinsko

George Brinsko, P.E., DEE
President

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7

W E S T C A S

STATEMENT FOR THE RECORD

BY

GEORGE A. BRINSKO
PRESIDENT, WESTERN COALITION OF ARID STATES (WESTCAS)

TO

THE HONORABLE DOUGLAS APPLEGATE, CHAIRMAN
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT,
HOUSE PUBLIC WORKS AND TRANSPORTATION COMMITTEE

ON

HR 3948:
REAUTHORIZATION OF THE FEDERAL CLEAN WATER ACT

MAY 26, 1994

Western Coalition of Arid States
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800-634-4377 Fax 202-429-4342

INTRODUCTION

Mr. Chairman and members of the Subcommittee. My name is George Brinsko. I am President of the Western Coalition of Arid States, otherwise known as WESTCAS. I am also the Director of the Wastewater Management Department in Pima County, Arizona.

We thank you for giving us this opportunity to submit this statement as part of the subcommittee's deliberations on HR 3948: Reauthorization of the Clean Water Act. From the outset, we want to express our support for your efforts to reauthorize the Act. We believe it is greatly needed and we commend you, Mr. Chairman, and members of your committee for the valiant efforts you are making to ensure that objective is realized in 1994.

We are concerned, however, that HR 3948 does not go far enough in addressing some of the major issues we are facing in the Arid West. With that in mind, this statement will focus on (1) some of the problems we are experiencing, (2) general concepts which we believe need to be considered by the bill, (3) specific language which we believe should be included in the reauthorization, and (4) the establishment of a Water Quality Research Program in Pima County, Arizona, to ensure that the Environmental Protection Agency (EPA) and those of us in the Arid West are given the authorization and tools needed to conduct much needed research in arid ecosystems.

This paper focuses primarily on problems associated with point source discharges to navigable waters of the United States. However, the changes we are proposing the subcommittee adopt as part of its reauthorization process--such as the need to conduct research to develop appropriate water quality criteria for arid ecosystems--would also assist the nation in dealing with the much larger issues associated with non-point discharges. The Clean Water Act has helped us make significant gains in improving the quality of waters resulting from point sources such as wastewater treatment facilities. That has not been the case with respect to non-point source discharges.

WESTCAS

Before I address these issues, however, I believe it would be helpful to the subcommittee if I gave you a little background on WESTCAS. The Western Coalition of Arid States was formed in 1992 by a group of Western water and wastewater agencies concerned about the manner in which water quality and water resource management issues were being addressed in states throughout the Arid West.

In the last two years, WESTCAS has attracted more than 50 members representing agencies and individuals from six Western states: Arizona, California, Colorado, Nevada, New Mexico and Texas. Representatives from agencies in several other Western states have consistently participated in our quarterly meetings and we have every reason to believe that they too will be joining us in the near term. WESTCAS has also been working closely with the Western States Senate Coalition to define problems in the West as well as provide assistance in developing legislative proposals. The Senate Coalition looks to WESTCAS for technical assistance.

WESTCAS's main objective is to assist in the development of water quality regulations, policies and laws which promote the protection of arid and semi-arid ecosystems throughout the West. With that in mind, WESTCAS has encouraged specific changes in the Clean Water Act Reauthorization that would protect those species which actually exist in arid ecosystems. For example, we are committed to a policy that assures that the quality of our effluent protects "what is there;" but we oppose policies that require us to adopt extremely expensive measures to protect aquatic species which do not exist in arid and semi-arid ecosystems.

EPHEMERAL AND EFFLUENT-DEPENDENT STREAMS IN ARID WEST ECOSYSTEMS

Prior to my move to Arizona, I served 22 years as General Superintendent of Operations for the Allegheny County Sanitary Authority in Pittsburgh, Pennsylvania, and also as President

of the Pennsylvania Water Pollution Control Association. In Pennsylvania, "a river is a river," in every sense of the word. By that I mean that it actually has water flowing in it twelve months a year. Under those circumstances, the quality of the receiving water becomes extremely important in determining the level of treatment to apply to effluent to meet the EPA National Pollutant Discharge Elimination System (NPDES) permit requirements.

But 15 years ago, I was introduced to a completely new set of circumstances and challenges when I moved to Pima County in southern Arizona. Pima County is located in the heart of the Sonoran Desert, an "arid ecosystem." The environment in southern Arizona is typical of the arid and semi-arid ecosystems found throughout 17 of our Western states.

I moved to Pima County to establish the first regional wastewater treatment system in Arizona. One of my first and most vivid experiences, upon my arrival, was standing beside the Santa Cruz River--a river with no water. The river is a dry wash, commonly known in the West by its Spanish name, *arroyo*. Exhibit 1 depicts an example of what I saw on that memorable day.

Now to someone who has been raised in the eastern United States, a river without water would seem to be a bit of a contradiction. But that is not the case in my new homeland. The Arid West is laced with *arroyos* such as the Santa Cruz. The scientific name for *arroyos* is ephemeral streams -- ephemeral streams have streambeds that are at all times above the water table and that flow periodically in response to precipitation, snowmelt, runoff, or temporary discharges. These streambeds are created over time by periodic powerful rainstorms whose runoff cuts through the desert floor. Exhibit 2 depicts the Santa Cruz River experiencing one of these rainstorms, or monsoons, as they are commonly known in the Southwest. These storms are beautiful to observe and experience, but they can be dangerous and deadly. They often cause loss of life and millions of dollars of property damage.

The point is that "rivers" such as the Santa Cruz are dry 80 percent of the year. However, these ephemeral streams have sections--or reaches--that owe their flows primarily to effluent

from local wastewater treatment facilities. Such reaches, which are actually independent ecosystems, are more specifically designated "effluent-dependent".

WESTCAS members, and other water and wastewater agencies throughout the West, must perform a balancing act between competing forces. On the one hand, we must fulfill our mandated responsibility to protect the environment by meeting NPDES permit requirements; on the other hand, we must convince our local elected officials and ratepayers that we are spending increasingly limited resources wisely and efficiently. But it is difficult for us to justify expending millions of dollars to build new wastewater treatment facilities, or to retrofit existing ones, to comply with increasingly stringent standards for effluent discharges when such additional improvements will result in no measurable net environmental benefit. The costs could actually reach into the billions if the same inappropriate water quality standards are imposed on local communities for stormwater discharges. The West needs the local and regional flexibility to adapt water quality programs to local ecosystems and conditions, particularly in the absence of federal dollars for these national mandates.

Now I want to make it clear that we are not arguing that these ephemeral stream environments do not need protection from pollutants -- because they do! In fact, when effluent is discharged to certain reaches of these ephemeral streams, a lush riparian ecosystem is often created. If the effluent discharges are continuous, a unique biological community often evolves. The photographs in Exhibit 3 depict this on a reach of the Santa Cruz River below Pima County's Ina Road Water Pollution Control Facility. This reach is a year-round, effluent-dependent ephemeral stream which has created a unique environment for birds, reptiles, and small animals. We believe we have a major responsibility to protect such ecosystems.

THE CLEAN WATER ACT

I want to emphasize that WESTCAS supports the objectives established by the Clean Water Act. The Act has provided all of us with a major tool to restore and maintain the physical and biological integrity of the nation's navigable waters.

Our concerns arise from the inappropriate application of the Clean Water Act to the Arid West environment. Concepts and regulations that make perfect sense when developed in terms of "wet" ecosystems have major flaws when applied to Arid West arroyos and wastewater situations. Water quality standards are a good example of this. State water quality standards and EPA permit limits are being established on the basis of nationally-based scientific water quality criteria developed in and for "wet ecosystems." Unfortunately, the individuals who established these national criteria failed to take into consideration differences in environmental ecosystems such as those found in arid and semi-arid ecosystems.

Under current federal policies, states and agencies use these national water quality criteria as a basis to develop state water quality standards for lack of applicable criteria. The EPA then uses those standards to establish National Pollution Discharge Standards (NPDES) permits for wastewater treatment facilities. States which find these imposed standards to be unreasonable or excessive must develop their own site-specific data to justify using different water quality standards. In other words, arid states that believe national criteria are inappropriate for all of their ecosystems have two options: (1) they can use these inappropriate national water quality criteria as the basis for establishing water quality standards, or (2) they can invest extensive local financial and scientific resources to develop site-specific standards for each stream in these ecosystems.

In most cases, the choice of either option turns into a lose-lose situation for local authorities. For example, if they choose option (1), they will establish inappropriate water quality standards which will require Public Owned Treatment Works (POTWs) to construct new or retrofit existing wastewater treatment facilities to satisfy more stringent NPDES permits. On the other hand, if they choose option (2), they are faced with going through an extremely burdensome and expensive process. To accomplish this, the state must conduct extensive research to identify designated uses for each stream reach; that research would then be used to develop water quality criteria documents to calculate the water quality standards necessary to protect the designated uses. However, there is no guarantee that the EPA will accept the

results of the state's research because the EPA has not promulgated specific guidance for the states to use in conducting the research.

Another unique feature of the Arid West is the extensive use of constructed water conveyance systems (canals). During the reclamation of the Arid West over the last 90 years, canals were constructed to transport groundwater or surface water to agricultural lands or municipal water treatment plants. Incidental ecosystems have evolved in some of these canal systems. WESTCAS believes that future laws and regulations for canals must recognize the originally intended water use. Such laws and regulations must not impede critical water management programs in an attempt to meet inappropriate national fishable/swimmable policies. These canals were designed to move water for agricultural, municipal and industrial purposes, not to maintain an artificially-constructed fishery. The Reauthorization should permit the development of water quality standards that allow the use of ephemeral streams for the transportation of reclaimed water.

AMENDMENTS TO THE CLEAN WATER ACT: ARID WEST ECOSYSTEM ISSUES THAT NEED TO BE ADDRESSED

WESTCAS members have consistently supported the goals of the Clean Water Act. And we believe that HR 3948 will significantly enhance national efforts to control water pollution. However, the Reauthorization needs to address more specifically and substantially the issues essential to the management of the water and wastewater resources of the Arid West. With that in mind, we respectfully request that the committee expand upon the "Arid West" section it has included in HR 3948. For example, the section should state specifically that, as a matter of policy, the Congress recognizes the existence of diverse watersheds and waterbodies throughout the nation; having recognized that fact, the Congress should then state its belief that environmental protection of Arid West ephemeral and effluent-dependent ecosystems would be enhanced by the development of regional water quality criteria documents based on sound scientific data. The Congress should also urge the EPA to develop appropriate regulations for Arid West ecosystems in accordance with that policy.

In this connection, WESTCAS specifically endorses, and urges the committee to adopt the six Arid West amendments to HR 3948 recommended to the committee by four Members of Congress, three of whom are members of the House Public Works and Transportation Committee: Congressman Sam Coppersmith, Congresswoman Karen Shepherd, Congressman Robert Menendez, and Congressman Ed Pastor. The recommendations were sent to Congressman Douglas Applegate, Chairman of the Subcommittee on Water Resources and Environment, as well as to Congressman Norman Mineta, Chairman of the Public Works and Transportation Committee. We have attached a copy of those letters and the six amendments to this statement as Exhibit 4. The six amendments would require:

1. the promulgation of a reclaimed water policy;

2. the establishment of a Water Quality Research Program in Pima County, Arizona, along with a Research Advisory Board;

3. the development of appropriate reclaimed water standards to promote the beneficial use of reclaimed water in the Arid West;

4. the development of appropriate water quality criteria for ephemeral and effluent-dependent streams based on recommendations proposed by a Regulatory Working Group;

5. the establishment of a policy that gives states flexibility to designate a range of beneficial uses for constructed water conveyance systems (canals); and

6. the listing and defining of various terms associated with terminology used throughout the Arid West amendments.

We believe that the six amendments will lead to practical, workable regulatory guidelines which will enable Western agencies to better manage scarce water resources in an environmentally-sound manner with strong consideration for local concerns and values.

In this connection, we also want to lend our support to recent efforts made to change the manner in which the EPA utilizes whole effluent toxicity tests (commonly called biomonitoring) as a tool to enforce NPDES permits. We believe that biomonitoring should be used as indicators of potential toxicity which trigger specific follow-up evaluations. To the

extent scientifically-accurate means are developed to measure the impact of the discharge of pollutants on the ecological integrity of a water body, such means may be utilized by states as a further measurement of control performance. However, we believe it is inappropriate to use the results of biomonitoring testing as the basis for enforcement compliance given the myriad of variabilities in the test methods, the natural environment, and the sources impacting the water body. With that in mind, we recommend that the Clean Water Act be amended to direct the EPA to develop protocols and select regionally indigenous test species which are accurate indicators of toxicity in ephemeral streams and effluent-dependent waters of the Arid West. WESTCAS is in support of the revision to the proposed Publicly Owned Treatment Works Biological Monitoring Use Act (HR 3213). A fact sheet on the biomonitoring bill and the proposed amendment is included as Exhibit 5.

ESTABLISHMENT OF WATER QUALITY POLICIES BASED ON GOOD SCIENCE

Without good science, we run the risk of expending scarce financial and technical resources on unnecessary and non-critical pollution control activities. Without full-scale research and demonstration projects, we lack the ability to develop the appropriate water quality criteria and standards to effectively control water pollution, increase effluent utilization and encourage new technologies and environmentally sound methods to manage and preserve our limited water resources.

WESTCAS believes that there is only one way we can be certain we are protecting arid ecosystems in accordance with good science and the dictates of the Clean Water Act. And that is for us to conduct the basic scientific research and demonstration needed to identify "what is there" and then to determine how to protect it.

There is a very real danger that current federal policies are simply shifting the cost of much needed research and demonstration projects to local jurisdictions. Some may believe that this is a good way to reduce the federal budget -- and they are probably right. However, we believe it is a short-sighted policy which requires local authorities to expend large sums of

monies that results in research which has limited transferable technology potential. Congress can achieve tremendous economies of scale by adopting a regional approach to the science of arid lands water quality management. Research and demonstration projects on Western water resource management could be funded and implemented for regional benefit. Both the federal government and many diverse Arid West interests would benefit from a federal partnership on these projects.

Therefore, WESTCAS urges the Committee to include a provision in HR 3948 which would require the EPA to establish a Water Quality Research Program in Pima County, Arizona, to coordinate appropriate research throughout the Arid West. Representatives Coppersmith, Shepherd, Menendez, and Pastor have proposed the establishment of such a program in Amendment No. 2 of the attached (Exhibit 4) six amendments they have proposed to the committee. This would create a program to conduct the research needed to develop appropriate water quality criteria documents for arid ecosystems throughout the Arid West.

CONCLUSION

In closing, Mr. Chairman and Members of this Subcommittee, on behalf of WESTCAS, I would like to thank you once again for allowing us to submit this statement for the committee's consideration. WESTCAS is anxious to work with you to ensure that HR 3948 incorporates an Arid West perspective as it marches through the committee process.

"....the Santa Cruz River: a river with no water."

EXHIBIT 1

"...the Santa Cruz River experiencing one of these rainstorms, or monsoons, as they are commonly known in the Southwest."

EXHIBIT 2

"...when effluent is discharged to certain reaches of these ephemeral streams, a lush riparian ecosystem is often created."

EXHIBIT 3a

"If the discharges are continuous, a unique biological community may evolve."

EXHIBIT 3b

EXHIBIT 4

Congress of the United States
Washington, DC 20515

March 21, 1994

The Honorable Douglas Applegate, Chairman
Subcommittee On Water Resources and Environment
Committee on Public Works and Transportation
B370-A Rayburn HOB
Washington, D.C. 20515

Dear Mr. Chairman:

We want to thank you for your efforts to reauthorize the Clean Water Act (CWA). As you well know, the reauthorization will affect millions of people throughout the United States, and we appreciate the time you have devoted to crafting a well-rounded legislative proposal.

With this in mind, we once again urge you to consider the enclosed amendments to H.R. 3948. The amendments attempt to help those in the arid West remedy some very real problems with respect to the Clean Water Act. As you know, the EPA has, pursuant to the provisions of the Clean Water Act, adopted national water quality criteria based on scientific research performed on biota native to "wet ecosystems" in an attempt to satisfy the objectives, known as "fishable-swimmable," established by amendments to the CWA. These criteria, Mr. Chairman, are simply not suited for arid ecosystems throughout the West.

H.R. 3948 does attempt to deal with some of these concerns; however, we believe it does not go far enough. If additional changes are not made to the bill, we fear that citizens throughout the arid West will have to expend large sums of money and local resources to satisfy water quality standards which are inappropriate for arid ecosystems. Attendant with this scenario is the distinct possibility of the loss of riparian habitats in the arid West that have developed in response to effluent discharges into otherwise dry riverbeds.

We respectfully request, Mr. Chairman, that you adopt the enclosed six amendments to H.R. 3948 during the Subcommittee's mark-up of H.R. 3948. The amendments, as a unit, are designed to appropriately protect water quality and fully utilize reclaimed water resources in arid ecosystems throughout the West.

Many of the provisions contained in these amendments have been included in policy statements issued by the Western Governors Association, the Western States Water Congress, and the

The Honorable Douglas Applegate, Chairman
March 21, 1994
Page 2

Association of Metropolitan Sewerage Agencies. In addition, the Western Coalition of Arid States, the Co-chairs of the Western States Senate Coalition, numerous local governments and water/wastewater agencies, and several local environmental organizations have also expressed support for various aspects of the amendments.

Should you or your staff have any questions, please contact Representative Pastor or Rob Cohen at 225-4065. We thank you for your time and consideration of this important request.

Sincerely,

Ed Pastor
Member of Congress

Karen Shepherd
Member of Congress

Sam Coppersmith
Member of Congress

Robert Menendez
Member of Congress

enclosure

Congress of the United States
Washington, DC 20515

March 21, 1994

The Honorable Norman Y. Mineta, Chairman
Committee on Public Works and Transportation
2165 Rayburn HOB
Washington, D.C. 20515

Dear Mr. Chairman:

We want to commend you for your efforts to reauthorize the Clean Water Act (CWA). We believe that H.R. 3948 takes significant steps in remedying many of the problems the nation is facing in attempting to implement and abide by the Act's mandates and provisions.

With this in mind, we once again urge you to consider the enclosed amendments to H.R. 3948. The amendments attempt to help those in the arid West remedy some very real problems with respect to the Clean Water Act. As you know, the EPA has, pursuant to the provisions of the Clean Water Act, adopted national water quality criteria based on scientific research performed on biota native to "wet ecosystems" in an attempt to satisfy the objectives, known as "fishable-swimmable," established by amendments to the CWA. These criteria, Mr. Chairman, are simply not suited for arid ecosystems throughout the West.

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Many of the provisions contained in these amendments have been included in policy statements issued by the Western Governors Association, the Western States Water Congress, and the Association of Metropolitan Sewerage Agencies. In addition, the

Western Coalition of Arid States, the Co-chairs of the Western States Senate Coalition, numerous local governments and water/wastewater agencies, and several local environmental organizations have also expressed support for various aspects of the amendments.

Should you or your staff have any questions, please contact Representative Pastor or Rob Cohen at 225-4065. We thank you for your time and consideration of this important request.

Sincerely,

Ed Pastor
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Sam Coppersmith
Member of Congress

Robert Menendez
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enclosure

PROPOSED AMENDMENTS TO H.R. 3948

Amendment No. 1 (Reclaimed Water Policy)

On Page 4 of the bill, strike lines 18 through 23.

On Page 5 of the bill, after line 3, add the following:

Section 101 of the Clean Water Act (33 U.S.C. 1251) is amended by adding at the end the following:

"(h) It is the policy of Congress to promote the beneficial reuse of reclaimed water to the fullest extent reasonably possible in those arid or semi-arid regions of the nation which have limited ability to develop and maintain traditional water resources. It is the further policy of Congress to recognize that reclaimed water is a valuable resource and that the discharge of reclaimed water to otherwise arid or semi-arid environments, such as predominately non-perennial (ephemeral or intermittent) watercourses, can also support limited aquatic and riparian habitat which would not otherwise exist. Water quality standards established for such watercourses may consider the unique ecosystem associated with reclaimed water."

Amendment No. 2 (Arid West Water Quality Criteria Research Program)

Subsequent to the provisions of Amendment No. 1, insert the following:

"SEC. 121. ARID WEST REGIONAL WATER QUALITY CRITERIA RESEARCH PROGRAM.

"(a) WATER QUALITY CRITERIA RESEARCH--

"(1) AUTHORITY.--The Administrator shall, within one year after date of enactment of this section, make a grant for the purpose of establishing and operating an Arid West Water Quality Criteria Research (AWWQCR) Program. The AWWQCR Program shall be operated out of Pima County, Arizona with supplemental projects in selected field locations throughout the Arid West in order to provide data representative of specialized arid environments, watersheds, and ecosystems. The purpose of the AWWQCR Program is to obtain data for criteria documents and other relevant scientific investigations for species and environments appropriate for ephemeral and effluent-dependent streams throughout the Arid West. The Program will conduct its work in field locations in the Arid West which shall be selected and located in areas recommended by the Research Advisory Board. Grants to continue the operation of the AWWQCR Office and Program will be made annually thereafter.

The Program shall be operated by a Director selected by the Administrator of EPA with staff, budget, physical resources, and locations approved by the Administrator, however, no funding shall be provided for construction of permanent buildings to conduct the Program. The Director shall conduct and direct a series of research projects leading to the development of Arid West water quality criteria documents consistent with advice and recommendations of the Research Advisory Board and the Regulatory Working Group:

"(2) COMPOSITION OF RESEARCH ADVISORY BOARD.--The Administrator shall appoint a chairman and two members from the following groups:

a) EPA research labs conducting studies related to water quality criteria, including the EPA research laboratory at Duluth, Minnesota.

b) EPA research labs conducting studies on watersheds, terrestrial, and riparian habitat in arid regions, including the EPA research laboratories at Las Vegas, Nevada and Corvallis, Oregon.

c) Each of three universities in the Arid West possessing expertise and physical resources to conduct the necessary research projects.

d) Each of three municipal WWTFs in the Arid West contributing expertise and physical resources to achieve the objectives of the Program, including lab space and research equipment.

e) The general scientific community including private industry, public and private scientific foundations and research organizations.

The method of selection, terms of service, and rotation of the representative groups shall be established by the Administrator. The activity of the Board shall be supported by the Director according to procedures established by the Administrator.

Within the first six months the Board shall advise the Administrator on the types of research to be conducted, research approaches and methods that should be considered and employed, content of research proposals submitted for funding consideration by the Program, methods for peer review of proposals, and criteria the Board will use in making funding recommendations to the Director.

"(3) SUBMISSION OF PROPOSAL.--Any interested parties may submit proposals to the Director to conduct research according to the criteria established by the Research Board. The Director shall periodically submit groups of proposals and peer review comments to the Board for their priority rankings and funding recommendations. To the extent funding is available the Director shall fund research studies consistent with the priorities established by the Research Advisory Board and the Regulatory Working Group to the extent possible.

"(b) AUTHORIZATION OF APPROPRIATIONS.--There are authorized to be appropriated to the Administrator such sums as may be necessary to carry out this subsection."

Amendment No. 3 (Reclaimed Water Standards)

On Page 15 of the bill, after line 10, insert the following:

Section 303(c) of the Clean Water Act (33 U.S.C. §1313(c)) is amended as follows:
Renumber section 303(c)(2)(B) to 303(c)(2)(C). Add section 303(c)(2)(B) to read:

"(B) Whenever a State adopts or reviews water quality standards for ephemeral or intermittent watercourses in an arid or semi-arid State, or region of a State, such standards may consider the need for allowing the discharge of reclaimed water to the watercourses to promote the beneficial use of reclaimed water pursuant to section 101(h). In addition to requirements of 303(c)(2)(A), such standards may also take into consideration:

"i) The use and value of reclaimed water as a resource to augment the State's traditional water supply and to reduce demand on other environmentally sensitive water resources;

"ii) The natural conditions which influence water quality in the area, including, but not limited to extremes of temperature, water flow, turbidity, mineralization, and salinity, and flooding;

"iii) Whether the discharge of reclaimed water will result in a net environmental benefit to the watershed."

"(11) EPA GUIDANCE.--EPA, with recommendations from the Regulatory Working Group convened pursuant to Paragraph (9) above, shall provide guidance on scientific methods for conducting supporting studies to create subclassifications of attainable uses and to establish site-specific or regional water quality criteria appropriate to protect such uses."

Amendment No. 4 (Criteria for Ephemeral and Effluent-Dependent Streams)

On Page 16 of the bill, after line 22, insert the following:

Section 304(a) of the Federal Water Pollution Control Act (33 U.S.C. 1314(a)) is amended by adding at the end the following:

"(9) CRITERIA FOR EPHEMERAL AND EFFLUENT-DEPENDENT STREAMS.--Not later than six months after the date of enactment of this subsection, the Administrator shall convene a Regulatory Working Group to recommend revisions to the procedures used by the Administrator to develop water quality criteria for ephemeral and effluent-dependent streams, including a prioritized list of water quality criteria to be developed or revised. The Regulatory Working Group shall consist of two representatives of each of the following groups: (A) the EPA regulatory offices, (B) environmental organizations and (C) industrial dischargers, (D) state regulators, (E) local governments, (F) water supply entities and (F) wastewater agencies in the Arid West.

The Regulatory Working Group shall make recommendations for scientific research and any other information or guidance that is needed in order to develop criteria for water quality standards that can be appropriately adapted by the States to reflect special regional and site-specific characteristics especially for the Arid West. The Administrator shall revise the procedures used to develop water quality standards for ephemeral and effluent-dependent streams in accordance with the recommendations of the Regulatory Working Group and shall publish the revised procedures in the Federal Register within 18 months after date of enactment of this subsection.

"(10) DEVELOPMENT AND PUBLISHING OF CRITERIA DOCUMENTS.--In accordance with the revised procedures established pursuant to paragraph (9) above, not later than three years after the date of enactment of this section, and annually thereafter, the Administrator subsequently shall develop and publish at least two criteria documents for ephemeral and effluent-dependent streams each year, reflecting accurate and relevant scientific data. At a minimum, such criteria documents must include a description of the types of watercourses to which the criteria may appropriately be applied, and detailed guidance as to methods that may be used by a State to modify such criteria to account for unique ecological, hydrological, physical, biological or chemical conditions that may be associated with such types of watercourses especially for the Arid West.

Amendment No. 5 (Constructed Water Conveyance Systems)

Subsequent to the provisions of Amendment No. 4, insert the following:

Section 304 of the Clean Water Act (33 U.S.C. §1314) is amended by adding at the end the following:

(n) Constructed Water Conveyance Systemes.--

"(1) IN GENERAL.--If a State adopts or reviews water quality standards for constructed water conveyance systems, the standards may consider--

"(A) the then existing and planned uses of water transported in a conveyance system;

"(B) the ability to return water to natural water systems or navigable waters;

"(C) human-caused conditions necessary to maintain the functionality of a conveyance system; and

"(D) State or regional water resource management and water conservation plans.

"(2) USES.--A State is not required to impose aquatic, wildlife, and fish consumption uses for constructed water conveyance systems if the uses are not existing and foreseeable uses.

Amendment No. 6 (Definitions)

On Page 92 of the bill, after Line 1, insert the following:

Section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) is amended by adding at the end the following:

"(21) The term 'Arid West' means an area in the western portion of the United States that typically receives less than 15 inches of rain on an annual basis.

"(22) The term 'constructed water conveyance' means a man-made lined canal or other man-made water transport system constructed for the purpose of transporting water in a waterway that is not and never was a natural waterway.

"(23) the term 'effluent-dependent' means a stream or stream segment--

"(A) in which the average daily flow is primarily treated wastewater more than half the year; or

"(B) that, in the absence of a discharge referred to in sub-paragraph (A) and other primary anthropogenic surface or sub-surface flows, would be considered an ephemeral stream; or

"(C) that consists primarily of the discharge of treated wastewater and that is classified as an effluent-dependent stream or equivalent in accord with applicable state water quality standards; or

"(24) The term 'ephemeral stream' means a stream that has a channel that is at all times above the permanent water table and that flows periodically in response to precipitation, snowmelt, runoff, or temporary discharges.

"(25) The term 'reclaimed water' means that portion of treated wastewater that is used for additional purposes."

EXHIBIT 5

Publicly Owned Treatment Works Biological Monitoring Use Act

H.R. 3213, the proposed Publicly Owned Treatment Works Biological Monitoring Use Act, would remove biomonitoring test failures at sewage treatment plants from federal Clean Water Act liability and substitute in place thereof, failure to follow a compliance schedule for locating and resolving whole effluent toxicity at those plants. Attached is a revision to H.R.3213 which retains the essential elements of the bill in reduced text and is formatted as an amendment to H.R.3948. the Water Quality Act of 1994 now before the House Public Works and Transportation Committee.

A. Background

Section 304(a)(8) of the Clean Water Act ("CWA" or "Act") provides for states to adopt water quality criteria using biological monitoring or assessment methods based on information published by EPA. Neither Section 304(a)(8), nor any other provision of the CWA requires the Environmental Protection Agency ("EPA") to establish biomonitoring test limits, and the CWA does not provide that biomonitoring or whole effluent toxicity ("WET") test failures constitute NPDES permit violations.

EPA has chosen to make WET test failures enforceable, subject to fines and penalties of up to $25,000 per day per violation. A recent EPA administrative ruling upheld this interpretation. See In the Matter Of Miami-Dade Water And Sewer Department Authority, NPDES Appeal No. 91-14, Slip Opinion (Decided July 27, 1992).

EPA civil enforcement complaints have included CWA violation allegations against municipalities for WET test failures. The Agency has also suggested that NPDES permit program delegation would be removed for any state that failed to adopt water quality standards or issue NPDES permits that provided for WET test failure liability. Recent stormwater NPDES permits have included WET tests as monitoring requirements.

Wide variations in WET test results, control sample mortality and related technical problems have made biomonitoring tests fundamentally unreliable. EPA's imposition of liability and enforcement actions for WET tests, coupled with this unreliability, has reduced their attractiveness and effectiveness as a toxicity detection tool.

B. POTW Biological Monitoring Use Act Would Remove CWA Test Failure Liability

The proposed Publicly Owned Treatment Works Biological Monitoring Use Act, H.R. 3213, and the enclosed amendment to H.R.3948 would clarify the CWA by explicitly removing liability under the Act for WET test failures through amendments to Section 303(c)(2)(B) and to Section 402, relating to NPDES permits.

H.R.3213 explicitly substitutes liability for failure to follow a compliance schedule for locating and resolving toxicity such as through toxicity identification and reduction evaluations ("TIE/TREs"), in place of liability for test failures. WET tests would be retained as a monitoring tool. Removal of test failure liability is supported by the following:

- Unlike for chemical specific limits, POTWs are not designed to treat WET and prior actions cannot be taken to stop potential violations before they occur. Even an adequately implemented pretreatment program does not guarantee against WET test failures because, among other things, of household and illegal sources of toxicity.

- According to EPA scientists, biomonitoring tests were not designed for enforcement use. Wide variability and other technical issues associated with WET tests make them an inappropriate enforcement tool.

- EPA's liability policy is a disincentive for using WET tests. Test failures through accelerated WET testing under a TIE/TRE program could result in additional fines and penalties, making the implementation of such a program punitive and impractical.

- Eliminating CWA liability for biomonitoring test failures would provide a positive incentive for WET test use to detect, locate, and eliminate toxicity under a compliance schedule.

C. Status

POTW biological monitoring use legislation been introduced in both houses of Congress. Further hearings on comprehensive Clean Water Act reauthorization legislation are scheduled in the House Public Works Committee and committee markup on H.R.3948 are likely this summer though not scheduled. Senate floor consideration of CWA reauthorization legislation may occur in June.

Contacts: John Svihlik, Administrative/ Regulatory Manager, Department of Wastewater, City of Colorado Springs, 703 East Las Vegas Street, Colorado Springs, Colorado 80906, telephone 719 636-5866, FAX 719 444-2445; or, Robert Weaver, Suite 700, 11 Dupont Circle, N.W., Washington, D.C. 20036, telephone 202 797-7100, a facsimile 202 939-6969.

POTW BIOLOGICAL MONITORING USE AMENDMENT

Amend H.R.3948, the proposed Water Quality Act of 1994, by adding the following new section as follows:

SEC.__. BIOLOGICAL MONITORING FOR PUBLICLY OWNED TREATMENT WORKS

(a) Section 303(c)(2)(B) of the Federal Water Pollution Control Act is amended by striking at the end thereof, the "." and inserting a ";", and adding the following: "provided, that for publicly owned treatment works, nothing in this Act shall be construed to authorize the use of effluent limitations which result in the finding of a violation upon failure of whole effluent toxicity tests or biological monitoring tests."

"(C) Where the permitting authority determines that the discharge of a publicly owned treatment works causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criterion for whole effluent toxicity, the permit shall contain terms, conditions or limitations requiring biological monitoring or whole effluent toxicity testing and establishing a process or protocols for the identification and reduction of the cause of the whole effluent toxicity including procedures for ending the identification and reduction of such toxicity if the source or cause of the toxicity cannot be located."

(b) INFORMATION ON WATER QUALITY CRITERIA. -- Section 304(a)(8) of the Federal Water Pollution Control Act (33 U.S.C. 1314(a)(8)) is amended by inserting ", consistent with section 303(c)(2)(B) and (C) of this Act," after "publish".

(c) USE OF BIOLOGICAL MONITORING OR WHOLE EFFLUENT TOXICITY TESTING AT PUBLICLY OWNED TREATMENT WORKS. -- Section 402 of the Federal Water Pollution Control Act is amended by adding the following new section at the end thereof:

"(q) USE OF BIOLOGICAL MONITORING OR WHOLE EFFLUENT TOXICITY TESTING AT PUBLICLY OWNED TREATMENT WORKS. -- Where the Administrator determines that it is necessary in accordance with Section 303(c)(2)(B) and (C) of this Act to include biological monitoring, whole effluent toxicity testing, or assessment methods as a term, condition, or limitation in a permit issued to a publicly owned treatment works pursuant to this section, such permit term, condition, or limitation shall be in accordance with Section 303(c)(2)(C) of this Act, and the failure of biological monitoring tests or whole effluent toxicity tests at a publicly owned treatment works shall not result in a finding of violation."

(d) EFFLUENT LIMITATION DEFINED. -- Section 502(11) of the Federal Water Pollution Control Act (33 U.S.C. 1362(11) is amended to read as follows:

"(11) The terms 'effluent limitation' and 'effluent limit' shall mean any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance as established through permit conditions, enforcement orders, or consent decrees."

CORRESPONDENCE

Testimony on Behalf of Manny Dosil

My name is Manny Dosil and I own Dosil's Sport Center located in North Middletown, New Jersey. I started Dosil's 32 years ago, as a small bait & tackle shop, but it quickly grew to include boating, SCUBA, sailing, surfing and other outdoor sports. A staff of one (me) became a staff of 10 full-time and eight part-time employees. And by the mid 1980s, with my business continuing to grow, I could truly say I was living the American Dream.

But then the dream turned into a nightmare when starting in 1987 and continuing in 1988, our ocean became badly polluted. In a little over a year, I lost between 50-60 percent of my business -- a net of over $300,000. I had to lay off employees and nearly went Chapter 11. I understand that in 1988 alone, over $3 billion in tourism revenue was lost in N.J. because of water pollution.

I can't tell you how frustrating it was to be losing so much over something like water pollution that is so preventable. To be run out of business --something you worked for your whole life -- because as a society we refused to clean up our own mess is an outrage.

But we did something about it. With the help of Clean Ocean Action the American Littoral Society and other groups, we stopped ocean dumping of sewage sludge, industrial waste, and offshore woodburning, and we educated thousands of people about water pollution.

And my business has bounced back. Fish have come back to local waters, boating is on the rise, and my business is slowly getting on its feet again. But I'll tell you right now, and I speak for many of my colleagues in the shore area, we can not take another hit like we did in 1987 and 1988. If we do, I will lose my business, and many people will be put out of work.

That's why I strongly support passing a strong Clean Water Act. We need clean water, and the thought that special interest groups and politicians are trying to take away that right -- yes, I said right -- infuriates me. Specifically I am in favor of strong provisions to control point and non-point source pollution. This is the type of pollution that closes beaches and affects my business most directly. But I also support all efforts to make this law as strong as possible.

We need clean water. Anyone who tells you that a clean environment is bad for business is uneducated, misinformed, or just plain wrong. Pass a strong Clean Water Act...NOW.

Thank you for the opportunity to comment.

20 May 1994

Subcommittee on Water Resources
Committee on Public Works
U.S. House of Representatives
WA D.C. 20515

Dear Subcommittee Chairman:

It bothers to learn that you are holding hearings on H.R. 3948, a bill which would weaken the Clean Water Act, including Section 404 related to the Corps wetland fill permit program.

As a private property owner, I support strong wetlands protection. When wetlands are filled, flood waters are displaced on to other people's property

This is not fair.

You should pass a bill like H.R. 350 which includes tax incentives for property owners to maintain their wetland resources. We have already lost over half our nation's wetlands. We must restore, not destroy these invaluable resources. I would ask that you include my letter in your reauthorization of the Federal Clean Water Act hearing of May 24th and 26th.

Sincerely,

Mike Fortune

7432 Tsuga St SW
Olympia WA 98502

22 May 1994

Subcommittee on Water Resources
Committee on Public Works and Transportation
U.S. House of Representatives
Washington D.C. 20515

Dear Chairman:

It has come to my attention that your subcommittee is holding hearings on H.R. 3948 which would amend the Federal Clean Water Act. I am concerned that you have not provided enough opportunity to submit comments and that you will only hear from vested interest who stand to make a profit at the expense of critical wetland areas.

I think the focus should be on restoring wetland areas and keeping development out of wetland areas where they do not belong. Here in the Northwest we are losing our fishery resources. Too much pollution and loss of habitat will result in increased listing of endangered species. Congress should help improve the Clean Water Act by passing H.R. 350, the Wetlands Reform Act. Please include this letter in your 24th May hearing record. Thank you.

Sincerely,

Isabel L. Hill
1891 High St #5
Eugene, OR 97401

4125 Ashworth NE
Seattle, WA 98105

23 May 1994

Subcommittee on Water Resources
Committee on Public Works and Transportation
U.S. House of Representatives
Washington D.C. 20515

Dear Chairman:

Please place this letter in your hearing record for the reauthorization of the Federal Clean Water Act for 24 May held by your Subcommittee.

I strongly support H.R. 350 which would provide reasonable amendments to Section 404 of the Clean Water Act. I am opposed to H.R 3948 which seems designed to accelerate the loss of wetlands in our country.

In Washington State, the Seattle Corps District has hindered rather than helped enforce the Clean Water Act. They hand out dozens of nationwide 26 wetland fill permits event though the permits are not for activities similar in nature. And there is no public review of these nationwide permits. Didn't Congress say that nationwide permits are only for activities similar in nature. Why is the Corps breaking the law?

Now the Seattle Corps District wants to give a permit to fill wetlands for a horse racing track in Auburn, Washington. Now there is a non-water dependent use if there ever was one. The Corps admits that the project will result in a net loss of 6.5 acres of wetlands, but apparently intends to give a permit for this project anyway.

In the past, the Seattle District has given permits to fill wetlands for such non-water dependent projects as a fire station. Surely, a fire station does not have to be build in wetlands. At least the U.S. Fish and Wildlife Service and the Environmental Protection Agency did not think so. But the Corps issued the permit anyway over the objections of the agencies. This is another clear pattern of how we continue to lose wetlands. The Corps will not listen to resource agencies or the public. About the only thing that they will pay attention to is lawsuits.

H.R. 350 would be a big help in straightening out the Corps of Engineers and putting some backbone into the Environmental Protection Agency. I am very disappointed in how EPA has failed to protect wetlands in Washington State. They seem to think that they are still working for President Reagan or something.

I would ask you to please include this letter in your hearing record on the Clean Water Act to be held on May 24th and 26th. Thank you.

Sincerely,

2110 N. 42 #A
Seattle, WA 98103

May 21, 1994

Chairman
Subcommittee on Water Resources
Public Works and Transportation Committee
U.S. House of Representatives
WA D.C. 20515

Dear Mr. Chairman:

I support strong wetlands protection legislation and oppose H.R. 3948. Why is your Subcommittee starting with such a weak bill? Protection of our waters and wetlands is a national goal and should not be undermined by short-term economic interests.

A large percentage of existing wetlands in western Washington have already been lost to economic development. It is time to keep developers out of the remaining wetlands and try and restore wetland areas were possible.

I strongly oppose amendments which would require taxpayers to pay for any wetland protection regulation. I do support changes to the tax code which would reduce taxes for property owners who preserve and protect wetlands.

Please place this letter in your hearing record for 24 May and send me a copy of the hearing record.

Thank you.

Don Platesz

May 21, 1994

Subcommittee on Water Resources
Committee on Public Works
U.S. House of Representatives
WA D.C. 20515

Dear Subcommittee Chairman:

Please include this letter in your hearing record of May 24, 1994. As a private property owner I feel strongly that wetlands should be protected and not filled. Wetlands provide many significant functions and values and should not be destroyed, particularly for non-water dependent uses.

According to articles in the press, most wetland mitigation projects do not work. The Corps should stop issuing permits when they have no real expectations that the proposed mitigation will not be successful.

It is alarming to hear that H.R. 3948 is considered to be the amendments to the existing Clean Water Act. Better to have no new amendments then to weaken the Act. The wetland sections of H.R. 3948 are particularly troublesome. I do not believe that local governments will be able to withstand development pressures on wetlands, if they are given authority under so-called general permits. That is a crazy idea. So is the notion of wetland banks. There is no reason to create a wetland bank, just so you can fill real wetlands someplace else.

It is time for Congress to protect our fish and wildlife resources by protecting wetlands.

Sincerely,

5253 15th Ave NE
Seattle, WA 98105

May 20, 1994

Subcommittee on Water Resources
Committee on Public Works
U.S. House of Representatives
WA D.C. 20515

Dear Chairman:

I am concerned about the increasing loss of wetland habitat, especially for anadromous fish in the Pacific Northwest. As you may be aware, all coastal salmon fishing off the Washington and Oregon coasts has been shutdown this year due to depleted stocks of fish.

While there are many related causes, including dams, overharvesting of forests, and overfishing, one element is certainly the loss of our estuary wetlands.

In order to help bring back our salmon, we need a strong Clean Water Act. I am very disappointed that H.R. 3948 weakens the Clean Water Act, especially in regards to wetlands. What makes you think that fish care about mitigation banks, miles from where their habitat is destroyed? Stop listening to the developers and polluters and start listening to the public who care about these resources. Please support H.R. 350 as a substitute for the wetland amendments in H.R. 3948. Please include this letter in your hearing record of May 24th on the reauthorization of the Clean Water Act.

Thank you.

Marla Swint
225 17th Ave SE
Olympia, WA 98502

23 May 1994

Subcommittee on Water Resources
Public Works and Transportation Committee
United States House of Representatives
WA D.C. 20515

Dear Subcommittee Chairman:

I am a property owner in Westport, Washington. A neighbor began filling wetlands near my property last year draining a stream and swamp.

This activity was reported to the Seattle Corps District in January. It took them until May to issue a stop work order after most of the work was already done. I do not believe the Corps is doing enough to protect wetlands.

I am also concerned that the bill you are looking at, H.R. 3948 will weaken our wetland laws. Please support a strong bill like H.R. 350 which would be a big improvement.

Please place this letter and material in the hearing record for 24 May. Thank you.

Sincerely,

Bratton Watson

Bratton Watson
P.O. Box 1993
Westport, WA 98595

Reported in January 1994!

FIED MAIL

DEPARTMENT OF THE ARMY
SEATTLE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 3755
SEATTLE, WASHINGTON 98124-2255

REPLY TO ATTENTION OF

Regulatory Branch

MAY 10 1994

Mr. Neil Overman
2215 Pleasant Drive
Westport, Washington 98595

Reference: 94-4-00115
Overman, Neil

Dear Mr. Overman:

We recently inspected your property off of Pleasant Drive near Westport, Washington. You have placed material in wetlands without a Federal permit. These wetlands are waters of the United States. We consider the filling work to be in violation of the Clean Water Act. I direct you to do no further discharging of any material, filling, land clearing, or excavating in wetlands on your property.

To assist in the evaluation of this violation, we request the following information:

a. As-built sketch of the work. Enclosed for your use is a copy of our sketch. You should make any necessary changes to reflect current conditions, sign, and return with your other comments.

b. Who did the work? If a contractor, please furnish name, address, and telephone number.

c. Date when the work started.

d. Reasons why the work was started before obtaining a Federal permit.

e. Property ownership at time of construction.

f. Primary purpose of the fill.

g. Practicable alternatives available that would not involve the discharge of material in wetlands.

The U.S. Environmental Protection Agency (EPA) also enforces Sections 402 and 404. The EPA will receive a copy of this letter and may provide views and/or recommendations concerning this matter to our office.

Please furnish this information within 30 days from the date of this letter. Your comments will be beneficial in resolving this matter. If you have any questions concerning your reply, please contact Ms. Muffy Walker, telephone (206) 764-6915.

Sincerely,

Rex N. Osborne
Lt. Colonel, Corps of Engineers
District Engineer

Enclosure

cc:

Environmental Protection Agency
Washington State Department of Ecology,
ATTN: Shorelines Enforcement

Complainant

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